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THE NEW YORK SUPPLEMENT VOLUME 146

FERNET v. JAMES STEWART & CO., Inc.

(Supreme Court, Special Term, Albany County. February 28, 1914.)

1. PLEADING (§ 318*)—BILL OF PARTICULARS—NECESSITY OF FURNISHING.

In a personal injury action by an injured servant, where the defendant set up as defenses the servant's contributory negligence, the negligence of fellow servants, and assumption of inherent risks, it is not an abuse of discretion to require defendant to furnish plaintiff with a bill of particulars setting forth his contributory negligence, the negligence of his fellow servants, and the inherent risks of the employment which he assumed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 963-969, 971; Dec. Dig. § 318.*]

2. PLEADING (§ 323*)—BILL OF PARTICULARS.

An order for a bill of particulars should not require the defendant to disclose to the plaintiff substantially all of the evidence necessary to support his claim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 976-979; Dec. Dig. § 323.*]

3. PLEADING (§ 318*)—BILL OF PARTICULARS.

A defendant will not be ordered to furnish a bill of particulars of allegations in his answer which are wholly superfluous.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 963-969, 971; Dec. Dig. § 318.*]

Action by Ovilion Fernet against James Stewart & Co., Incorporated. On motion by plaintiff requiring the defendant to serve a bill of particulars. Motion granted.

J. S. Carter, of Cohoes, for plaintiff.

R. A. Mansfield Hobbs, of New York City (J. Sheldon Frost, of Albany, of counsel), for defendant.

RUDD, J. [1-3] Motion by plaintiff requiring the defendant to serve a bill of particulars of the affirmative defenses set up in defendant's answer, to wit: First. The facts which constitute the acts of contributory negligence, of which defendant claims plaintiff is guilty. Second. The name or names of the fellow servant or servants whose alleged negligence or fault caused or contributed to plaintiff's injuries as alleged by defendant. Third. The facts showing the risks inher-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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ent in the employment of the plaintiff and incident thereto as claimed by defendant.

An order for a bill of particulars should not require the defendant to disclose to the plaintiff substantially all the evidence in his possession necessary to support his claim. *Posner v. Rosenberg*, 149 App. Div. 270, 133 N. Y. Supp. 702. A defendant will not be ordered to furnish a bill of particulars of allegations in his answer which are wholly superfluous. *Nickel v. Ayer*, 141 App. Div. 576, 126 N. Y. Supp. 321. Neither one of the above cases is here controlling. This does not seem to be an application requiring defendant to disclose all his evidence. Neither does it relate to an allegation in defendant's answer which is superfluous.

In *Dwyer v. Slattery*, 118 App. Div. 346, 103 N. Y. Supp. 433, it was held that plaintiff must give the name of an alleged negligent employé in charge of blasting at the time of the happening of an accident in which plaintiff was injured.

In an action brought under the Labor Law to recover for personal injuries to plaintiff's intestate, resulting in his death, the defendant may be required to furnish a bill of particulars of the alleged contributory negligence of the deceased, when pleaded as an affirmative defense. *Szymanski v. Contract Process Co.*, 82 Misc. Rep. 46, 143 N. Y. Supp. 604, citing *Dwight v. Germania Life Insurance Co.*, 84 N. Y. 493.

In *Havholm v. Whale Creek Iron Works*, 159 App. Div. 578, 144 N. Y. Supp. 833, it was held that the court may in its discretion require defendant to give a bill of particulars of the affirmative defenses of contributory negligence and assumed risk.

Justice Stapleton, writing the opinion for the unanimous court, said:

"We see no reason why one who alleged in a verified pleading a general charge of contributory negligence should have any difficulty in particularizing. No greater burden is imposed upon the master in this respect than is imposed upon the employé with respect to the allegation of the master's negligence. The Legislature must be deemed to have legislated in contemplation of the frequent exercise by the courts of the power to require bills of particulars of affirmative defenses. The courts should act in harmony with the purposes of this reparative legislation, and should not be astute to discover nice grounds for differentiation which would impair its force and weaken its effect."

Under the authorities cited, which in large measure are controlling upon this court, it certainly does not seem that it would be an abuse of the discretion vested in the court to grant the order for which the motion is made.

An order may be entered requiring the defendant to serve a verified bill of particulars specifying in detail as set forth above, without costs.

YOUKER v. POST.

(Supreme Court, Appellate Division, Second Department. February 27, 1914.)

Appeal from Special Term, Kings County.

Action by W. Earl Youker, as Trustee in Bankruptcy, against Mary Elizabeth Post, as executrix. From an order denying his motion for judgment on the pleadings, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and PUTNAM, JJ.

George W. McKenzie, of Brooklyn, for appellant.

Melville H. Cane, of New York City, for respondent.

PER CURIAM. Order affirmed, with costs and disbursements.

BURR, J. I dissent. The denial in this case is of the allegations "contained in the paragraphs of the complaint numbered II, IV, V, and VI," with two exceptions not important.

When the case of Curran v. Arp, 141 App. Div. 659, page 662, 125 N. Y. Supp. 993, was before this court, in the opinion which I then wrote, I tried to point out that a *conjunctive* denial of this sort was bad. Woodward, J., concurred with me; Hirschberg, P. J., thought that this form of denial was good, and so wrote; Thomas and Rich, JJ., concurred in the result, which was for a reversal of an order granting a motion for judgment on the answer as frivolous. While contending that the answer was bad, I also voted for a reversal of the order granting judgment upon it, upon the ground that argument was required to establish its defects. I think that the question is therefore an open one in this court.

The case of Kirschbaum v. Eschmann, 205 N. Y. 127, 98 N. E. 328, seems to me to be an authority for appellant instead of for respondent. In that case the form of the denial was of "*the* allegations contained" in such and such paragraphs of the complaint. The court said, "This is not good pleading" (see pages 131 and 132 of 205 N. Y., page 329 of 98 N. E.), and pointed out the reasons therefor. If that case is not good as to the allegations contained in separate paragraphs, a conjunctive denial as to a number of paragraphs must be worse. I have examined the original record in the Kirschbaum Case, and find that the denials there were in the form of separate denials of *the* allegations contained in specified paragraphs. In that case, where the motion for judgment was made at the trial, the court held that when the attention of the pleader was not called to the defects of his pleading by a motion before trial, so that the "pleader then has the opportunity to establish his good faith, if he can," and may be permitted to change or amend his pleading, if necessary, and he can do so (see page 134 of 205 N. Y., page 330 of 98 N. E.), the motion should not be granted. The court concludes: "The judgment should not be sustained for the reason *that the plaintiff should make his motion before trial.*"

That was precisely what was done in this case, and the pleader's attention was called to its defects. I concede that this form of con-

junctive denial is frequently employed at the present time. Nevertheless it is loose pleading. It is to be hoped that the question may be taken to the Court of Appeals, and that it may there be finally determined whether its use is to be countenanced. It seems strange, when it is so easy to employ the language "*denies each and every allegation in paragraphs II, IV, V, and VI, respectively,*" that this less scientific method should be followed.

(160 App. Div. 740)

OCHS v. WOODS.

(Supreme Court, Appellate Division, First Department. February 20, 1914.)

FRAUD (§ 59*)—ACTIONS—DAMAGES SUSTAINED.

Plaintiff was employed by defendant to procure a tenant for a theater, and was to receive as commissions a certain percentage of an excess of rental paid over \$15,000 a year, and, upon procuring a tenant, was informed by defendant that another was the owner of the theater and then fraudulently represented, as alleged, that the owner was solvent. Plaintiff, when informed as to the true owner, refused to disclose to defendant the name of his prospective tenant, and proceeded to make a contract with the owner to procure a tenant, and, upon the owner's failure to pay him commission provided, sued defendant for damages for fraudulently representing to plaintiff that the owner was solvent. *Held*, that since plaintiff had never earned any commissions under his original contract with defendant when the alleged fraudulent representations were made, and there was no evidence that a lease would have been executed had such representations not been made, he could only recover from defendant nominal damages for defendant's alleged deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.*]

Appeal from Trial Term, New York County.

Action by Lee A. Ochs against Albert H. Woods. From a judgment for plaintiff and order denying a motion for new trial, defendant appeals. Reversed and complaint dismissed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Nathan Burkan, of New York City, for appellant.

Louis Frankel, of New York City (Milton M. Goldsmith, of New York City, on the brief), for respondent.

LAUGHLIN, J. This is an action to recover damages for fraud and deceit. The alleged fraud and deceit consist in false representations with respect to the financial condition of the Brooklyn Court Theatre Company, whereby the plaintiff was induced to accept that company instead of the defendant as his principal under an employment to obtain a tenant for a term of years for the Court Theatre.

Plaintiff alleged that on or about the 16th day of February, 1911, he was employed by the defendant to procure a tenant for the Court Theatre at a rental of \$15,000 per annum, \$5,000 of which was to be payable in advance, and that plaintiff was to receive, as commissions

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for his services 62½ per cent. of any excess of rental paid by the tenant over \$15,000 per annum; that he procured one Rosenquest, who was ready, able, and willing to perform, as a tenant at a rental of \$19,000 per annum; that on the 28th day of the same month, on notifying the defendant "that he was ready, able, and willing to carry out his portion of the agreement," he was informed by defendant that the Brooklyn Court Theatre Company, which defendant knowingly, falsely, and fraudulently represented, was a solvent corporation and able to perform the contract for commissions which the defendant had made with the plaintiff, was the owner of the lease, and that, relying thereon, plaintiff entered into a formal contract with said company to *procure* for it a tenant for the theater; that he procured Rosenquest as a tenant for the theater company, and it duly leased the theater to him at an annual rental of \$19,000 for the period ending in the month of August, 1914; that the tenant paid the rental in accordance with the provisions of the lease, and the theater company paid the plaintiff the sum of \$288.33 per month for the months of March, April, May, and June, 1911, being 62½ per cent. of the excess of rental over and above \$15,000 per annum as specified in plaintiff's original employment from defendant and in the contract between him and the company; that plaintiff was obliged to bring an action against the theater company to recover the amounts due him for the months of July and August, 1911, and that he recovered judgment therefor, which remains unsatisfied; that defendant was examined in proceedings supplemental to execution on said judgment and admitted that the corporation was insolvent and without assets at and prior to the time plaintiff was induced to contract with it. Plaintiff demanded judgment for \$10,000.

Upon the trial the plaintiff gave evidence tending to show his employment by the defendant as alleged; that he was not aware that the defendant was not the owner of the lease until after he had interested Rosenquest and the latter had manifested willingness to take a lease of the theater at \$19,000 per annum, and otherwise according to the terms on which plaintiff was authorized to procure a tenant. His evidence, however, shows that he did not give the defendant the name of his customer, and expressly refused to do so, and before that fact was made known to the defendant, or to any one connected with the theater company, plaintiff was informed that the company was the owner of the lease, and he accepted it as his employer and entered into a formal contract in writing with it, by which it employed him to procure for it a tenant, and prescribed the terms and conditions upon which he was to receive commissions and the extent thereof. At the interview between the plaintiff and the defendant after the former had interested Rosenquest in the project, the plaintiff requested that the contract between him and the defendant be reduced to writing. It was in that connection that the plaintiff refused to disclose the name of his customer, and that the defendant stated that he was not the owner of the lease. It is quite clear, therefore, that the plaintiff had not earned his commissions under his employment from the defendant, for not only had the theater not been leased, but the defendant had been deprived of all knowledge with respect to the prospective tenant (Gerd-

ing v. Haskin, 141 N. Y. 514, 36 N. E. 601). As already observed, however, this action is not brought upon the theory of holding the defendant liable for the commissions, but with a view to holding him liable for the false representations with respect to the financial condition of the theater company, which the plaintiff accepted as his employer in place of the defendant. If the plaintiff had earned and become entitled to the commissions under his employment with the defendant, a different question with respect to his right to recover *substantial* damages for the false representations concerning the financial condition of the theater company would be presented. The plaintiff has recovered as his damages for the false representations the amount of the unpaid commissions. There is no basis in the evidence for the finding that the plaintiff sustained damages by the false and fraudulent representations in the amount of the commissions he was to receive from the theater company. The most favorable view of the evidence to the plaintiff is that, if it had not been for the false and fraudulent representations, he would not have entered into the contract with the theater company. But the difficulty with his case is that if he had not done so, there is no evidence that the theater would have been leased, or that he would have become entitled to commissions. For the false representations if the plaintiff believed and relied upon them to his prejudice, he would have a cause of action; but on the facts presented by this record he has only shown nominal damages, even if he relied on the representations.

The evidence fairly warrants a finding that the defendant knowingly and falsely represented to the plaintiff the financial condition of the theater company; but the plaintiff repeatedly testified that he had no confidence in the defendant, and would not believe or rely upon anything he said, and therefore the verdict cannot be sustained in so far as it is predicated on the other essential fact that the plaintiff relied upon the representations. In view of his testimony, to which reference has been made, we think he was not entitled to go to the jury for even nominal damages on the question as to whether he relied on the representations, and that the court erred in denying defendant's motion for a dismissal of the complaint.

It follows that the judgment and order should be reversed, with costs, and the complaint dismissed, with costs. All concur.

(160 App. Div. 725)

SELWYN & CO. v. WALLER et al.

(Supreme Court, Appellate Division, First Department. February 13, 1914.)

1. JOINT ADVENTURES (§ 4*)—CONTRACT—CONSTRUCTION—RIGHTS OF PARTIES

Where a contract between defendants for the production of a play expressly provided that they were to produce the play, not as partners, but with a mere sharing of profits and losses, each to contribute a certain sum of money to the enterprise, they were not partners as between themselves, and hence one of them was under no obligation of trust or otherwise to the other not to assign a part of his share of the profits.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. §§ 3-6; Dec. Dig. § 4.*]

2. ASSIGNMENTS (§ 126*)—RIGHTS OF ASSIGNEE—DEFENSES.

Where defendants contracted one with the other to produce a play and share the profits and losses in certain proportions, paying royalties to the authors, as a part of the expense, it was no defense to an action by an assignee of a portion of such profits from one of the joint adventurers, against the other, that the assignor had secretly obtained from the authors an assignment of 25 per cent. of their royalties, in the absence of any allegation that the joint contract would not have been made had such fact been disclosed.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 195-197; Dec. Dig. § 126.*]

Laughlin and Hotchkiss, JJ., dissenting.

Appeal from Special Term, New York County.

Action by Selwyn & Company, play brokers, a New York Corporation, against Lewis Waller and another. From an order (142 N. Y. Supp. 1051) sustaining a demurrer to the first and second separate defenses of defendant Lee Shubert, he appeals. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, DOWLING, and HOTCHKISS, JJ.

Walter H. Pollak, of New York City, for appellant.

Melville H. Cane, of New York City, for respondent.

INGRAHAM, P. J. The action is brought to recover the amount due to the plaintiff under a contract, whereby the appellant Shubert agreed to pay to the defendant Waller $33\frac{1}{3}$ per cent. of the profits realized from the production of a play known as "The Butterfly on the Wheel." That contract recited that the defendant Waller had received by assignment all the right, license, and privilege to produce and perform the said play in the United States of America and Dominion of Canada, and that the parties thereto, Waller and Shubert, agreed to produce said play in the United States of America and Dominion of Canada, "not as partners, but with a sharing of the profits in the percentage of sixty-six and two-thirds ($66\frac{2}{3}$) to the party of the second part (Shubert) and thirty-three and one-third ($33\frac{1}{3}$) to the party of the first part (Waller), and with a sharing of the losses and expenses in the same percentage." The contract also contained provisions as to the methods of producing the play and as to the contributions by the parties to enable it to be produced. The contract further provided that Shubert assumed in his two-thirds proportion such obligations as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

are imposed on Waller in his contract for the purchase of the production and the contract rights to produce the said piece from one Frohman, and contained further provisions as to disbursements and expenses incident to the production of the play. This contract was dated December 29, 1911.

The complaint alleged that on or about October 4, 1912, for and in consideration of \$4,000 paid to him by the plaintiff, the said defendant Waller bargained, sold, transferred, assigned, granted, and conveyed to the plaintiff a 22½ per cent. interest in and to all the authors' royalties which authors' royalties had been previously assigned to the defendant Waller, and that by said agreement Waller promised that he would personally see to it that the said 22½ per cent. of authors' royalties were paid direct to the plaintiff by the managers or producers of the said play, and a copy of the contract was thereto annexed. The complaint further alleged the said play had been produced by the said defendants under their agreement and was performed by several different companies in various cities and towns throughout the United States of America and Dominion of Canada, and still is being produced by them; that said play has earned large royalties from the productions; and that the plaintiff's share of such authors' royalties earned by reason of the production has been received and is being held by the said defendants and both of them; and that the remaining 75 per cent. of authors' royalties earned from all productions of said play has been paid over by the defendants to the authors; that the plaintiff has made due and repeated demands on both of the defendants to turn over and pay to it 22½ per cent. of the authors' royalties out of the moneys earned by said play and properly chargeable to authors' royalties, and the defendants have neglected and refused to pay over to the plaintiff the said 22½ per cent. of the authors' royalties; and that the said 22½ per cent. of the authors' royalties now amounts to the sum of \$8,000, and the plaintiff has made due and repeated demands on the said defendant Waller to see to it that the said 22½ per cent. of authors' royalties were paid to the plaintiff direct by the manager or managers producing the said play, but that the said Waller had neglected and refused to do so; and that the plaintiff has duly performed the terms and conditions of the agreement made with the said defendant Waller, on its part to be performed; and that the plaintiff has been damaged in the sum of \$8,000, for which sum judgment is demanded.

[1] By the contracts between Waller and Shubert, it was expressly provided that Waller and Shubert were to produce the play, not as partners, but with a mere sharing of the profits and the losses. While each of the parties to the agreement was to contribute a certain sum of money to the production of the play, as between themselves they could agree that they should not be partners and that each should be entitled to his share of the profits realized from the production of the play. There is nothing in this agreement that I can see that prevented the defendant Waller from assigning to the plaintiff a part of the share in the profits that he was to receive from Shubert, and he has assigned to the plaintiff the right to a portion of the profits to which

he would be entitled under his contract with Shubert. There was no position of trust or confidence between the parties. The defendant Waller, being entitled to a percentage of the profits that would result from the production of the play, simply assigned such percentage of the profits to the plaintiff. I think it is entirely clear that, before the assignment, Waller and Shubert were not partners, so as to impose upon them any trust relation, and, by the assignment to the plaintiff, the plaintiff did not know of such a partnership or have such relation with Shubert as to impose upon it any trust relation.

[2] After denying certain allegations of the complaint, the defendant Shubert sets up two defenses. The first defense alleges that when, on or about December 29, 1911, the defendant made and entered into the agreement with the defendant Waller, alleged in the complaint and annexed thereto, he entered into such agreement and assumed the obligation therein contained believing Hemmerde & Neilson to be the sole owners of said authors' royalties and without any knowledge or notice of any assignment of the whole or any portion thereof to the said defendant Waller or to any other person; that the said defendant Waller fraudulently suppressed and concealed from this defendant, before they entered into such agreement, the fact which the said defendant Waller well knew that he had taken an assignment from the said Hemmerde & Neilson on or before December 1, 1911, of 25 per cent. of the authors' royalties earned or to be earned in the United States of America and Dominion of Canada; that between January 13, 1912, and October 26, 1912, he paid to the defendant Waller the sum of \$11,621.47 upon the representation of the said Waller that said sum was the amount due to Hemmerde & Neilson for authors' royalties and that the same would be paid to the said Hemmerde & Neilson by the said defendant Waller; and that the said defendant Waller did not pay over the whole of said sum of \$11,621.47 to the said Hemmerde & Neilson, but did secretly retain the sum of \$2,905.37, being a 25 per cent. interest in said authors' royalties.

It seems to me clear that this is entirely insufficient as a defense. It is not expressly alleged that, if defendant Shubert had known that Waller was entitled to 25 per cent. of the authors' royalties, he would not have made the contract with him. Nothing is alleged to show that it made the slightest difference to Shubert to whom the authors' royalties were paid. He undertook by the contract with the defendant Waller to pay the authors' royalties. The amount was not changed by the assignment, the obligation of the defendant Shubert was in no way increased by reason of the fact that, by the agreement between the authors and Waller, Waller was to retain a portion of authors' royalties that was to be paid to the authors. Nothing is alleged to show any breach of trust or any violation of any obligation of Waller to Shubert, or that it made the slightest bit of difference to whom the authors' royalties were paid. Both Waller and Shubert knew that, under the agreement by which Shubert and Waller had procured the right to produce the play, the authors' royalties had to be paid. Shubert assumed the obligation to pay his share of the authors' royalties. Both Waller and Shubert understood that authors' royalties were to be paid

out of the profits from the production of the play, and the play has been produced and profits have been realized therefrom. There was no suppression of a fact that was at all material or which could possibly have had any influence upon the making of the contract between Waller and Shubert. No fraud was committed. A mere suppression of information, as to who would ultimately receive the authors' royalties, which both parties understood should be paid and which Shubert agreed should be paid, could have no possible effect upon the making of the contract, or could have increased in the slightest degree Shubert's obligation under it. The ultimate disposition of these authors' royalties was a matter about which Shubert had no possible interest. I can see no duty of any kind that was imposed upon the defendant Waller to make any statement as to his relations with the authors or as to the ultimate disposition of the authors' royalties. It is not alleged that the suppression of this information caused Shubert any damage, and he does not even allege that he would not have entered into the contract, if he had known of defendant Waller's contract with the authors for a share of the authors' royalties.

The second defense realleges the allegations in the first defense, and further alleges that the assignment of the 22½ per cent. of the authors' royalties by the defendant Waller to plaintiff was not made honestly or in good faith; and the plaintiff was cognizant of the facts and circumstances under which said assignment was made and well knew that the defendant Waller was not the true owner of the percentage of authors' royalties so assigned, and that the said Waller had fraudulently suppressed and concealed from this defendant, at the time of entering into the agreement of December 29, 1911, annexed to the complaint, the fact that prior thereto and on or about December 1, 1911, he had taken an assignment of 25 per cent. of the authors' royalties from any and all performances in the United States of America and Dominion of Canada. But this adds nothing to the defense. The authors are not disputing the validity of the assignment of a percentage of their royalties to Waller, and it is none of Shubert's business what disposition the authors made of royalties which Shubert undertook to pay to them. I cannot see that Shubert has any more right to this percentage of authors' royalties, which the authors had assigned to Waller, than he has to the remaining percentage of authors' royalties, which the authors retained for their own use. The fact that defendant characterized these assignments as fraudulent, and the suppression of this information as to Waller's interest in the royalties as fraudulent and in bad faith, does not make them so; there is not a single fact alleged as to such charge, and not a single fact alleged that could entitle Shubert to any relief either against Waller or the plaintiff.

I think therefore the Special Term was clearly right in sustaining the demurrer to the two defenses, and that the order appealed from should be affirmed, with \$10 costs and disbursements.

McLAUGHLIN and DOWLING, JJ., concur.

LAUGHLIN, J. (dissenting). The plaintiff alleges that on the 6th day of May, 1911, Edward G. Hemmerde and Francis Neilson, who

were the authors of the play or dramatic composition entitled "The Butterfly on the Wheel," and the proprietors of the performing rights thereof for the United States and Canada, made an agreement in writing with Charles Frohman, and thereby assigned to him the sole and exclusive right to produce the play in the United States and Canada for the period of five years from the date of the first production, which was to be on or before December 31, 1911, in consideration for which Frohman agreed to pay to them weekly, as authors' royalties, 5 per centum on the first \$5,000 of gross weekly receipts, 10 per centum on the next \$2,000, and 15 per centum on all gross weekly receipts in excess of \$7,000, and at the time the agreement was signed an advance payment of £300 was made on account of said royalties; that thereafter and prior to the 1st day of December, 1911, the authors, for full and adequate consideration, duly assigned to the defendant Waller a 25 per cent. interest in and to all authors' royalties earned or to be earned from any and all performances of said play in the United States or Canada under contracts made and to be made therefor; that thereafter and in said month of December Frohman, by an agreement in writing between him and the defendant Waller, in consideration of \$4,000 paid to him by Waller and of the latter's agreement to pay him the further sum of \$1,000, if the play should be successful financially during the first season of its production in the United States and Canada, and of Waller's agreement to hold him "harmless against any claim which" said authors might thereafter assert against him in connection with his said agreement with them, assigned to Waller all his rights under his contract with the authors, together with all manuscripts of the play and all scenery and other equipment and properties used by him in producing it. It is recited in the agreement between Frohman and Waller that the latter in making it was acting as agent and representative of the authors. That doubtless accounts for the fact that the agreement contains no express assumption by Waller of Frohman's obligation to pay royalties.

The plaintiff further alleges that on the 29th day of December, 1911, Waller and the defendant Shubert entered into an agreement in writing, a copy of which is annexed to the complaint, for the production of the play, "not as partners, but with a sharing of the profits" and of losses and expenses in the proportions of two-thirds by Shubert and one-third by Waller, with a proviso, however, limiting Waller's liability for making advances and for losses and his responsibility to \$2,500, one-half of which, according to recitals in the agreement, he had paid over to Frohman. That agreement further provided, in effect, that, for the purpose of accomplishing what the parties intended, Shubert was to be given the rights to produce the play and the use of the scenery and other property which Waller acquired from Frohman, and Waller was to give such time and attention to the production as might be convenient and as he might deem wise; and Shubert assumed two-thirds of "such obligations as are imposed on" Waller "in his contract for the purchase of the production and the contract rights to produce the said piece from the said Charles Frohman." The plaintiff also alleges that thereafter and down to October 4, 1912, Waller and Shu-

bert paid to the authors the royalties to which they were entitled under their contract with Frohman, with the exception of 25 per centum thereof, which was kept and retained by Waller by virtue of said assignment from the authors to him. It is further alleged that on the 4th day of October, 1912, the defendant Waller, in consideration of \$4,000, assigned to plaintiff a 22½ per cent. interest in and to the authors' royalties, and agreed that such royalties would be paid direct to the plaintiff by the managers or producers of the play; that 75 per centum of the royalties due since the assignment to plaintiff have been paid to the authors; but that 22½ per centum of the royalties due to the authors under the contract with Frohman earned by the defendants in presenting the play since said assignment to plaintiff which have not been paid aggregate \$8,000. This action was brought to recover that amount. The contract between the defendants contains no specific reference to royalties. The contract contained other provisions with respect to the presentation of the play not material to the appeal.

The defendant Shubert, after putting in issue some of the material allegations of the complaint, alleged for a first defense that when he made the contract with the defendant Waller he was not aware that the latter was interested in the royalties; that Waller fraudulently concealed from him the fact that he was so interested; and that the payments made to and received by Waller on account of royalties were received on the representation that they were to be paid to the authors, and without knowledge on the part of Shubert that there had been an assignment of any part of their interest therein; that by reason of the premises Waller became a trustee for the defendant of two-thirds of the 25 per cent. of the royalties and was without authority to assign any part thereof to the plaintiff.

For a second defense Shubert alleges, by reference, most of the allegations contained in the first defense, and further alleges that the assignment by Waller to the plaintiff was not in good faith; that plaintiff was cognizant of the facts and circumstances under which it was made and knew that Waller was not the true owner of the royalties so assigned and had fraudulently suppressed the material facts from him at the time they made the agreement of December 29, 1911, and he demands judgment for the dismissal of the complaint with costs, and that all royalties received by Waller be impressed with a trust in his favor for two-thirds thereof.

The plaintiff demurred to these defenses on the ground that they are insufficient in law upon the face thereof. Appellant urges two points in support of his appeal. The first is that he was wronged by Waller's concealment of his interest in the royalties; and the second is that upon the formation of the firm of Waller and Shubert—there is no allegation that there was such a firm—Waller's interest in the royalties became a firm asset, and that he held it in trust for the firm, and that therefore he could not assign any part thereof to the plaintiff.

The full scope of the point presented for decision may, I think, be more readily grasped by assuming that the assignment of royalties to Waller was of *all* instead of 25 per centum thereof. If Waller owned all royalties and were suing Shubert, on the agreement for the joint

adventure, to recover two-thirds thereof, we would have pointedly presented the question whether, in view of his concealment of his interest, a court of equity would aid him in appropriating to his exclusive use the share of the gross receipts of the adventure represented by the percentages set apart for royalties, thereby reducing profits if any profits were, or otherwise would have been, made; and the same point would be presented if Waller, having so concealed his interest, had secretly received and appropriated to his own use all the royalties and Shubert were here asking that he be required to account. The wisdom of ages has developed a wholesome rule of honesty and fair dealing between men about to embark in any lawful enterprise or adventure, which involves relations of mutual trust and confidence, either as partners or as joint adventurers, and that rule, which has and can have no exception, rigidly requires the utmost good faith on the part of each toward the other, and a full and complete disclosure by each of all knowledge and information possessed by him that might influence the making of the copartnership or joint adventure agreement by the other and throughout the period of its continuance, and especially his interest, if any, in property to be rented or acquired for the business venture, under penalty for failing to make such disclosure, regardless of whether or not any direct loss to the copartnership has been shown to have resulted, of forfeiture, to the copartnership or joint adventure of all secret profits realized or reserved, and of liability to account to each copartner or joint adventurer for his proportionate share thereof. *White v. Sherman*, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132; *Getty v. Devlin*, 54 N. Y. 403; s. c., 70 N. Y. 504; *Brewster et al. v. Hatch et al.*, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498; *Dunlop v. Richards*, 2 E. D. Smith, 181; *Manufacturers' Nat. Bank v. Cox*, 2 Hun, 572, affirmed 59 N. Y. 659; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Pratt v. Frazer*, 95 Ark. 405, 129 S. W. 1088; *Van Deusen v. Crispell*, 114 App. Div. 361, 99 N. Y. Supp. 874; *Spears v. Willis*, 151 N. Y. 443, 45 N. E. 849; *Mitchell v. Reed*, 61 N. Y. 123, 19 Am. Rep. 252; s. c., 84 N. Y. 586; *Reinhardt v. Reinhardt*, 134 App. Div. 440, 119 N. Y. Supp. 285; *Joplin Land Co. v. Case*, 104 Mo. 572, 16 S. W. 390; *Colton Imp. Co. v. Richter*, 26 Misc. Rep. 26, 55 N. Y. Supp. 486; *Jordan v. Markham*, 130 Iowa, 546, 107 N. W. 613; *The Telegraph v. Loetscher*, 127 Iowa, 383, 101 N. W. 773, 4 Ann. Cas. 667. See, also, *Reis v. Volck*, 151 App. Div. 613, 136 N. Y. Supp. 367; *Koster v. Pain*, 41 App. Div. 443, 58 N. Y. Supp. 865.

It does not appear whether or not the royalties agreed to be paid were the usual or customary authors' royalties paid on the production of a play, or whether by usage and custom there are fixed and uniform royalties. Since Waller concealed from Shubert the fact that he was interested in the royalties, it is fairly to be inferred that Shubert was led to believe that Waller could not produce the play without paying the royalties, and that, notwithstanding the requirement that such royalties would have to be paid out of the gross receipts, it was Waller's conviction that the play could be produced with financial success. If Waller's interest in the royalties had not been suppressed from

Shubert, the latter might not have undertaken to produce the play at all, or on terms embodied in the joint adventure agreement. In view of Waller's interest in the royalties and his limited liability for losses, it was to his interest to have the play produced, even if he thought no profits would be realized for distribution between him and Shubert, for he expected profits in the form of royalties. It may fairly be inferred that Waller was led by these considerations to conceal from Shubert his interest in the royalties. Manifestly Shubert on discovering the facts was at liberty to rescind the contract and to call Waller to account for a proportionate share of the profits he thus secretly realized from the receipts of the business, subject, perhaps, to reduction by a proportionate share for the period involved, of Waller's burden, if any, on account of his investment in procuring an assignment of the royalties; but I am of opinion that Shubert was neither obliged to rescind nor to acquiesce in Waller's fraud and deception, and that he was at liberty to claim, as he does in effect by his answer, that the assignment of the royalties to Waller inures to the benefit of the joint adventure, subject, possibly, to a claim for an equitable return on his investment—a point not presented for decision and on which I express no opinion. *White v. Sherman*, supra; *Getty v. Devlin*, supra; *Spears v. Willis*, supra; *Manufacturers' Nat. Bk. v. Cox*, supra; *Reinhardt v. Reinhardt*, supra; *Mitchell v. Reed*, supra; *Trice v. Comstock*, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; *Dunlop v. Richards*, supra; *Van Deusen v. Crispell*, supra; *Reis v. Volck*, supra; *Brooks v. Belasco*, 48 Misc. Rep. 600, 97 N. Y. Supp. 712.

If, as I am convinced and have endeavored to show, Waller could not recover the royalties from Shubert and would be accountable therefore if he owned all royalties, for the same reasons he could not recover and would be accountable for his one-quarter interest therein. Manifestly, under the defense charging plaintiff with having taken the assignment from Waller with full knowledge of the facts with respect to his having suppressed from Shubert his interest in the royalties, he could have no greater right than Waller.

I am likewise of opinion that the other defense is good, on the theory that Waller's contract for a percentage of the royalties inured to the joint adventure for the period of its continuance, and that plaintiff, under the assignment from Waller individually, took subject to Shubert's rights, and that the assignment only transferred a right to share in Waller's interest in any surplus on the termination or abandonment of the joint adventure. *Wood v. American Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733.

I therefore vote for reversal, with \$10 costs and disbursements, and for overruling the demurrer, with \$10 costs, but with leave to plaintiff to withdraw the demurrer on payment of said costs.

HOTCHKISS, J., concurs.

(160 App. Div. 651)

PEOPLE v. CASSIDY.

(Supreme Court, Appellate Division, Second Department. February 20, 1914.)

1. CRIMINAL LAW (§ 566*)—EVIDENCE OF IDENTITY—WEIGHT.

The probative force of a witness' identification of accused must be determined by the witness' reliability based on his familiarity with the person in controversy and his freedom from prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1273-1275; Dec. Dig. § 566.*]

2. CRIMINAL LAW (§ 566*)—IDENTITY—EVIDENCE.

In a prosecution for robbery in the first degree and grand larceny in the second degree, evidence held insufficient to identify accused as the person who committed the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1273-1275; Dec. Dig. § 566.*]

Appeal from Kings County Court.

James Cassidy was convicted of robbery in the first degree as a second offense and grand larceny in the second degree as a second offense, and he appeals. Reversed, and new trial ordered.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and PUTNAM, JJ.

John J. Curtin, of New York City, for appellant.

Edward A. Freshman, Asst. Dist. Att'y., of Brooklyn (James C. Cropsey, Dist. Att'y., of Brooklyn, on the brief), for the People.

JENKS, P. J. This appeal turns almost entirely upon the credibility of a single witness, who identifies the defendant as the criminal, for there is no other evidence, direct or circumstantial, that connects the defendant with the crime.

Upon the issue of identification the burden of proof rested upon the prosecution (Wharton's Crim. Evidence [10th Ed.] § 329), and the defendant was entitled to the benefit of any reasonable doubt (Greenleaf on Evidence [15th Ed.] vol. 3, § 30; State v. Morris, 47 Conn. 179). A writer on evidence well says that evidence of identity is "perhaps one of the most difficult questions with which courts and juries are called upon to deal," and again:

"Evidence of identity should be as far certain as human recollection under the most favorable circumstances will permit. The books are full of instances where inaccurate evidence as to identity has consigned unfortunate beings to the prison and the gibbet." Rice on Evidence, vol. 3, §§ 300, 304.

For many instances, see Ram on Facts, Will on Circumstantial Evidence, Wigmore's Principles of Judicial Proof.

As the defendant did not attempt to impeach the witness, our inquiry is limited to his capacity. Under the disadvantage of not having seen or having heard the witness, unlike the triers of fact, but with the advantage, denied to them, of isolated time for deliberation upon a permanent record, we must strive to determine whether the probative force of this testimony was sufficient to justify the verdict.

[1] That probative force must be determined by the reliability of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

this witness. Mr. Wharton says in his *Criminal Evidence* (10th Ed.) § 807, that the two great constituents of reliability are "familiarity with the person in controversy, and freedom from personal or party prejudice." But after we have determined such familiarity and passed upon such freedom, we must estimate the capacity of the witness for perception, observation, reflection, memory, and reasoning, as revealed by him upon the witness stand. And we must endeavor to estimate some other characteristics of the man as exhibited in his testimony.

[2] About 7:30 p. m. of February 15, 1912, Price was in the rear room of his jewelry shop in Broadway in the borough of Brooklyn, about to eat his supper. Scharen, an optician, who worked there, was alone in the shop. Two men came through the door of the shop, confronted Scharen with pistols drawn, and ordered him into that rear room. After some parley, Scharen obeyed. Price, who had come to the door of the rear room, was also ordered to stay in that room and obeyed. One of the men held Scharen and Price at bay in that room at pistol's point, while the other gathered up some of the wares. Scharen, when he did not obey promptly a command to raise up his hands, was struck and wounded by the man who was holding him at bay. The man who was rifling the shop went out, his companion backed out after him, and both escaped with their plunder. At the trial, Scharen, the witness now under discussion, positively identified the defendant as the man who kept guard over him and Price. Scharen, during the time that intervened the crime and the trial, testifies that he saw the defendant once at police headquarters, twice at a magistrate's court. He testifies that he identified the defendant on the first visit to the magistrate's court and that he recognized him on the second visit. He does not describe any peculiarity of appearance or of manner that then impressed him. He did give a description of the men to the police, but it does not appear that it corresponded with the defendant in any marked degree.

He admitted that on February 25th he and Price went to police headquarters in the borough of Brooklyn at about 7:30 p. m., that there was then lined up before them a number of men, of which the defendant was one, and that he (Scharen) was asked to identify the criminal. He testifies that he could not do so, although he admits that he was neither nervous nor hurried and that he had full opportunity for careful and repeated scrutiny. His explanation of his failure is that he was "kind of shaky" and "kind of in doubt." Lynch and O'Connell, connected respectively with the *New York Tribune* and the *New York Times* newspapers, testified that they stood in the line at the time, and that not only Scharen failed to identify the defendant, but that, after long and careful scrutiny, he identified, or went far to identify, Lynch, who was next in line to the defendant, as the criminal. Lynch is positive, save that the hand of Scharen extended towards him did not rest upon him; but O'Connell is positive that Scharen actually laid his hand upon Lynch. Before these witnesses testified, Scharen had denied that he had identified any one on this occasion; but the testimony of these two witnesses was not thereafter contradicted, although not

difficult if contradiction were possible, for there were several other people, including a high police official, then present at the headquarters. It is true that O'Connell on cross-examination admitted that there were other "line-ups" that night that included him and Lynch, but he was positive that on no other occasion was Lynch identified as a criminal. And there is evidence of another attempt at identification by Scharen at the Raymond Street jail on the occasion of lining up a number of people in the latter part of that February, which resulted in failure. Scharen himself, although he testified that he knew the location of that jail, testified five times that he did not remember that he was ever there, and that he was positive that he had never attempted and yet had failed to identify the defendant in that jail. But Kiebrick, a keeper of the jail, and Clarke, then a prison keeper of the jail and now a keeper in another prison, who was apparently indifferent to all parties, testified positively that there was such line-up, and Clarke testified that Scharen and Price then made an attempt at identification and failed. It is true that there was no record of such a line-up as is usual in such cases.

After the crime, Scharen failed to identify the criminal with photographs produced by the police, supposed to be likenesses of the defendant. He was in frequent conversation with members of the police force almost every day. He says:

"I didn't talk to any policeman about the case at all, until they come to the store and asked us about it. Then we said, 'Well, we didn't know.'"

He was told by them that they had in custody in the magistrate's court two men as the suspected criminals, and that he was wanted to identify them. He admits that when he first saw the defendant in that place the defendant was alone in one of the cells, in not very brilliant light and in the daytime, that he approached the cell with detectives, and that he then knew that the detectives wished him to identify the man therein as the criminal. And he testifies he recognized the defendant right there and then. He afterwards saw the defendant in the police court and had full occasion to study him.

It does not appear that Scharen or Price had ever seen the defendant or his companion before the period of the crime. The time afforded for original observation of the criminals, according to Scharen, was about 8 or 10 minutes. He stood behind the counter reading a newspaper. The two men unlatched the front door, ran in, and immediately both confronted Scharen with pistols drawn. Scharen had been facing the wall and did not look at the door. As he and the men faced one another, the ordinary large gaslight in the shop, overhead, shone downwards, and if, according to Scharen, the defendant wore a peaked cap, that headgear shadowed defendant's face. Scharen says that the part of the occurrence in the shop consumed about two minutes, but of course any estimate of time by minutes is mere guesswork, and as the instant orders given to Scharen were to go into the rear room, the interval between such command and obedience must have been very brief, although Scharen did parley with the men in a sentence or two. For the remainder of the time both Scharen and

Price were held in the rear room. Scharen says that the light in this room was very dim, partly dark, did not amount to anything, and Price, who had come from the room, says that it was not lighted at all, that there was "just enough light to see around the stove." Some light did penetrate from the shop, but that shone over the safe. It was in this room only that Scharen saw the one criminal alone. And the evidence justifies the inference that the criminal stood with his back towards the reflected light from the shop, as he must have faced the men whom he held at bay, and it is clear enough that these two men had a view into the shop.

It is not violent assumption that the opportunity for Scharen's impression as to the identity of the person of this criminal was afforded only in the brief interval between the time he was confronted by the two men in the shop and the time he obeyed the command to go into the rear room, and this is the period in which Scharen says that he saw the face distinctly. During that tense period, a man in Scharen's position would naturally be greatly excited. A few days afterwards he attempted identification under circumstances which afforded him every opportunity for long and careful scrutiny, and confessedly failed. And according to the other credible testimony, he not only failed but he mistook another for the criminal. Moreover, there is testimony that he failed once again under similar circumstances. Then followed again his failure as to the photographs, and then the identification in the magistrate's court. Before this identification he had been in more or less constant touch with the police, and he went to the police court at the request of policemen and detectives, understanding from them that they wished him to identify a certain person then under arrest. In company with detectives, he went to the cell where that particular person was in solitary confinement and thereupon identified him at once. We do not say that in this instance there was coercion, but it is clear that suggestion from the officers of the law was made that he should do exactly what he did. He was in effect told to go down to the police court cell to identify as the criminal a certain person then in a cell, who was first pointed out to him by the police as a suspect. We impute no blame to the police, for it was their duty to see that the man under arrest was identified if that was possible.

The circumstances of Scharen's failure at headquarters, and of his success at the door of the cell, were radically different. He had every advantage at the former place that he possessed at the latter place. But on the first occasion he was required to select the defendant from among other men, and on the second occasion he was first pointed to the person to be identified. Naturally on the first occasion his impressions of the criminal were more recent. Nothing is shown to have occurred between the visits to the headquarters and to the police court that helped the witness to certainty. But his original doubt (to express description of his state of mind) was dissipated without any apparent reason, and his final certainty, for aught that appears, must have been the result of reflection alone upon the same circumstances which were not sufficient for his identification at police headquarters, or even to save him from positive mistake at that time. Contrary to the natural

order of things, the witness asserts under cross-examination that his impression was "more fresher" as time sped on, and that it was "getting fresher every day." His study of the defendant in the police court, he says, confirmed his opinion. But on the second occasion in the police court he saw the defendant as a prisoner at the bar, accused of a crime. The learned and able assistant district attorney lays stress upon the fact, as testified to by Scharen, that when he saw the defendant and his alleged companion, Redmond, together, he became positive for the first time, and suggests as a reason that the appearance of two related matters brings more readily to memory the subject upon which there was uncertainty or lapse of memory. It is true that the association with a person recalled dimly, of some incident or circumstance which we remember, often enables us to recall clearly the person himself. But what was there in the association of Redmond with the defendant in the crime that to Scharen cast light upon the identity of the defendant? Redmond, too, was a stranger to the witness. Redmond with his companion at first confronted Scharen when the latter stood behind the counter, but after that moment, according to Scharen and Price, Redmond returned from the rear room, went about rifling the shop, and remained there until his escape. Scharen does not tell us why the sight of Redmond in company with the defendant, or how the subsequent association of the two men, resolved his doubts.

Price invariably failed in his attempts before and at the trial to identify the defendant. The difference in the opportunities of Scharen and Price is found in the circumstance that Price came out of the rear room and stood at the door to see the men confronting Scharen, and that his mind was diverted by his young lad who was with him in the rear room for awhile, while he was held there, and by his testimony that he closed his eyes while the pistol was pointed at his head. But he had from his point of view a similar opportunity to see the men who confronted Scharen while Scharen saw them, and before Scharen and he went into that rear room.

We do not perceive any spirit of malice or of persecution in the witness. It was natural, like any other good citizen, that he would desire to see the criminals detected and punished. It was not unnatural that as the victim of a wanton assault he should desire to see his assailant revealed and punished. And as a witness it was natural that he would wish his testimony, positive in its character, to be approved, accepted, and appreciated.

The learned assistant district attorney, who did not take part in the trial, is frank to state in his brief that Scharen was "a man of small affairs, who was obviously confused by sharp cross-examination, and easily mixed by questions requiring a ready and acute memory." We do not disagree with this estimate. Indeed we commend, as we have had frequent occasion heretofore to commend, this public prosecutor for his fairness and his frankness. Scharen's powers of memory do not impress us. He testified that he was 59 years old and that he had been an optician for 47 years. Naturally a man remembers the different periods of his business life. And although it appears that he had no reason for concealment, he exhibited lapses of memory in such

matters. Thus he testifies that he left employment with a firm after 10 years' service in about 1901, and then under further cross-examination that he left the firm in 1889. And he was unable to account for nearly 15 years of the period of his business life, save with the explanation that he was at home—but kept no store. He could not identify in court the policeman who had taken charge of the case on the night of the crime, when that policeman stood up before him in court, nor could he recall the detective under similar conditions. He was certain that the defendant wore an overcoat at the time of the attempt at identification at headquarters, and he laid stress on that fact in contrast to the defendant's garments when he was in the cell at the police court, and yet Lynch and O'Connell testify positively that they removed their coats at the request of the defendant when they went into the line-up, in order that apparel would be uniform. He could not recall any visit to the jail, although he was positive that he did not attempt identification, and yet we have the testimony of the keepers to the contrary. He was questioned minutely as to his presence in part 5 of the Supreme Court in November, 1912, and, although he was plied with questions involving the details, he made his denial emphatic by saying that he was not there unless in his sleep. A night intervened and then, taken in hand by the learned trial counsel for the people, he said he had been refreshing his memory after conversation with counsel, and so he "come to remember" he was subpoenaed, and that he was told that it was not this case but another case on trial and might go home. On recross he was asked:

"You know when I asked you yesterday, I asked you to be very careful and take your time before answering, remember that? A. I do.

"Q. You remember that your answer was that if you were in part 5 you must have been asleep when you were there? A. I did not say anything of the kind. * * *

"Q. And you remember my asking you for at least ten minutes about your being in part 5, and swearing positively you never were there until last month? A. I only come to remember that I was subpoenaed, that's all I remember. Afterwards I come to refresh my memory."

This is rather a startling lapse in relation to matters almost germane to the case at bar. For example, he was asked on cross-examination:

"Q. So that you did not see these two men running away up the street, did you? A. No.

"Q. And you didn't swear that they did run up the street? A. Well—

"Q. Did you swear?

"Mr. Caldwell: I don't think he did.

"A. I didn't swear I ran after them. I did not see them run.

"Q. Didn't you swear here this morning that they went out to the street and ran up the street? A. They ran up the street, yes.

"Q. You swear you saw them run up the street? A. No.

"Q. You swore they did run up? A. Well, I didn't see them run."

Again he was asked on cross-examination:

"Q. Were you not down to the jail? A. No.

"Q. Didn't you go to the county jail on Raymond street at all? A. No, sir.

"Q. At no time? A. No time.

"Q. Didn't you testify in answer to a question by Mr. Caldwell that you did go to the jail? A. No, sir; it was the Flatbush jail, I seen him in the court."

And further on he testified:

"Q. Were you ever in the Raymond street jail? A. Who? Me?

"Q. I am not talking with anybody else at the present time. A. I don't remember that.

"Q. Is that your best answer, that you don't remember whether you were in the Raymond street jail or not? A. I don't remember.

"Q. And can't you state to this court and jury whether or not you were ever in your life in Raymond street jail. A. I don't remember it.

"Q. You know where the Raymond street jail is? A. I do.

"Q. Were you ever inside its doors? A. Not as I remember.

"Q. Think. A. I told you I don't remember.

"Q. Will you swear positively that you were not there? A. I don't know.

"Q. Isn't it a fact you went down to the Raymond street jail and attempted to identify this man Cassidy? A. No."

Many other similar examples might be given. It appears also that he had suffered from "presbyopia" for 15 years, and that he had fitted himself to eyeglasses which he required in reading but that were not used for long vision. He used them for reading the newspaper on the evening of the crime, but took them away when he looked at the criminals, whom he says he could see distinctly. As to the manner of the witness, we note that the court said to him:

"I have spoken several times about repeating the questions of counsel. It is incumbering the record and consuming time. If it is necessary for you to think before making a reply, think without repeating the question."

Such habit may, as we well know, be indicative of slow mental process, or of the desire to be exactly accurate in the answers, or of reservation of the whole truth, or of falseness of deliverance. We repeat that we do not say that the witness was willfully false in his identification. On the contrary, we assume that he intended to be truthful in his identification. But he does not impress us as one scrupulous to cling to an original doubt, but rather as ready to disregard it in order to strengthen his statements, as inclined to be positive rather than accurate, as apt to leap to certainty rather than to count his steps, as susceptible to suggestion, and, when assured by others of a fact, ready to affirm that it exists, casting aside dubiety. His positivity is not of strength but of weakness.

There was, as we have said, no other evidence even of identifying circumstance which connected the defendant with the crime. The defendant took the stand in absolute denial and to assert that at the time of the crime he was in the house where his family lived. To support the latter assertion, he called his mother as a witness, who testified likewise, and who determined the date by reference to a trifling incident. The alibi, of course, was rejected, in that the jury found the guilt of the defendant. But that incidental rejection does not necessarily imply that the jury thought that the woman deliberately lied, for the jury may have determined that the evidence was not satisfactory as to the essential elements of day and hour. Barrett, J., for the court in *People v. Smith*, 55 Hun, 606, 7 N. Y. Supp. 841, a case that is similar to the one at bar, well said:

"The defendant * * * cannot be convicted because of the mere weakness of this defense. The question of identification still remains, and must be determined upon the case made by the prosecution, supplemented by any

testimony emanating from the defendant really indicating a consciousness of guilt."

It is true that the defendant had a criminal record, and that he was not revealed as an orderly or industrious person; but, although such proof makes against him, it of course is not sufficient to convict him of this crime, and it throws no direct light upon the reliability of the evidence of identification.

The defendant was jointly indicted with Redmond, but was tried separately. At this trial Scharen also identified Redmond as one of the criminals. Thereupon there was a great mass of testimony taken to establish that Redmond was elsewhere at the hour of the crime, and the trial drifted into a partial trial of the alibi. But such proof only went to the credibility of Scharen. And the jury did not necessarily determine that the alibi was false, for the jury dealt only with the identification of the defendant. All that can be said is that, despite the proof that was given to show that Scharen's identification of Redmond was error, the jury found that Scharen's identification of the defendant was sufficient. We are not called upon to pass upon the probative force of the proof of identification as to Redmond. Suffice it to say that there was nothing elicited in this feature of the case that identified the defendant with the criminal.

Upon full consideration of the case we are convinced that it would not be safe to affirm this conviction, that rests almost, if not altogether, upon this testimony of personal identification. Greenleaf on Evidence (15th Ed.) vol. 3, § 30, says:

"But it must not be forgotten that the books furnish deplorable cases of the conviction of innocent persons from the want of sufficiently certain proofs either of the corpus delicti or of the identity of the prisoner. It is obvious that on this point no precise rule can be laid down, except that the evidence 'ought to be strong and cogent,' and that innocence should be presumed until the case is proved against the prisoner, in all its material circumstances, beyond any reasonable doubt."

The judgment of conviction of the County Court of Kings County is reversed, and a new trial is ordered. All concur.

(160 App. Div. 607)

JULIUS KAYSER & CO. v. ITALIAN SILK UNDERWEAR CO.

(Supreme Court, Appellate Division, First Department. February 13, 1914.)

1. COURTS (§ 489*)—JURISDICTION OF STATE COURTS—INFRINGEMENT OF.

Act Cong. March 3, 1881, c. 138, 21 Stat. 502 (U. S. Comp. St. 1901, p. 3401), respecting trade-marks upon goods, the subject of commerce with foreign nations, and the Indian tribes, providing by section 10 that nothing therein should lessen or avoid any remedy at law or in equity which any party aggrieved by any unlawful use of a trade-mark might have, and Act Cong. Feb. 20, 1905, c. 592, 33 Stat. 724 (U. S. Comp. St. Supp. 1911, p. 1459), providing for the registration of such trade-marks, and by section 23, re-enacting section 10 of the previous act, did not take away or impair the jurisdiction of the state courts over suits for the protection of trade-marks, whether registered or not.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. TRADE-MARKS AND TRADE-NAMES (§ 21*)—SUBJECT OF OWNERSHIP—PROTECTION—GEOGRAPHICAL NAMES—FEDERAL STATUTES.

Trade-Mark Act Feb. 20, 1905, c. 592, 33 Stat. 724 (U. S. Comp. St. Supp. 1911, p. 1459), providing that no mark consisting merely of a geographical name or term should be registered, but that nothing therein should prevent the registration of any mark used by an applicant or his predecessor or others from whom title to the mark was derived, in foreign or interstate commerce, "which was in actual and exclusive use as a trade-mark of the applicant, or his predecessor from whom he derived title, for ten years next preceding the passage of this act," entitled the geographical term or word "Italian," used by plaintiff and his predecessor for more than ten years in connection with their manufactured underwear, to registration, and the duly issued certificate therefor to protection.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24; Dec. Dig. § 21.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 70*)—COMMON LAW—UNFAIR COMPETITION.

Plaintiff's predecessor in 1893 originated and adopted the trade-mark "Italian" as applied to silk underwear of its manufacture to indicate the origin thereof, and in 1898 received a certificate of registration from the Patent Office, and during his continual use thereof the word acquired a secondary meaning, and was not understood as implying that the underwear so marked was manufactured in Italy, or by Italians, or from Italian silk, the silk in fact used being Japan silk, but to identify the goods as manufactured by the plaintiff and as indicating its quality, and a large foreign and domestic trade in such goods had been built up. In 1911, defendant incorporated under the name "Italian Silk Underwear Company," manufactured a lower grade of goods than plaintiff, and sold them under the mark "Italian," packed in similar boxes to which were attached printed tags identical in size and shape with those used by plaintiff and with similar directions thereon. *Held*, that under the principles of the common law plaintiff had an exclusive right to the word "Italian" in connection with the silk underwear manufactured by it, and that defendant's appropriation and use of it was an unfair competition and a violation of the plaintiff's rights which would be enjoined.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

Appeal from Special Term, New York County.

Action by Julius Kayser & Company against the Italian Silk Underwear Company. From a judgment restraining defendant from using plaintiff's trade-mark, defendant appeals. Affirmed.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Joshua Haberman, of New York City, for appellant.

Hardy, Stancliffe & Whitaker, of New York City (Charles J. Hardy, of New York City, of counsel, and Frederick P. Whitaker, of New York City, on the brief), for respondent.

CLARKE, J. The judgment appealed from adjudges and decrees that:

"The trade-mark 'Italian' (registered by the plaintiff's predecessor in the United States Patent Office on the 7th day of July, 1908, for which a certificate of registration was issued to said Julius Kayser & Co. numbered 69817 in the name of the United States of America and under the seal of the United States Patent Office and signed by the Commissioner of Patents), as applied to silk underwear, is a valid trade-mark, is the property of plaintiff, Julius Kay-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ser & Co., and said Julius Kayser & Co. is, as against the defendant, entitled to the exclusive use thereof."

And further:

"That the use by the defendant, the Italian Silk Underwear Company, of its said name 'Italian Silk Underwear Company,' is unlawful and constitutes an infringement of the plaintiff's said trade-mark 'Italian' and of plaintiff's property and rights therein, and that the defendant, the Italian Silk Underwear Company, be, and it and its officers, servants, agents, and employes hereby are, forever restrained from directly or indirectly using its said name 'Italian Silk Underwear Company' or any name so similar thereto as to be calculated to deceive, in connection with the sale or offering for sale of underwear manufactured by the defendant, 'The Italian Silk Underwear Company.'"

And is further ordered:

"That the defendant, its officers, servants, agents, and employes, be and they hereby are forever restrained from engaging in unfair competition in trade with the plaintiff, and the defendant, the Italian Silk Underwear Company, and its officers, servants, agents, and employes, hereby are forever restrained from packing, dressing, and labeling its underwear in the form and manner complained of by the plaintiff in form and manner, or so closely resembling the packing, dress, and labels of the plaintiff as to be calculated to deceive."

The court found, as matters of fact: That both plaintiff and defendant are engaged in the business of manufacturing and selling silk underwear, and plaintiff has been engaged in said business for the past 20 years. That plaintiff's predecessor, in the year 1893, adopted, originated, and has since continually used the trade-mark "Italian" as applied to silk underwear of its manufacture, to indicate the origin thereof, and marketed and sold underwear under such trade-mark. That at the time of the adoption of said trade-mark no other manufacturer of underwear had applied said mark to underwear of his or its manufacture; and that the use of said trade-mark, as applied to underwear, was used in and understood to be used in a purely fanciful sense. That, since the adoption of said trade-mark, the business of manufacturing and selling silk underwear under said mark by plaintiff's predecessor and plaintiff has constantly increased from \$2,000 a year to and in excess of \$300,000 a year, and a very large business has been built up by them therein in the several states and with foreign nations; and from 1893 to the present time many thousands of dollars have been expended in advertising their silk underwear under said mark, and said underwear has become very popular and well known to the trade and purchasing public. That during the 20 years of the manufacture and sale of "Italian" silk underwear by plaintiff and its predecessor the name "Italian" has become so associated with the underwear of Julius Kayser & Co., through long-continued and exclusive use thereof, as to become identified with its product, and the word "Italian," as applied to underwear signifies to the trade and the purchasing public the goods of Julius Kayser & Co. and no other, and said name "Italian" has acquired a secondary meaning as identifying the underwear of the manufacture of plaintiff and its predecessor. That plaintiff's predecessor made application for the registration of said trade-mark to the Commissioner of Patents, who allowed the same and issued a certificate of registration on July 7, 1908. That Mor-

ris S. Siegel caused the defendant to be incorporated in December, 1911, after the underwear manufactured by plaintiff and its predecessor under its said trade-mark had become well known to the trade and the purchasing public and had achieved great popularity, and said Siegel caused said name "Italian" to be incorporated in such corporate name of defendant with knowledge of plaintiff's said trade-mark and of the good will established by plaintiff and its predecessor in connection therewith and with the design of benefiting thereby. That defendant has sold its entire output of underwear (except petticoats) under its name of "Italian Silk Underwear Company," and has packed its goods in similar boxes and attached printed tags identical in size and shape to those used by plaintiff and with similar directions thereon. That the use of the name of defendant and the use by it of its said boxes and labels are calculated and designed to cause the trade and the purchasing public to believe that the defendant's underwear is the underwear of plaintiff's manufacture, and confusion has been and will be created by defendant's continued use thereof. And, as a conclusion of law, that the said trade-mark "Italian" as applied to silk underwear is a valid trade-mark, is the property of the plaintiff, and plaintiff is, as against the defendant, entitled to the exclusive use thereof, and that the defendant is engaging in unfair competition with plaintiff.

These findings are sustained by the evidence. The claim is made that "Italian," being a geographical word, may not be appropriated as a trade-mark. I consider this, first, under the United States statutes, and, second, under the principles of the common law as applied by the courts of this state.

[1] 1. The original United States statute, the act of July 8, 1870, carried forward into sections 4937 to 4947, U. S. Revised Statutes, providing for the registration of trade-marks and assuming to confer exclusive jurisdiction upon the federal courts in trade-mark cases, was declared unconstitutional by the Supreme Court of the United States in *U. S. v. Steffens*, 100 U. S. 82, 25 L. Ed. 550; that court saying:

"The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the states. It is a property right for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity. * * * This exclusive right was not created by the act of Congress, and does not now depend upon it for its enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage."

Soon after this decision Congress passed an act, approved March 3, 1881 (21 Stat. 502, c. 138 [U. S. Comp. St. 1901, p. 3401]), respecting trade-marks upon goods the subject of commerce with foreign nations and Indian tribes. This act, *inter alia*, provided (section 10):

"Nothing in this act shall prevent, lessen, impeach or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this act had not been passed."

In *re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402, Mr. Justice Gray said:

"That act, while conferring upon the courts of the United States, in general terms, jurisdiction over such suits, without regard to the amount in controversy, does not specify either the court or the district of the United States in which suit shall be brought; nor does it assume to take away or impair the jurisdiction which the courts of the several states always had over suits for infringement of trade-marks. This suit, then, assuming it to be maintainable under the act of 1881, is one of which the courts of the United States have jurisdiction concurrently with the courts of the several states."

In *Smail v. Sanders*, 118 Ind. 105, 20 N. E. 296, the court said:

"The state courts have jurisdiction to enjoin a party from infringing the trade-mark of a competitor. The act of Congress assuming to confer exclusive jurisdiction upon the federal courts in trade-mark cases has been pronounced unconstitutional. * * * These decisions settle the question, and, beyond all doubt, settle it correctly, since Congress has no more power to deprive the state courts of jurisdiction in trade-mark cases than it would have to deprive them of power to decide controversies concerning any other species of property. A trade-mark is not within the provisions of the federal Constitution respecting copyrights and patents."

Chapter 592 of the Laws of 1905, approved February 20, 1905 (33 Stat. 724 [U. S. Comp. St. Supp. 1911, p. 1459]), entitled "An act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same," extended the trade-mark provisions to interstate commerce. It likewise contained the provision of the act of 1881 above alluded to (section 23). In *Traiser v. Doty Cigar Co.*, 198 Mass. 327, 84 N. E. 462, 15 Ann. Cas. 219, a bill in equity had been filed to restrain the defendants from infringing a trade-mark of the plaintiff. The defendants filed a plea to the jurisdiction, alleging that one of them had registered with the Commissioner of Patents of the United States a mark, in accordance with the act of 1905, and had received therefor a certificate of registration, and hence that exclusive jurisdiction of all matters pertaining to this trade-mark and its validity was vested in the courts of the United States. The Supreme Judicial Court of Massachusetts said:

"The question presented is whether, when one had registered a trade-mark under the federal statute, he is immune from litigation as to his title to the trade-mark so registered in the state courts, in cases where they would otherwise have jurisdiction."

After referring to the former acts of Congress and to the cases thereunder and to the similar provisions in the two acts, it concluded:

"Plainly, where all the parties to the suit are domiciled in this commonwealth, our courts have jurisdiction to adjudicate, as to their respective rights, between the plaintiff owner of a registered or of an unregistered trade-mark and the defendant owner of a registered trade-mark who is charged with an infringement."

[2] Section 5 of said act provides in part as follows:

"Provided, that no mark which consists merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual or merely in word or devices which are descriptive of the goods

with which they are used or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the term of this act. * * * And provided further, that nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several states, or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title, for ten years next preceding the passage of this act."

The said statute with particular reference to the ten-year clause was construed by the Circuit Court of Appeals of this circuit in *Thaddeus Davids Co. v. Davids*, 178 Fed. 801, 102 C. C. A. 249. Noyes, J., said:

"The first question, then, is whether a name must be valid as a technical trade-mark to come within the ten-year clause. If this be so, the clause has no force or effect. Technical trade-marks are entitled to be registered under the act regardless of length of use. The owner of a valid common-law trade-mark may register it any time, and he has no greater or less privilege on account of its long use. There is no necessity for thus construing the ten-year clause so as to render it ineffective. In our opinion there is a distinction between the words 'mark' and 'trade-mark' as used in the clause. It provides that nothing shall prevent the registration of any 'mark' used as a 'trade-mark' for more than ten years. The evident purpose is to permit the registration of marks not amounting to technical trade-marks but which have been long used as such. * * * It would seem that Congress in the ten-year clause recognized the principle, so often stated by the courts, that words which through association with products have acquired secondary meanings will be protected although not amounting to technical trade-marks, and intended to permit their registration under certain conditions. The act makes a mark actually and exclusively used the requisite period entitled to registration as a trade-mark. And if it is entitled to registration it is entitled to protection. We are unable to appreciate the distinction sought to be drawn by the defendant between the right to register a trade-mark and the right to protect it. * * * With respect to names, descriptive words, and geographical terms, we are of the opinion that the proviso prevents their registration if they have been in use for less than ten years, but that the ten-year clause entitled them to registration if they have been actually and exclusively used for more than that period, before the passage of the act."

In *Coca-Cola Co. v. Nashville Syrup Co.* (D. C.) 200 Fed. 153, Sanford, J., said:

"The effect of the proviso in section 5 of the Act of 1905 was to make a name subject to registry as a valid trade-mark, through such prior use, even although the words were originally merely descriptive and not the subject of a valid trade-mark."

In *N. Y. Mackintosh Co. v. Flam* (D. C.) 198 Fed. 571, Holt, J., said:

"Moreover, the evidence shows that it was used exclusively by the complainant more than ten years before registration, and therefore the provisions of section 5, of the Trade-Mark Act of 1905, * * * apply, that, in such a case, the fact that the term was originally descriptive does not prevent registration."

And to the same effect are *Coca-Cola v. Deacon Co.* (D. C.) 200 Fed. 105; *Coca-Cola v. Am. Druggists* (D. C.) 200 Fed. 107; *Am. Pencil Co. v. Gottlieb* (C. C.) 181 Fed. 178.

It appearing that the plaintiff and its predecessor had exclusively used the mark here in question, although a geographical term, for more

than ten years prior to its application for registration, it was properly admitted to such registration, and, the certificate therefor having been duly issued, it is entitled to protection.

[3] 2. It appears conclusively in the evidence that the word "Italian" as applied by the plaintiff to its goods has acquired a secondary or fanciful meaning, or, as is expressed by certain witnesses, who are buyers for large concerns, "It is a byword." It does not mean, and is not understood to mean by those selling or purchasing the goods, that the underwear marked by it was manufactured in Italy or by Italians, or that the silk of which the underwear is composed was produced in Italy or imported therefrom. It is the evidence that no silk for the weaving or manufacture of such underwear is brought to this country from Italy; that neither the plaintiff nor the defendant uses such silk in the manufacture of underwear produced and sold by either of them. The silk used by the plaintiff is Japan silk of a high quality; the underwear is woven by the method employed in the weaving of silk gloves and is of high quality and runs in price from \$24 a dozen to \$300 a dozen. The articles manufactured and sold by the defendant are produced from a lower grade of Japan silk and are sold from \$11.50 a dozen to \$100 a dozen. The plaintiff manufactures and sells a cheaper grade of goods, but to these is never attached the mark "Italian," which is reserved exclusively for articles manufactured from the best of Japan silk. That word is known to the trade and purchasing public as identifying the silk underwear as that manufactured by the plaintiff and as indicating its quality.

In *Newman v. Alvord*, 51 N. Y. 189, 10 Am. Rep. 588, the trade-mark claimed by plaintiff consisted of the use of the word "Akron" in designating a cement manufactured by them near the village of Akron, Erie County, N. Y. They and their predecessors had used the word "Akron" as a trade-mark to designate the origin and quality of their cement for over 13 years before the commencement of the action. The defendants manufactured a cement in Onondaga County near Syracuse. They knew that the plaintiff had for years used the word "Akron" as a trade-mark to designate the origin and place of manufacturing their cement. They applied the word to designate their cement by calling it "Akron cement." The Court of Appeals, in affirming a decree granting a perpetual injunction, said:

"The trade-mark must be used to indicate not the quality, but the origin or ownership, of the article to which it is attached. It may be any sign, mark, symbol, word or words, which others have not an equal right to employ for the same purpose. I can perceive no reason why it may not be the name of a place. * * * It is sometimes said, in the cases to which our attention has been called, that the claimant of a trade-mark must have the exclusive right to it. This form of expression, I apprehend, is not strictly accurate. The right must be exclusive as against the defendant. It is generally sufficient, in such cases, if the plaintiff has the right and the defendant has not the right to use it. The principle upon which the relief is granted is that the defendant shall not be permitted, by the adoption of a trade-mark which is untrue and deceptive, to sell his own goods as the goods of the plaintiff, thus injuring the plaintiff and defrauding the public. Here the plaintiffs had given a reputation to the Akron cement in market. They had always been its principal manufacturers and sellers, and, at the time of the commencement of the suit, the sole parties who could be injured by the fraudulent use of the trade-mark by

the defendants, and hence they are clearly entitled to the protection which they seek."

The court expressly, in that case, reserved the question whether an injunction would lie against another manufacturer in the same Akron district who produced cement made from stone from the same quarries. It has been expressly held in *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581, and *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365:

"That no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right in the application as to prevent others inhabiting the district or dealing in similar articles coming from the district from truthfully using the same designation."

That principle, however, obviously does not apply to the case at bar, for neither of the parties deals in articles coming from Italy. But in the *Elgin Case*, *supra*, the court also said:

"But it is contended that the name 'Elgin' had acquired a secondary significance in connection with its use by the appellant, and should not, for that reason, be considered or treated as merely a geographical name. It is undoubtedly true that, where such a secondary signification has been acquired, its use in that sense will be protected by restraining the use of the word by others in such a way as to amount to a fraud on the public, and on those to whose employment of it the special meaning has become attached. In other words, the manufacturer of particular goods is entitled to the reputation they have acquired, and the public is entitled to the means of distinguishing between those, and other, goods; and protection is accorded against unfair dealing, whether there be a technical trade-mark or not. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another. * * * In *Reddaway v. Banham* [1896] A. C. 199, * * * Lord Herschell, referring to *Witherspoon v. Currie*, L. R. 5 H. L. 508, said: 'The name "Glenfield" had become associated with the starch manufactured by the plaintiff, and the defendant, although he established his manufactory at Glenfield, was restrained from using that word in connection with his goods in such a way as to deceive. * * * Lord Westbury pointed out that the term "Glenfield" had acquired in the trade a secondary signification different from its primary one, that in connection with the word "Starch" it had come to mean starch which was the manufacture of the plaintiff.'"

Witherspoon v. Currie was also cited with approval in *Newman v. Alvord*, *supra*.

In *Koehler v. Sanders*, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576, the court said:

"There are cases where the right to use a name to designate a product is so unqualifiedly exclusive that the right to the protection of its use against infringement by others rests upon the ground that such use by them is an untrue or deceptive representation. This may be applicable to a geographical name designating a locality or district, and which has been adopted by one as a trade-mark and afterwards deceptively used by another upon similar articles."

In *Fleischmann v. Schuckmann*, 62 How. Prac. 92, it was held (Van Varst, J.) that "Vienna" may be exclusively appropriated for a trade-mark for a particular kind of bread, as it is a purely arbitrary designation and is in no manner descriptive either of the ingredients or quality of the article. The word "Alderny" may be exclusively appropriated as a trade-mark for oleomargarine, as such is entirely arbitrary

and in no respect descriptive of the article. *Van Brunt, J., in Laufer v. Wheeler*, 63 How. Prac. 488. So the word "German," when not used in a geographical sense, being applied as an arbitrary name, may be appropriated as the name for sweet chocolate so as to make the use of the word "Germania" as applied to sweet chocolate an infringement. *Walter Baker & Co. v. Baker* (C. C.) 77 Fed. 181.

This principle may be regarded as the ground for decision in the following cases in which geographical names have been protected as trade-marks. "Ethiopian" for black cotton stockings. *Hine v. Lart*, 10 Jur. 106. "Indian Pond" and "Green Mountain" for scythe stones. *A. F. Pike Mfg. Co. v. Cleveland Stone Co.* (C. C.) 35 Fed. 896. "Quinnebog," "Western Red End," and "Lake Huron" for scythe stones taken from quarries situated at or near Grindstone City, Mich. *Cleveland Stone Co. v. Wallace* (C. C.) 52 Fed. 431. "Taylor's Persian Thread" for thread manufactured in England. *Taylor v. Carpenter*, 3 Story, 458, Fed. Cas. No. 13,784; *Taylor v. Taylor*, 23 L. J. Ch. N. S. 255; *Taylor v. Carpenter*, 11 Paige, 292, 42 Am. Dec. 114, affirmed 2 Sandf. Ch. 603. "Turin," "Sefton," "Leopold," and "Liverpool," for patterns of cloths manufactured at Huddersfield, Eng. *Hirst v. Dunham*, L. R. 14 Eq. 542.

In a note to the decision in the *Elgin National Watch Co. Case*, 179 U. S. 665, 21 Sup. Ct. 270, as reported in 45 L. Ed. 365, 370, citations from the Official Gazette are given showing that in the United States Patent Office geographical names were registered as trade-marks as wholly fanciful or arbitrary in their signification, as follows: "Dublin" for soap made in this country. "German Syrup" for a medical compound not a German product. "Dover" as applied to household goods manufactured by a Massachusetts corporation in its factory at Cambridge and its place of business at Boston. "Vienna" for flour manufactured at Pittsburgh. "Florentine" for rolled plate glass. "Menlo Park" for time-keeping instruments made at Canton, Ohio.

In *International Cheese Co. v. Phenix Cheese Co.*, 118 App. Div. 499, 103 N. Y. Supp. 362, a manufacturer at Chester, N. Y., was upheld in his claims to the trade-name "Philadelphia Cream Cheese."

It seems to me that the plaintiff has clearly established, as against the defendant, an exclusive right to the word "Italian" in connection with the silk underwear manufactured by it, and that the defendant's appropriation and use of the word in 1911, after plaintiff had made it valuable by long years of use, by registration in the Patent Office, and by building up a large and successful business, was a violation of plaintiff's rights.

The judgment appealed from should be affirmed, with costs and disbursements to the respondent. All concur.

(161 App. Div. 1)

PICKELL v. CITY OF UTICA.

(Supreme Court, Appellate Division, Fourth Department. January 7, 1914.)

TAXATION (§ 733*) — TAX LIENS — PRIORITY — COUNTY TAXES — CITY CERTIFICATES—STATE OF NEW YORK—"PEOPLE OF THE STATE OF NEW YORK"—"THE STATE."

Laws 1902, c. 559, relating to the enforcement of taxes in Oneida county, provides for the publication of notice of sale of lands for taxes, filing proof of due publication, the time and manner of redemption, and declares that no other or further or different notice of the expiration of the time to redeem shall be required to be published, served on, or given to any person whatever. Section 9 declares that if real estate is sold for taxes and any portion thereof is not redeemed, the county treasurer shall execute to the purchaser a conveyance which shall vest in the grantee an absolute estate in fee, free from all liens, claims, and incumbrances of every name and nature, subject only to such claims as "the state of New York" and county of Oneida may have thereon for taxes or other liens. Section 10 provides that the treasurer's deed shall vest in the grantee an absolute estate in fee subject to all claims that the state may have for taxes or other liens or incumbrances. *Held*, that the words "the state of New York" and "the state" were not used as equivalent to the "people of the state of New York" to designate the state in its sovereign capacity, including municipal subdivisions, and that the city of Utica being authorized by its charter as amended by Laws 1901, c. 577, to redeem from county taxes levied on land within the city on which the city also had a tax lien, and no such redemption having been accomplished, a sale of the land for subsequent county taxes freed the land from the lien of prior city tax certificates.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1469; Dec. Dig. § 733.*

For other definitions, see *Words and Phrases*, vol. 6, p. 5284.]

Kruse, P. J., and Foote, J., dissenting.

Appeal from Special Term, Oneida County.

Suit by Joseph S. Pickell against the City of Utica. From a judgment for plaintiff, defendant appeals. Affirmed.

The opinion of Crouch, J., at Special Term, is as follows:

This is an action in equity to remove a cloud upon title to real estate.

The real estate in question is a parcel of land in the city of Utica upon which certain taxes and assessments were levied by the defendant city and which upon default in the payment thereof was sold at public auction and struck off to the city of Utica. The city of Utica thus became the holder of a series of tax certificates for taxes levied during the years 1899 to 1904, inclusive, aggregating with penalties \$1,364.

The said premises were thereafter sold for unpaid taxes assessed by the county of Oneida for the years 1904, 1907, and 1908, and were struck off and subsequently conveyed by county treasurer's deeds to one Jay A. Pease, the purchaser, all of which deeds were duly recorded in the office of the clerk of Oneida county. The said Pease subsequently conveyed said premises to the plaintiff. The plaintiff also acquired deeds from the county treasurer of Oneida county under sales for unpaid taxes of 1909 and 1910, both of which deeds were duly recorded.

The plaintiff contends that the interest of the city of Utica in said property under the city tax certificates above set forth was cut off by the county tax sales, and the proceedings had thereafter culminating in the several tax deeds under which he claims, and he asks judgment that a decree be entered direct-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

ing defendant to surrender said certificates for cancellation and that they be declared no longer a lien against said property.

I am aware that it is the settled policy of the law to insure the collection of all taxes, and that the courts, wherever it is possible upon any theory to do so, will construe the statutes to accomplish that result. Upon the facts in this case, however, I am unable to find any construction which will give effect to the plain language of the statute and at the same time preserve the rights of the city of Utica under its several tax certificates. This unfortunate situation is not the result of any defect or inequality in the system of city and county taxation applicable to Utica, but rather to the lack of vigilance upon the part of the city in seasonably perfecting its title as required by the terms of its charter and in paying the county taxes within the time required by law.

The deeds under which plaintiff claims were given pursuant to chapter 559 of the Laws of 1902, which provides for the publication of notice of sale, the filing of proof of due publication, the time and manner of redemption, the publication of notice of redemption, and the filing of proof thereof, than which "no other, further or different notice of the expiration of the time to redeem shall be required to be published, served upon or given to any person whatever."

Section 9 then provides as follows: "If such real estate sold for taxes, or any portion thereof, be not redeemed, as herein provided, the county treasurer shall execute to the purchaser, his heirs or assigns, a conveyance of the real estate so sold, and unredeemed, which shall vest in the grantee an absolute estate in fee, free from all liens, claims and incumbrances of every name and nature whatsoever, subject only to such claims as the state of New York and county of Oneida may have thereon for taxes or other liens."

Section 10 also provides for the execution of a conveyance by the treasurer, and further provides that "every such conveyance shall vest in the grantee an absolute estate in fee simple, subject to all claims which the state may have thereon for taxes or other liens or incumbrances," etc.

The defendant claims that the phrases, "the state of New York" and "the state," used in the sections above quoted, refer to the state in its capacity as sovereign, as equivalent to "the people of the state of New York"; and maintains that the rule of law is well settled in this state that tax sales made by the sovereign, whether in its capacity as a state, county, or municipality, do not in any wise interfere with the other liens of the sovereign in either of those capacities. *Wells v. Johnston*, 55 App. Div. 484, 67 N. Y. Supp. 112, affirmed in 171 N. Y. 324, 63 N. E. 1095; *People ex rel. Atkins v. City of Buffalo*, 63 App. Div. 563, 68 N. Y. Supp. 409, 71 N. Y. Supp. 1145; *City of Rochester v. Kapell*, 86 App. Div. 224, 83 N. Y. Supp. 640, affirmed in 177 N. Y. 533, 69 N. E. 1121; *Bell v. City of New York*, 66 App. Div. 578, 73 N. Y. Supp. 298; *Tift v. City of Buffalo*, 9 N. Y. Supp. 920; *Raquette Falls L. Co. v. Int. Paper Co.*, 41 Misc. Rep. 357, 84 N. Y. Supp. 836, affirmed in 94 App. Div. 609, 87 N. Y. Supp. 1146, and 181 N. Y. 540, 73 N. E. 1131; *Raquette Falls L. Co. v. Hoyt*, 109 App. Div. 119, 95 N. Y. Supp. 1029, affirmed in 187 N. Y. 550, 80 N. E. 1119.

Without discussing these authorities in detail, it may be said that they do not in my opinion establish the broad doctrine for which defendant contends. They were decided under the particular language of other statutes and under other and different facts. If there is any general rule to be drawn from them, it is in substance that all tax liens will be preserved unless there appears on the face of the statute a clear intent to the contrary. That I think is the case here.

While the phrase, "the people of the state of New York," is the usual and accepted one to designate the sovereign, and the phrase "the state of New York" usually refers to the political subdivision or entity, I apprehend they might under certain circumstances be used interchangeably; but when the saving clause of the statute, as here, exempts "such claims as the state of New York and the county of Oneida may have thereon for taxes," there can be no doubt that reference is specifically made to state taxes and county taxes as those terms are ordinarily used and understood. If that be so, there can be as little doubt that the omission to include the city of Utica in the saving clause was intentional and significant. This is not, therefore, a case to which the doctrine of sovereignty applies (conceding that the cases have established such a

doctrine) because the sovereign itself, as embodied in the Legislature, has waived its rights so far as the city of Utica is concerned. And this it has the power to do. *Wells v. Johnston*, 55 App. Div. at page 488, 67 N. Y. Supp. 112.

This construction of the County Tax Law in no wise affects the coherency of the system of city and county taxation in Utica.

Under the Charter of that city, sections 54, 55, 56, and 57, as amended by chapter 577 of the Laws of 1901, it is the duty of the city treasurer on city tax sales, where there are no other bids, to bid in all parcels, taking a tax certificate therefor, and thereafter "to seasonably procure from the county clerk the necessary searches to enable the city to perfect its title," and, if not redeemed to take a conveyance thereof, "which conveyance shall vest in the grantee an absolute estate in fee simple subject to all claims which the city, county, or state may have thereon for taxes or any other liens or incumbrances."

Property so acquired and held by the city is subject to county taxation. *Clarke v. Sprague*, 113 App. Div. 645, 99 N. Y. Supp. 304. Hence, if the city had perfected its title to the premises in question as contemplated by law, it would, nevertheless, have been compelled to pay the county taxes, default in the payment of which resulted in the deeds under which plaintiff claims. If the city had not done so, its right in the property would have been cut off by the resulting county tax sales. I think that the city would not have been without power under those circumstances to protect its interest in the property and to raise money by taxation for that purpose. See section 35 of the Charter of the City of Utica, giving common council "the care, management and control of the property of the city and its finances"; also, section 47, subdivision 1, providing for a contingent fund; also, section 48, providing that the common council shall impose upon persons and property "amount of any other tax or tax for extraordinary purposes, which may be required or authorized by law."

If, then, the city, upon peril of being cut off, would have been obliged to pay the county taxes even if it had done as directed by the law and perfected its title, is it to be said that it was in better case because it neglected to comply with the law and relied upon its inchoate title under its tax certificate? I think not.

Whether, having neglected to perfect its title under its own sales, the city had the right or power to redeem from subsequent county tax sales, and thereby preserve its vested rights to receive tax deeds, is not absolutely clear. I am inclined to think it did have such right and power under the sections of the charter above referred to and after 1908, under the provisions of article 1, § 3, subd. 5, of the uniform charter of second-class cities.

In short, the scheme of city and county taxation in Utica seems to have contemplated the payment of county taxes by the city in all cases where individuals interested in the property defaulted in payment, leaving the city to recoup itself out of the property. That such was the legislative intent is further evidenced by chapter 287 of the Laws of 1913, by which it was provided, in substance, that hereafter the city shall pay the county its portion of the county taxes and afterward collect the same along with its own taxes.

It seems to me, therefore, that it was the duty of the city and within its power to preserve its interests in the property in question by the payment of the county taxes within the statutory period, and, having failed to do that, its rights were extinguished.

The other issues raised by the answer of defendant are decided without discussion against the defendant.

The decree sought is granted, with costs, and findings may be prepared accordingly.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Seward A. Miller, of Utica, for appellant.

Martin & Jones (Richard R. Martin, of Utica, of counsel), for respondent.

PER CURIAM. Judgment affirmed with costs, upon the opinion of Crouch, J., delivered at Special Term.

FOOTE, J. (dissenting). The judgment adjudged that plaintiff had become the sole owner of a certain parcel of land in the city of Utica, and that the same is free from any lien thereon in favor of defendant to secure the payment of certain city taxes levied thereon and certain city tax sale certificates issued upon the sale of said premises for city taxes, and declaring said city tax certificates null and void and directing them to be surrendered up and canceled.

The city of Utica is the holder of a series of tax certificates for taxes levied upon the premises in question located in that city during the years 1899 to 1904, inclusive, aggregating, with the penalties, \$1,364. The same premises were thereafter sold for unpaid taxes assessed by the county of Oneida for the years 1904, 1907, and 1908, and were struck off and subsequently conveyed by county treasurer's deeds to one Jay A. Pease, the purchaser, all of which deeds were duly recorded in the Oneida county clerk's office. Pease subsequently conveyed the premises to plaintiff. Plaintiff also received deeds from the treasurer of Oneida county under sales for unpaid taxes of the years 1909 and 1910, and these deeds were duly recorded.

This action is brought in equity to have it adjudged that the tax certificates held by the defendant the city of Utica upon sales for city taxes are invalid as against the taxes subsequently levied upon the same premises by the county of Oneida and the title thereunder acquired by plaintiff by deeds from the county treasurer, and to have the said city tax certificates surrendered up and canceled and thereby removed as a cloud upon plaintiff's title.

The decision of this court in the case of *City of Rochester v. Kapell*, 86 App. Div. 224, 83 N. Y. Supp. 640, affirmed 177 N. Y. 533, 69 N. E. 1121, on the opinion below, applies in principle to this case, and we think requires a reversal of the judgment appealed from and the dismissal of plaintiff's complaint.

In that case the city of Rochester held a tax certificate as the purchaser upon a tax sale of certain premises in the city of Rochester for a city tax levied in the year 1899, and the action was brought to foreclose the lien of the city by virtue of this tax sale certificate and thereby to perfect the city's title to the lands. The defendant Kapell, who was made a party, was the holder of a tax sale certificate issued by the county treasurer of the county of Monroe for a tax sale made on August 19, 1902, for a state and county tax levied upon the same premises in the year 1901. The decree from which defendant Kapell appealed adjudged the lien of the city of Rochester, by virtue of its tax certificates, to be prior and superior to that of defendant Kapell by virtue of his county tax certificate, and directed that upon the sale of the premises the amount due upon the city tax sale certificates should be first paid from the proceeds of the sale, and that the premises should be sold free and clear of the lien of the defendant Kapell under his county tax certificates, and that he be barred and foreclosed of all

right, title, or equity of redemption. By the statute under which the county tax sales were made, being chapter 107 of the Laws of 1884, it was provided that, if after the sale there was no redemption from the sale within two years, the county treasurer should then execute to the purchaser a conveyance of the property, and the statute further provided that this conveyance, "when perfected in the manner herein-after provided, shall vest in the grantee an absolute estate in fee, subject, however, to all the claims which the people of this state may have thereon for taxes or other liens or incumbrances." It was the contention of the defendant Kapell that this quoted provision of the statute entitled him, in case there was no redemption from his tax sale certificates, to a deed which would cut off and extinguish the lien of the city taxes and tax certificates issued thereunder, prior in point of time to the county tax and tax certificates issued thereunder. This contention was disposed of in the opinion of Mr. Justice Williams for a unanimous court, adopted also by the Court of Appeals, as follows:

"The question is as to the effect of the deed which he (defendant Kapell) will be entitled to as purchaser under the county sale. The tax for the non-payment of which the sale to appellant was made included a state tax, to be collected by the county, and it is claimed that the only tax liens which are preserved, under the language of this section, are pure state taxes. This we apprehend is too narrow a construction of the language of the section, viz., 'all the claims which the people of this state may have thereon for taxes,' etc. The source of all power to tax within the state, whether by the state, the city, the town, or the county, is the Legislature. The Legislature has the right to provide for the protection of all such taxes. The policy of the law is to insure the collection of all taxes. We must assume that the Legislature intended no conflict between the systems of taxation provided by it for the several political divisions above referred to. It could not have intended that a sale for taxes by one division should cut off and nullify sales made by other divisions for their taxes. The more reasonable construction of this section is one that preserves all liens for taxes, whether state, county, town, or city. All these political divisions represent the people of the state, and their taxes are all claims of the people of the state. This construction in effect results in the principle that no individual can secure a perfect title to real property, purchased upon tax sales, without paying all taxes thereon, imposed by any political subdivision of the state. This is a reasonable and salutary doctrine."

With the general rule in mind enunciated in this opinion, which was by no means a new rule, we have to examine the statutes applicable to the case at bar to determine whether they require a similar construction for the same reasons. The city taxes in question here are prior in point of time to the county taxes.

Section 47 of the Revised Charter of the City of Utica, being chapter 18 of the Laws of 1862, as amended by chapter 577 of the Laws of 1901, provides that the city taxes assessed as therein provided "upon or in respect to any real estate shall be liens thereon until such taxes are paid." There is a similar provision in the statute in reference to the lien of assessments for local improvements. The city charter also requires the city treasurer to bid in for the city property sold upon city tax sales, where there is no other bidder, to an amount equal to the tax, and also provides a method of perfecting the city's title in such cases.

County tax sales in Oneida county are or were governed by the provisions of chapter 559 of the Laws of 1902. Section 9 of that act provides:

"If such real estate sold for taxes, or any portion thereof, be not redeemed, as herein provided, the county treasurer shall execute to the purchaser, his heirs or assigns, a conveyance of the real estate so sold, and unredeemed, which shall vest in the grantee an absolute estate in fee, free from all liens, claims and incumbrances of every name and nature whatsoever subject only to such claims as the state of New York and county of Oneida may have thereon for taxes or other liens."

Section 10, which provides for the form of conveyance to be made, also contains this provision:

"Every such conveyance shall vest in the grantee an absolute estate in fee simple, subject to all claims which the state may have thereon for taxes or other liens or encumbrances, and which shall be presumptive evidence that the sale and all proceedings prior thereto * * * were regular. * * * After two years from the date of such conveyance such presumption shall be conclusive, the sale and conveyance thereof shall become absolute, and the occupant and all others interested in the land be forever barred from all liens upon, claims against, interest in or right or title thereto."

We are of opinion that these provisions of the county tax law should, for their true construction, be read with the charter and statutes relating to city taxes of the city of Utica, so far as the two sets of statutes provide for the assessment and collection of taxes on real property in the city of Utica, and that, when read together, the county tax law does not in express terms or by necessary implication provide for the destruction of prior liens for city taxes upon the sale and conveyance of the same lands for subsequent county taxes. By the city charter, the city taxes are to remain liens until the taxes are paid. In view of the policy of the law to insure collection of all taxes and the assumption which we must make that the Legislature intended no conflict between the systems of taxation provided by it for the several political divisions in Oneida county, we think the general language of the county tax law, although it expressly excepts from the effect of the conveyance "such claims as the state of New York and the county of Oneida may have thereon for taxes or other liens," does not indicate a legislative intent that prior city tax liens should be extinguished by such conveyance, and the provisions on the same subject in section 10 serve to confirm this view. In view of the general policy of the Legislature in such matters and the decisions of the courts on the subject, we think a statute to have that effect should provide in express terms that prior city tax liens should be extinguished.

Our conclusion is that the judgment appealed from should be reversed, with costs, and judgment directed upon the findings below dismissing the plaintiff's complaint, with costs.

KRUSE, P. J., concurring.

(160 App. Div. 807)

LUGAR v. LUGAR et al.

(Supreme Court, Appellate Division, First Department. February 13, 1914.)

1. TRUSTS (§§ 17, 18*)—RESULTING TRUSTS—EVIDENCE TO ESTABLISH TRUST.

Where property was conveyed to one person and part of the consideration paid by another, under an oral agreement that the grantee was to hold the property in trust, though no trust resulted by virtue of such void oral agreement, yet where the grantee came into court and gave his express consent recognizing and adopting the agreement, accounted for moneys, and failed to appeal from a decree charging him with the trust, and directing him to convey to the owners on proper tender, the relations of the parties were as firmly established as though they were evidenced by a formal written instrument, and hence a trust did result.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 15-24; Dec. Dig. §§ 17, 18.*]

2. DOWER (§ 14*) — ESTATES AND INTERESTS SUBJECT TO DOWER — EQUITABLE ESTATE.

A husband furnished part of the purchase money for a conveyance taken in the name of another, under agreement with the grantee that the grantee should take charge of the property, collect the rents, and, after reimbursing himself for all payments made, to convey any interest in the property to which the husband might be entitled at his death to such persons as he might appoint by will. *Held* that, though the agreement did not create an express trust, it did confer upon the husband an enforceable power in trust, which, not being extinguishable by his death, was an estate of inheritance under 3 Rev. Stat. (5th Ed.) pt. 2, c. 2, § 28, and, as such, his widow was entitled to dower therein under 3 Rev. Stat. (5th Ed.) pt. 2, c. 1, tit. 3, § 1.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 45-47, 49-56; Dec. Dig. § 14.*]

3. DOWER (§ 15*) — MORTGAGES (§ 28*) — ESTATES OR INTERESTS SUBJECT TO DOWER—MORTGAGED PROPERTY.

Where a husband furnished part of the consideration for a conveyance to another under an agreement that the grantee should reimburse himself for all payments made, and at the death of the husband convey the husband's interest in the property to his appointees by will, the agreement was a mortgage, the intent being only to secure the grantee for his disbursements, and hence, the husband's estate being that of mortgagor, his widow was entitled to dower therein.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 18, 57-60, 132; Dec. Dig. § 15;* Mortgages, Cent. Dig. §§ 44, 56-58, 153; Dec. Dig. § 28.*]

4. ESTOPPEL (§ 65*)—EQUITABLE ESTOPPEL.

Where a party claimed the property in controversy as the heir of a husband, she was estopped to deny the inheritable nature of the estate, and hence that the husband's widow was entitled to dower therein.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 155-158; Dec. Dig. § 65.*]

Ingraham, P. J., and Dowling, J., dissenting.

Appeal from Special Term, New York County.

Action by Helen B. Lugar against Catherine Lugar and others. From a judgment for plaintiff, defendant named appeals. Modified and affirmed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

E. M. Wight, of New York City, for appellant.
Henry C. Hunter, of New York City, for respondent.

HOTCHKISS, J. In February, 1890, certain premises in this city were conveyed by Gedney to the defendant Livermore. The consideration for such conveyance was paid in part by Henry P. Lugar and in part by the grantee Livermore; the latter paying \$3,000. At the time of the conveyance the premises were subject to a first mortgage of \$14,000, of which \$2,000 has since been paid by Livermore, who has also paid and satisfied a second mortgage for \$963.50, which also was a lien on the premises at the time of said conveyance. The conveyance to Livermore was made pursuant to an oral arrangement between him and said Lugar, by which Livermore agreed to take the title in trust, to receive the rents, pay for repairs and necessary improvements, taxes and the interest on the two mortgages, and also to pay or renew the mortgages or any part thereof at such times as might to him seem expedient, "and make such other payments, loans and advances as said Lugar might direct or require," with power to sell, and from the proceeds, together with the rents, "reimburse himself for all moneys disbursed by him," with interest on yearly balances in his favor, and after the death of said Lugar "to distribute the balance of any moneys derived from the said rents, issues and profits and to distribute any interest in the said land and premises to which said Henry P. Lugar may be entitled at his death, in the manner and to the persons to whom" Lugar "might name and appoint in his last will and testament." The premises were never conveyed by Livermore and are still held by him pursuant to said agreement. Henry P. Lugar died September 10, 1895, leaving a will by which he devised his interest in the premises in undivided shares to his widow, his daughter Marion, one of the defendants, and to his son Charles, to whom he gave one-third. Thereafter the widow died and devised her share to Marion. In May, 1893, Charles married the defendant Minnie, who in December, 1889, procured from Charles an absolute divorce by decree of our Supreme Court. The plaintiff is the sole issue of that marriage. In December, 1906, Charles married the appellant Catherine in the state of Connecticut, and in July, 1909, he died intestate.

This action was brought by Helen to determine the interest of herself and, as well, the interest of Minnie, the divorced wife of Charles, and of Catherine, his widow, in the premises; for an accounting by Livermore; and for a decree directing him to convey to Helen and Marion according to their respective interests, after he should have been reimbursed for all moneys due to him. Livermore appeared at the trial, and the court below decreed the amount due him; that he holds the premises in trust pursuant to said agreement; that neither Minnie nor Catherine is entitled to dower in the premises, which, subject to Livermore's right to reimbursement for moneys due, belongs to Helen and Marion; that Livermore "has the right and power to sell"; and that "upon any sale" he divide the proceeds as above. The court has also decreed that, on paying to Livermore his due, the costs, etc., Minnie and Marion were entitled to a conveyance from him for

their respective undivided interests in the premises. Neither Livermore nor Minnie has appealed, and the question is whether the sole appellant, Catherine, is entitled to dower in the premises. Inasmuch as Livermore does not appeal, it must be presumed that he does not dispute the alleged trust, and that he never has disputed it; the latter presumption being strengthened by the fact that the findings of the trial court show that, in the course of his administration, he has collected upwards of \$33,000 from rents and has paid to the defendant Marion and her deceased mother, Mary, upwards of \$7,500, and to the plaintiff and her deceased father, Henry, upwards of \$4,500.

[1] Conceding for the argument that the oral agreement was void to the extent that no trust resulted in favor of Henry or his heirs or devisees (3 Rev. Stat. [5th Ed.] c. 1, tit. 2, art. 2, § 51, p. 15), nevertheless I know of no law which prevented Livermore from treating it as valid and accepting and performing its duties, and when he has come into court and has given his express consent to recognize and adopt the agreement, has accounted for the moneys coming into his hands, and has failed to appeal from the court's decree charging him with a trust, passing his accounts, establishing his equities and the equities of those interested in the land or its net proceeds, and directing him to convey to the owners of the fee, on proper tender made, it seems to me that we have the relations of the parties from the day of the deed to this date as firmly and solemnly established as they could have been had they been expressed by formal instrument executed contemporaneously with the deed. So expressed, the instrument would have been enforceable. *Woerz v. Rademacher*, 120 N. Y. 62, 23 N. E. 1113.

[2] In this situation, was the estate of Henry and his devisees a dowerable estate? It will be noted that Charles died before the Real Property Law was enacted and while the Revised Statutes were still in effect. Under the Revised Statutes (5th Ed., vol. 3, c. 1, tit. 3, § 1, p. 31)—the present Real Property Law is the same—a widow was entitled to dower in "all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage." Whether this was merely declaratory of the established common law (*House v. Jackson*, 50 N. Y. 161, 164), or was an adoption of a controverted principle (*Hawley v. James*, 5 Paige, 318, 320, 452, 453), is immaterial. In either case, a widow had her "equitable dower in lands in which her husband had an inheritable interest at the time of his death" (Id.). Authority other than the statute is unnecessary to show that estates of inheritance include any equitable interest which is not extinguished by the death of him entitled thereto. 3 Rev. Stat. (5th Ed.) c. 2, § 28, p. 44. Seisin in fact in the husband is unnecessary; seisin in law satisfies the statute. *Durando v. Durando*, 23 N. Y. 331. "Seisin in law," as defined by Bouvier, is "a right of immediate possession." Had the relations between Henry and Livermore been reduced to writing, the instrument, while insufficient to create an express trust, would have conferred upon Livermore an enforceable power in trust; the legal estate remaining in Henry. *Woerz v. Rademacher*, supra, 120 N. Y. 67, 68, 23 N. E. 1113. That such an estate was one

of inheritance is apparent, and that it was dowable was decided in *Hawley v. James*, 5 Paige Ch. 318, 319, 451-457. The cases of *Phelps v. Phelps*, 143 N. Y. 197, 38 N. E. 280, 25 L. R. A. 625, and *Nichols v. Park*, 78 App. Div. 95, 79 N. Y. Supp. 547, are not in point, for in each, because of the void oral agreement, the husband was held never to have had any estate whatever in the premises.

[3] The same result is reached from another point of view. It is found as a fact that, although Henry paid part of the consideration, the remainder was paid by Livermore, and that one of the purposes of the conveyance was to enable him to reimburse himself "for all moneys disbursed by him," from which it may be inferred that he was authorized to reimburse himself for the part of the consideration he had paid as well as for his subsequent disbursements, thus constituting him a mortgagee, the equitable title remaining in Henry, descending to his heirs, subject to Livermore's lien (*Carr v. Carr*, 52 N. Y. 251, applying 4 Lans. 314, where the facts are fully stated), and entitling Henry's widow to dower (*Bowery Nat. Bank v. Duncan*, 12 Hun, 405).

[4] One further consideration would seem to put the question at issue beyond doubt. The only estate vested in the respondent Helen (and in Marion as well) is such as has come to her by means of the agreement with Livermore, and not otherwise. She claims under the will of Henry and as the heir of Charles, Henry's devisee; and the appellant Catherine claims as the widow of Charles. These facts justify us in holding that the respondent Helen is estopped to deny either the validity of Henry's estate or the inheritable nature of her father Charles' estate thereunder. *Sherwood v. Vandenburg*, 2 Hill, 303.

The judgment should be modified by striking from the third conclusion of law so much thereof as denies to the appellant Catherine dower in the undivided one-third part of the premises belonging to Helen, and substituting therefor one or more findings in conformity to this opinion, and as so modified the judgment should be affirmed, with costs to the appellant.

CLARKE, J., concurs.

SCOTT, J. I concur with Mr. Justice HOTCHKISS. It was found by the surrogate, and no one excepts to the finding, that John R. Livermore held the legal title to the lands and premises, as trustee, under and by virtue of an agreement between him and Henry P. Lugar, deceased. It was further found that, as a part of the agreement from which the trust resulted, John R. Livermore agreed that after the death of Henry P. Lugar he would distribute the balance of the moneys derived from the rents, issues, and profits, and distribute any interest in said land and premises to which said Henry P. Lugar might be entitled at his death in the manner and to the persons to whom he, the said Henry P. Lugar, might name and appoint in his last will and testament. It is true that under this trust the whole legal estate was vested in Livermore, subject, however, to the execution of the trust. At Henry P. Lugar's death his devisees acquired a legal estate in the property as against all persons except the trustees and those claiming under them. Real Property Law [Consol. Laws, c. 50] § 101; For-

mer Real Property Law, Laws 1896, c. 547; 1 Rev. Stat. 729, § 61. If the terms of the trust as found by the surrogate required Livermore, at Henry P. Lugar's death, to sell the property and distribute the proceeds, as Mr. Justice INGRAHAM assumed that they did, I should agree with him that Charles E. Lugar never had a descendible estate in the real property as such. But that is not the finding. The only money to be distributed was the proceeds of the rents, issues, and profits. As to the land it was to be distributed in specie. It is true that the word "distributed" is not a happy one to describe the process of dividing land among a number of persons, but it will suffice where the clear intention of the testator is that the land itself shall be divided, and that intention seems to me to be clearly evidenced by the terms of the trust as found by the surrogate. I think therefore that upon Henry P. Lugar's death Charles E. Lugar became vested with the equitable title to one-third of the real estate, and to a legal title, as well, good as against every one but the trustee. He had the right then to a conveyance to himself by the trustee, subject of course to making proper provisions to satisfy any claim or lien the trustee had against the property. But the existence of any claim or lien in favor of the trustee did not operate to prevent or postpone the absolute right of Charles E. Lugar to demand a conveyance subject to the satisfaction of the claim or lien, nor did it serve to convert his share of the property from realty into personalty. If I am right in this, it follows that Charles E. Lugar acquired, at his father's death, a descendible equitable title to the real estate, and the instant right to demand a conveyance. If so, the appellant is entitled to dower. *Hawley v. James*, 5 Paige, 320.

INGRAHAM, P. J. (dissenting). The only question presented on this appeal is whether the appellant, Catherine Lugar, is entitled to dower in certain real property described in the complaint. Catherine Lugar was married to one Charles Lugar in December, 1906, and in July, 1909, Charles Lugar died intestate. To entitle the appellant to dower it must appear that her husband "was seised of an estate of inheritance" during her marriage of the property in question. Real Property Law, chapter 52 of the Laws of 1909 (Consol. Laws, c. 50); Revised Statutes, pt. 2, c. 1, tit. 2, art. 1, § 1. As was said by Judge Gray in *Phelps v. Phelps*, 143 N. Y. 197, 38 N. E. 280, 25 L. R. A. 625:

"The position of a wife, with respect to her husband's property, is limited by the Revised Statutes, and unless she can bring herself within their limitations, she is without the right to assert any claim to it."

And the question therefore is whether at any time during coverture Charles Lugar was seised of an estate of inheritance in the property in question. The appeal is based upon the judgment roll, and consequently we are confined to the findings of the court at Special Term to determine whether under the facts there found Charles Lugar, the appellant's husband, was seised of an estate of inheritance in this property.

The court found that on the 12th of February, 1890, Emma Gedney and Sarah Ann Gedney, being the owners in fee of certain lands and premises situated in the county of New York, for a valuable consideration to them paid and delivered by Henry P. Lugar, since deceased, and John R. Livermore, one of the defendants herein, duly executed a deed bearing date the 12th day of February, 1890, and delivered the same to the defendant John R. Livermore, whereby they conveyed to him the said land and premises. By the law of this state that conveyance vested the whole title of the land in the defendant Livermore, and he was seised of an estate of inheritance in the land, and by virtue of that conveyance Henry P. Lugar acquired no legal or equitable interest therein. This deed was duly recorded, and the court found that Livermore since the 12th day of February, 1890, has held and now holds the title to the said land and premises under and by virtue of the said deed and has been and now is in possession thereof by virtue of the same. The finding does not state what consideration Lugar paid to Livermore or to the Gedneys upon the conveyance of this property. There is, however, a finding that Livermore paid to the Gedneys the sum of \$3,000, as consideration therefor and the land conveyed subject to mortgages aggregating over \$14,900. The court then finds that Livermore became so seised and possessed of said land and premises under an express oral agreement made by and between him and the said Henry P. Lugar, whereby the defendant John R. Livermore agreed to take and hold in his own name the title to the said land and premises in trust, to receive the rents, issues, and profits accruing therefrom, pay the expenses of keeping the same in repair, and make necessary and proper improvements thereon, pay the taxes, assessments, and water rents assessed or levied thereon, pay the interest on the two mortgages then a lien thereon, pay off or renew said mortgages or any part thereof at such time or times as circumstances might in his judgment render expedient, and make such other payments, loans, and advances as the said Henry P. Lugar might direct or require, with the right and power, in said Livermore, to sell and convey the said land and premises, and, out of the proceeds of any sale, so to be made by him, and out of the rents, issues, and profits derived therefrom to reimburse himself for all moneys disbursed by him together with interest at the rate of 5 per centum on all unpaid balance due him at the end of each year, and after the death of the said Henry P. Lugar to distribute the balance of any moneys derived from the said rents, issues, and profits, and to distribute any interest in the said land and premises to which said Henry P. Lugar may be entitled at his death in the manner and to the persons to whom he, the said Henry P. Lugar, might name and appoint in his last will and testament.

Certainly Lugar had no estate in this property either legal or equitable. He was seised of no interest in the property by reason of this oral agreement. The statute says that to entitle a wife to dower her husband must have been seised of an estate of inheritance during coverture, and I think it clear that Henry P. Lugar never was seised of an estate of inheritance. Whatever interest he had under such a void trust certainly would not descend to his heirs or devisees. Liv-

ermore remained in possession collecting the rents and profits and making such disposition of them as he pleased until Henry P. Lugar died on September 10, 1895, in the borough of Brooklyn, and left him surviving a widow, a daughter, Charles the appellant's husband, and a grandson. He left a last will and testament duly admitted to probate, whereby he devised his interest in said lands and premises—one-third undivided share thereof to his son Charles the appellant's husband. His son Charles married the appellant on the 20th of December, 1906, and died on the 22d of July, 1909, intestate. The question is whether Charles was seised of an estate of inheritance in this real property before his death. I think it clear he was not. Livermore was seised and possessed of the property during Charles' life. He held it under an oral agreement by which he was authorized to sell and convey the land and premises, and he agreed that out of the proceeds of any sale made by him to reimburse himself for all money disbursed by him with interest, and after the death of Henry P. Lugar "to distribute any interest in the said land and premises to which said Henry P. Lugar may be entitled at his death in the manner and to the persons to whom he, the said Henry P. Lugar, might name and appoint in his last will and testament."

So that the interest of those in whose favor Henry P. Lugar exercised the power of appointment was not to the land, even assuming that this oral agreement was enforceable, but to a distributive share of any interest in the land and premises to which Henry P. Lugar may be entitled at his death. Assuming that this instrument had been in writing and enforceable, the sole remedy of a person in whose favor Henry P. Lugar had exercised the power of appointment would be to compel Livermore to sell the property and distribute its proceeds according to the agreement. It seems to me clear that at no time would Henry P. Lugar or his children have been entitled to a decree compelling Livermore to convey this land either to Lugar or a person in whose favor he exercised the power of appointment. Livermore was seised of the whole of this property. He had advanced a large part of the purchase money; he was in actual possession of it receiving the rents and profits; and the utmost that can be said is that he had, under a contract which was not enforceable as against him, agreed when the property was sold to distribute whatever interest Henry P. Lugar had in it to those in whose favor Henry P. Lugar should direct it to be paid by his last will and testament. One of Charles' children commenced this action to enforce this oral agreement, and, until the court made its finding in this case and entered judgment based thereon, there never was at any time, so far as appears from these findings, any interest in either Henry P. Lugar or his children which could be called an estate either legal or equitable in the property, and at that time appellant's husband was dead. As Judge Gray says in *Phelps v. Phelps*, supra:

"So far as my examination has gone, I am unable to find in the adjudged cases any support for the proposition that a right to dower can be asserted, except with respect to real property of which the husband was actually seised during his lifetime, or to the actual seisin of which he had a legal right."

Adopting this definition, the appellant's husband must have had during coverture either the actual seisin of this property or a legal right to actual seisin. It seems to me clear he had neither. It is conceded that he had not actual seisin, and it seems to me it must also be conceded, assuming this oral agreement was enforceable, that he had not a legal right to actual seisin. That he could have come into equity and compelled Livermore to exercise the power of sale and distribute the proceeds after paying Livermore's advances was not either actual seisin or a legal right to actual seisin, as I view the condition that existed.

The court, in the decision, having set out the conveyance of the property showing that the legal title was in defendant Livermore, and the oral agreement under which he became seised and possessed of the land and premises, the finding that Henry P. Lugar died "owning an interest in the said land and premises," that said Henry P. Lugar "devised his interest in said land and premises," and that said Charles E. Lugar "died on the 22d of July, 1909, owning a one-third undivided interest in the said land and premises," if taken as findings of fact, would expressly contradict the findings as to the actual conveyances, from which, as before stated, the title to the property is vested in the defendant Livermore. I think these findings can be treated as conclusions, although included in the findings of fact; and, as upon the conceded facts as found by the referee the appellant's husband was never vested with the title to the property, these conclusions can be disregarded.

I think therefore the judgment appealed from was right and should be affirmed.

DOWLING, J., concurs.

(160 App. Div. 662)

HANBURY v. BENEDICT, Supreme Court Justice.

(Supreme Court, Appellate Division, Second Department. February 20, 1914.)

1. WITNESSES (§ 21*)—CONTEMPT—POWER TO PUNISH—EXISTENCE OF OTHER REMEDY.

That a contumacious and unlawful refusal of a witness to answer proper questions, punishable as a contempt under Judiciary Law (Consol. Laws 1909, c. 30) § 750, subd. 5, may also constitute a crime under Penal Law (Consol. Laws 1909, c. 40) § 600, is immaterial, since the remedies by indictment and by punishment for criminal contempt may coexist.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 37-41; Dec. Dig. § 21.*]

2. CONTEMPT (§ 2*)—NATURE AND ELEMENTS—"CRIMINAL CONTEMPT"—"CIVIL CONTEMPT."

As used in the statutes, "criminal contempt" has to do with vindicating the dignity of the court, while "civil contempt" has to do in part with recompensing the person injured by the conduct complained of.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 1-3, 5, 7, 8; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1747, 1748; vol. 2, pp. 1194, 1195.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

3. CRIMINAL LAW (§ 168*)—FORMER JEOPARDY—CONTEMPT.

While contempt of court is in the nature of a crime, because in its origin it is in a violation of public law and in its punishment ends in the vindication of public justice, the procedure resulting in a criminal contempt is not a criminal prosecution which will prevent subsequent prosecution in a criminal action, notwithstanding Const. art. 1, § 6, prohibiting double jeopardy for the same offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 290-303; Dec. Dig. § 168.*]

4. CONTEMPT (§ 40*)—PROCEEDINGS TO PUNISH—NATURE.

The proceeding to determine whether a person has been guilty of a criminal contempt in connection with a civil action or special proceeding, and which is instituted by a warrant of attachment or an order to show cause, is a civil or special proceeding and not a criminal one.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 122-124; Dec. Dig. § 40.*]

5. EXECUTION (§ 418*)—SUPPLEMENTARY PROCEEDINGS—CONTEMPT—PROCEEDINGS TO PUNISH—CERTIORARI.

Under Code Civ. Proc. § 2121, providing that certiorari shall not issue to review any determination in a civil action or special proceeding, certiorari will not issue to review a conviction for criminal contempt committed in proceedings supplementary to execution in a civil action.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1201; Dec. Dig. § 418.*]

6. CONTEMPT (§ 67*) — PROCEEDINGS TO PUNISH — CERTIORARI — "CRIMINAL MATTER."

Under Code Civ. Proc. § 2121, and section 2148, which is a part of the same article, providing that such article shall not apply to determinations in criminal matters, except criminal contempts, even if a criminal contempt committed in a civil action is a "criminal matter" within the statute, the article applies and prevents the issuance of a writ of certiorari.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 221, 222; Dec. Dig. § 67.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1749, 1750.]

7. EXECUTION (§ 418*)—PROCEEDINGS TO PUNISH—APPEAL.

Under Code Civ. Proc. § 2122, providing that certiorari shall not issue where there is an adequate remedy by appeal, and section 1356, authorizing appeals from any order affecting a substantial right made in a special proceeding, an appeal, and not certiorari, is the proper remedy to review a conviction for contempt committed in proceedings supplemental to execution in a civil action.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1201; Dec. Dig. § 418.*]

8. CONTEMPT (§ 3*)—NATURE AND ELEMENTS—CRIMINAL CONTEMPT.

Criminal contempts may occur in either criminal actions or civil actions and special proceedings.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 4; Dec. Dig. § 3.*]

9. APPEAL AND ERROR (§ 4*)—NATURE AND FORM OF REMEDY—PROPER MODE OF REVIEW.

The general policy of the law as expressed in our statutes is to make appeal the only method of review whenever it is applicable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. § 4.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, Kings County.

Application by Harry A. Hanbury for a writ of certiorari to be directed to Russell Benedict, one of the Justices of the Supreme Court, to review an order adjudging said Hanbury guilty of contempt of court. From an order vacating a writ of certiorari entered on his application, as modified by a later order resettling the first order, the said Hanbury appeals. Affirmed.

See, also, 146 N. Y. Supp. 44.

Argued before BARR, THOMAS, RICH, STAPLETON, and PUTNAM, JJ.

George W. Sickels, of New York City, for appellant.

Charles L. Craig, of New York City, for respondent.

BARR, J. On November 12, 1913, in a proceeding entitled "People of the State of New York, on the relation of J. Benedict Roache, Complainant, against Harry A. Hanbury, Accused," Hanbury was arrested under a warrant of attachment allowed by Hon. Russell Benedict, a justice of this court. The charge against him was for contempt of court. He was brought before a Special Term of this court in Kings county for the hearing of litigated motions, and filed a verified answer denying the contempt, and thereupon interrogatories were framed, which the accused was required to answer. On November 24, 1913, he filed his answer to said interrogatories, under oath, and on the succeeding day an affidavit alleged to be corroborative of such answers. The matter then came on for hearing before Mr. Justice Benedict at said Special Term, and on December 30, 1913, an order was entered in said proceeding finding him guilty of criminal contempt, and prescribing as the punishment therefor a fine of \$250, and imprisonment in the county jail of Kings county for a period of 30 days. On the succeeding day, without notice, he obtained from Hon. James C. Van Siclen, a justice of this court sitting at a Special Term thereof for the hearing of ex parte applications in Kings county, a writ of certiorari addressed to Mr. Justice Benedict, directing him to make return of said proceedings for purposes of review. On January 7, 1914, at the same Special Term, upon the papers upon which said writ of certiorari was granted (Mr. Charles L. Craig, as attorney for J. Benedict Roache, the relator in the proceeding in which the determination of contempt was made, and a person specially and beneficially interested in upholding such determination, having appeared specially by permission of the court for the purpose of making an application to vacate said writ), the order of December 31st, directing that such writ issue, was vacated and set aside, and the writ issued thereunder was quashed and annulled. Subsequently, and on January 16, 1914, the attorney for said Hanbury appearing and applying therefor, the order of January 7, 1914, was resettled so that it contained a recital that the opinion of Mr. Justice Van Siclen, delivered at the time that the motion to vacate was granted, was one of the papers upon which the order of January 7, 1914, was based. From the order of January 7th as resettled by the order of January 16th Hanbury appeals.

The proceedings antecedent to the contempt proceeding are but meagerly stated in the record now before us, but there is sufficient to indicate that Hanbury was being examined as a witness in certain proceedings supplementary to execution, in a civil action in which J. Benedict Roache was judgment creditor and one Patrick H. Flynn was judgment debtor, and that according to the contention of the relator in said contempt proceedings he willfully and contumaciously refused to answer certain questions addressed to him in the course of such examination, when directed to do so by a justice of the Supreme Court before whom such examination was being held. The only question presented by this record is whether the order adjudging said Hanbury guilty of contempt may be reviewed by a writ of certiorari or by a notice of appeal.

Some confusion seems to have arisen as to the proper practice arising either from dicta in opinions, or because the point as to the proper method of review was not raised. In some instances it has been reviewed by appeal, in others by a writ of certiorari. It makes little practical difference which shall be held to be the proper method, provided only that the practice respecting the same is settled, and that it stays settled.

[1] It may assist in arriving at a correct determination of this question if we clearly apprehend the nature of the proceeding terminating in the order sought to be reviewed.

"A court of record has power to punish for a criminal contempt a person guilty of either of the following acts and no others: * * * Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory." *Judiciary Law (Consolidated Laws, c. 30; Laws of 1909, c. 35) § 750, subd. 5.*

Conduct of which Hanbury has been found guilty may constitute a crime (*Penal Law [Consol. Laws 1909, c. 40] § 600*) to be prosecuted by indictment (*Id. § 602; Code of Criminal Procedure, § 4; People v. Meakim, 133 N. Y. 214, 30 N. E. 828*). But the remedies by indictment and the imposition of a fine and imprisonment in a special proceeding for a criminal contempt may coexist.

[2] The distinction is made in our statute law between contempt termed "criminal" and that designated as "civil." Some confusion might have been avoided if the former had been termed "public" and the latter "private," since the former has to do with vindicating the dignity of the court which has been defied, while the latter has to do in part with recompensing the person injured by the contumacious conduct complained of. *Rapalje on Contempts, § 21.*

[3] While the offense is in the nature of a crime, since in its origin it is a violation of public law, and in its punishment ends in the vindication of public justice, the procedure resulting in punishment for a criminal contempt is not a criminal prosecution which will prevent subsequent indictment, and, after conviction, sentence in a criminal action, nor will such conviction and sentence bar a subsequent prosecution and punishment by a special proceeding as a criminal contempt, notwithstanding the constitutional provision that "no person shall be subject to be twice put in jeopardy for the same offense." Constitu-

tion, art. 1, § 6; *People ex rel. Choate v. Barrett*, 56 Hun, 351, 9 N. Y. Supp. 321, affirmed 121 N. Y. 678, 24 N. E. 1095; Penal Law, § 602; *People v. Meakim*, 133 N. Y. on page 225, 30 N. E. 828.

[4] We think that the proceeding to determine whether a person has been guilty of a public or criminal contempt by reason of his conduct in connection with the prosecution of a civil action or special proceeding, and which is instituted by a warrant of attachment or an order to show cause, is a civil special proceeding and not a criminal one. *People ex rel. Negus v. Dwyer*, 90 N. Y. 402; *Matter of Strong v. Randall*, 177 N. Y. 400, 69 N. E. 721; *Matter of King v. Ashley*, 179 N. Y. 281, 72 N. E. 106. In *People ex rel. Negus v. Dwyer*, supra, defendant was adjudged by a Special Term of the Supreme Court to be guilty of a contempt in willfully violating an injunction order, issued in a civil action, and a fine and imprisonment were imposed as punishment therefor. The court there said:

"The conviction here was for a criminal contempt, the disobedience adjudged willful, and the permitted punishment imposed. Civil Code, §§ 8 and 9. It is now said that from such a condition there is no appeal, because it is not a civil but a criminal special proceeding. It cannot be the latter, for the Code of Criminal Procedure does not recognize or provide for it. That describes what are called 'special proceedings of a criminal nature,' but criminal contempts are not among them. Crim. Code, pt. 6, tits. 1-11. They appear and are regulated in the Civil Code. When they originate in the violation of an order, made, not by a criminal court, but by a civil court in a civil action, it is difficult to see how they can be anything else than the special proceedings defined in the Civil Code as civil special proceedings. That the willful contempt is denominated 'criminal' does not make the proceeding by a civil court, having before it a civil action, to protect its dignity and compel respect for its mandates, any the less a civil special proceeding. If it is in a court having only civil jurisdiction, or on the civil side of a court having criminal jurisdiction also, it must be deemed a special proceeding within the meaning of sections 1356 and 1357 of the Code of Civil Procedure, and section 190, subd. 2, which permit an appeal. But where a criminal court makes an order in a criminal proceeding pending before it, which is disobeyed, the process by which it vindicates its authority must be held to be, as we decided in *People ex rel.*, etc., *v. Gilmore*, 88 N. Y. 627, not a special proceeding as defined in the Code of Civil Procedure. Possibly in this latter class of cases there is no appeal. If it is best that there should be, the attention of the Legislature should be directed to the subject."

[5-7] If such is the character of this proceeding, then:

"A writ of certiorari cannot be issued, to review a determination, made, after this article takes effect, in a civil action or special proceeding, by a court of record, or a judge of a court of record." Code Civ. Proc. § 2121.

And "except as otherwise expressly prescribed by statute, a writ of certiorari cannot be issued, in either of the following cases: * * * Where the determination can be adequately reviewed, by an appeal to a court, or to some other body or officer." Id. 2122.

It is not claimed that there is any special statutory authority for review by writ of certiorari in the case that we are now considering. Sections 2121 and 2122 of the Code of Civil Procedure appear in chapter 16, tit. 2, art. 7, of said Code. This article concludes as follows:

"This article is not applicable to a writ of certiorari, brought to review a determination made in any criminal matter, except a criminal contempt of court." Code Civ. Proc. § 2148.

If we should concede that every contempt of court which is "criminal" according to the nomenclature of the statute is a "criminal matter" as the words are here used, this article would apply, and would prevent the issuing of a writ of certiorari at least if the determination may be reviewed by appeal.

Let us now consider the statutory provisions relative to an appeal in a civil special proceeding.

"An appeal may be taken, to the Appellate Division of the Supreme Court, from an order, affecting a substantial right, made in a special proceeding, at a Special Term or a Trial Term of the Supreme Court; or made by a justice thereof, in a special proceeding instituted before him, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued before, him." Code Civ. Proc. § 1356.

We think, therefore, that under the circumstances here disclosed the determination as to the conduct of appellant was a final order affecting a substantial right in a civil special proceeding. It cannot be reviewed; therefore, by certiorari, but can and must be reviewed by appeal.

[8] Criminal contempt may also arise in connection with a civil action or a civil special proceeding when the offense was committed in the immediate view and presence of the court, and where the offender is summarily punished. Judiciary Law, § 755. In such case it may be that as in the first instance the only record containing any facts showing the particular circumstances of the offense is comprised in the recitals necessarily contained in the order of commitment (*People ex rel. Barnes v. Court of Sessions*, 147 N. Y. 290, 47 N. E. 700; *People ex rel. Palmieri v. Marcan*, 86 App. Div. 278, 83 N. Y. Supp. 843), a proceeding in the nature of a writ of certiorari is proper which shall compel a return by the court or judge making the adjudication, and, where the original return is defective, a further return setting forth all the facts (Code Civ. Proc. § 2135). Such proceeding may be brought to a hearing upon the writ and the return and the papers upon which the writ was granted. *Id.* § 2138. We will determine that question when it arises. Criminal contempt may also occur in connection with criminal as well as civil actions. *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N. Y. 245, on page 249, 4 N. E. 259, 54 Am. Rep. 691. If the objectionable conduct arose in connection with a criminal trial or a criminal special proceeding, and if the criminal court or judge vindicated its or his authority and inflicted punishment for contempt, whether in such case the writ of certiorari may be employed as a writ of review we need not now determine. Code of Criminal Procedure, §§ 515, 517; *People ex rel. Negus v. Dwyer*, *supra*, 90 N. Y. on page 407. In 1909, the provisions of the existing statute relating to criminal contempts was transferred from the Code of Civil Procedure to the Judiciary Law (sections 750-752). Its language is sufficiently broad to include every court of record, both civil and criminal. In view of the change, some of the decisions formerly made with respect to contempts occurring in criminal courts may be no longer applicable.

In conclusion, we may refer to some of the cases in which the ques-

tion here involved has been considered, either directly or incidentally. In *People ex rel. Mitchell v. Sheriff*, 29 Barb. 622, 626, there is a dictum to the effect that an order committing a party for contempt arising in connection with the conduct of a civil action may not be reviewed by certiorari. See, also, *People ex rel. Hackley v. Kelly*, 24 N. Y. 74, 78; *People ex rel. Brewer v. Platzek*, 133 App. Div. 25, 117 N. Y. Supp. 852. In *People ex rel. Munsell v. Court of Oyer & Terminer*, supra, the offense was committed in the course of or in connection with a criminal trial, and the proceedings to inflict punishment therefor were reviewed by certiorari. The same was true in *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303, and *People ex rel. Barnes v. Court of Sessions*, supra. In *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493, it is not entirely clear whether the proceedings were to punish for a civil or a criminal contempt. The order contained no recital that the rights of any one in the supplementary proceeding had been impeded, impaired, prejudiced, or defeated by defendant's misconduct, as would seem to be necessary if it was a civil contempt. This determination was reviewed by appeal. In *Kendrick v. Wandall*, 88 Hun, 518, 34 N. Y. Supp. 976; *People ex rel. Negus v. Dwyer*, 27 Hun, 548, affirmed 90 N. Y. 402; *People ex rel. Gaynor v. McKane*, 78 Hun, 154, 28 N. Y. Supp. 981; and *People ex rel. Stearns v. Marr*, 181 N. Y. 463, 74 N. E. 431, 106 Am. St. Rep. 562, 3 Ann. Cas. 25—each of which was a proceeding for a criminal contempt, the order determining the fact of such contempt and imposing punishment therefor was reviewed by appeal. In *Boon v. McGucken*, 67 Hun, 251, 22 N. Y. Supp. 424, the order of the Special Term was reversed because the facts proven did not constitute criminal contempt; but the review of such order was by appeal and not by certiorari. In *People ex rel.*, etc., v. *Gilmore*, 88 N. Y. 626, although the proceeding for criminal contempt arose in connection with a charge of misdemeanor, and it was held to be so far criminal in character that an unsuccessful relator was not chargeable with costs, the review was by appeal. In *Matter of Teitelbaum*, 84 App. Div. 351, 82 N. Y. Supp. 887, the Appellate Division of the First Department did say:

"The practice to review a proceeding adjudging a party guilty of a criminal contempt is not by appeal, but by certiorari"—citing *People ex rel. Taylor v. Forbes*, supra.

Under the circumstances of that case the statement may have been correct. *Teitelbaum* had been summarily adjudged guilty of contempt committed in the presence of the court, during the course of the trial. He then made a motion, based upon his own affidavit, to vacate this order, which was denied, and he then appealed from both orders. The court said:

"The record as thus made is not certified, either by the justice presiding or by any other officer, that the affidavit" (appellant's affidavit used on the motion to vacate) "contains all of the proceedings which were had before the justice or of the orders entered thereon. * * * No court would be authorized to review the proceedings unless a record was made up, properly authenticated, and thereby enable the reviewing court to see what the actual case was upon which the court acted in adjudging the defendant guilty of contempt."

If the language of the court as to the method of review is to be construed as applicable to every case of criminal contempt, no matter how or where it arises, we should not be inclined to follow it. *People ex rel. Palmieri v. Marean*, 86 App. Div. 278, 83 N. Y. Supp. 843, was also a case of summary commitment for an offense committed in the presence of the court, and was reviewed by certiorari. In *People ex rel. Kuhne v. Burr*, 127 App. Div. 907, 111 N. Y. Supp. 1136, affirmed without opinion 195 N. Y. 610, 89 N. E. 1109, the offense was committed in connection with proceedings in a criminal court, to wit, the County Court of Kings county, although the hearing was had and the punishment imposed upon the civil side of the Supreme Court; the writ of habeas corpus which was disobeyed having been issued by a justice of that court. The accused both appealed and sued out a writ of certiorari, and the cases came on for hearing together. No stress was laid on the form of the procedure, and the decision was handed down in the certiorari proceeding. *People ex rel. Drake v. Andrews*, 134 App. Div. 32, 118 N. Y. Supp. 37, was also a case where the alleged contempt arose in connection with a criminal proceeding. The Appellate Division reversed the order for commitment upon a writ of certiorari, upon the ground that the conceded facts did not constitute a criminal contempt. The decision in that case was reviewed in the Court of Appeals upon the merits, the order of the Appellate Division reversed, and the relator remanded to custody. The question of the form of the procedure in which a hearing was had at the Appellate Division seems not to have been raised in that court. If certiorari was not the proper remedy, the Court of Appeals would have been obliged to reverse the order of the court below. Instead of reversing upon any technical ground, it reversed upon the merits. *Pitt v. Davison*, 37 N. Y. 235; *King v. Flynn*, 37 Hun, 329; *Greite v. Hendricks*, 71 Hun, 11, 24 N. Y. Supp. 545; *Matter of Backus*, 91 App. Div. 266, 86 N. Y. Supp. 638; *Matter of Westminster Realty Corp.*, 123 App. Div. 797, 108 N. Y. Supp. 551; *Matter of Woods*, 134 App. Div. 361, 119 N. Y. Supp. 69; *Feinberg v. Kutcosky*, 47 App. Div. 393, 132 N. Y. Supp. 9; and *Schreiber v. Garden*, 152 App. Div. 817, 137 N. Y. Supp. 747—were each of them a case of a civil and not a criminal contempt.

[8] Our attention has been called to no well-considered case, nor have we been able to discover any by our own industry, in which a criminal contempt was committed in connection with a civil action or a civil special proceeding and where the adjudication was not summary in character, in which such adjudication has been reviewed in any other manner than by appeal. The general policy of the law as expressed in our statutes is to make this the only method of review when it is applicable.

It is applicable in this case, and the order vacating the order directing the writ of certiorari to issue, and quashing the writ, should be affirmed, without costs. All concur.

MALTZ et al. v. WESTCHESTER COUNTY BREWING CO.

(Supreme Court, Appellate Division, Second Department. February 6, 1914.)

EVIDENCE (§ 441*)—PAROL EVIDENCE.

Where a lease is in writing and appears complete on its face with mutual obligations and does not contain a declaration of trust, oral evidence is not admissible, in an action to cancel an assignment of the lease made to defendant, of statements preceding and accompanying its execution offered to show that it was taken by lessee in trust for plaintiffs.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

Appeal from Special Term, Westchester County.

Action by Adolph Maltz and another against the Westchester County Brewing Company. From a judgment at Special Term for plaintiffs (140 N. Y. Supp. 521), defendant appeals. Judgment directed for defendant.

Argued before JENKS, P. J., and BURR, THOMAS, STAPLETON, and PUTNAM, JJ.

Norbert Blank, of New York City, for appellant.

Thomas F. Curran, of Yonkers, for respondents.

PER CURIAM. The plaintiffs have a judgment against the defendant canceling an assignment of a lease made to defendant's assignor. The lease is a written instrument, appearing on its face complete, with mutual obligations to be performed, and containing no declaration of trust. Oral evidence of statements preceding and accompanying its execution, offered with a design to establish that the lease was taken by the lessee in trust for the plaintiffs, was received over objection and exception. Plaintiffs testified that they requested the lease to be made in the form in which it was made. There was no evidence of facts from which a trust would result or be implied in equity. The judgment should be reversed. *Hoar v. Hoar*, 48 Hun, 314, 1 N. Y. Supp. 379, affirmed 125 N. Y. 735, 26 N. E. 758. The third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, fifteenth, sixteenth, and seventeenth findings of fact are reversed, and the fifth finding of fact is amended to read as follows:

"5. That on the 27th day of March, 1912, at the request of the plaintiffs, the said Frederick W. Behrmann executed a lease of said premises to Joseph B. Schwartz for a term of five years from June 1, 1912. That said lease expressed mutual obligations to be performed and did not express any declaration of trust in favor of the plaintiffs."

The conclusion of law is reversed, and the conclusion of law is made that the complaint be dismissed on the merits, with costs, and judgment directed for the defendant accordingly.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(160 App. Div. 835)

WEBER v. COLUMBIA AMUSEMENT CO.

(Supreme Court, Appellate Division, First Department. February 20, 1914.)

1. LANDLORD AND TENANT (§ 49*)—BREACH OF CONTRACT—ACTION—PARTIES PLAINTIFF.

A company leasing a theater from plaintiff and another as partners could not defend an action brought by plaintiff in his own right and as assignee of his partner on the ground that by some other agreement to which the company was not a party and in which it was in no way interested, a third party was interested with plaintiff in the subject-matter of the action.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 117-119; Dec. Dig. § 49.*]

2. PARTIES (§ 7*)—TRUSTEE OF EXPRESS TRUST.

Partners who leased a theater to an amusement company for a term of five years, and who thereafter took in another partner under an agreement entitling him to a certain interest, could, as trustees of an express trust, maintain an action against the company for damages for its breach of the lease, so that a recovery by them would discharge the company's obligation, and make the original partners accountable to the subsequent partner; and, since their right to maintain the action as trustees would be established by the lease, it would not be necessary to expressly allege that they sued as such trustees.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 9-11; Dec. Dig. § 7.*]

3. CONTRACTS (§ 330*)—ACTIONS—PARTIES.

An action upon a contract under seal can be maintained only in the right of the parties who are, by its express terms, parties thereto.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1589, 1591-1594, 1596, 1597, 1602-1604; Dec. Dig. § 330.*]

Appeal from Trial Term, New York County.

Action by L. Lawrence Weber against the Columbia Amusement Company. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial granted.

See, also, 154 App. Div. 882, 138 N. Y. Supp. 879.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Daniel P. Hays, of New York City (Edwin D. Hays, of New York City, on the brief), for appellant.

George Edwin Joseph, of New York City (Leon Laski, of New York City, on the brief), for respondent.

LAUGHLIN, J. This is an action to recover damages for the breach of a contract in writing, made on the 14th day of May, 1910, between the defendant, a domestic corporation, as party of the first part, and the plaintiff and one Edward F. Rush, who, it is recited in the contract, comprised the firm of Weber & Rush, as parties of the second part. The contract further recites that the party of the first part was engaged in booking burlesque companies throughout the United States and Canada, and that the parties of the second part are the lessees of and control and manage the Mohawk Theatre in the city

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of Schenectady, New York. The parties of the second part leased said theater to the party of the first part for the period of five years from the commencement of the theatrical season of 1910-1911.

It is alleged in the complaint that the plaintiff and Rush were copartners in business under the firm name and style of Weber & Rush, and that on the 25th day of January, 1911, the copartnership was dissolved and Rush duly assigned, transferred, and set over unto the plaintiff all his right, title, and interest in and to said contract; that the plaintiff and Rush as such copartners made said contract with the defendant, and duly performed the same on their part, but that the defendant, without just cause, assumed to terminate the contract on the 10th day of June, 1912, and refused to perform the same to the damage of the plaintiff's damages in the sum of \$100,000. The defendant pleaded, among other things, a defect of parties plaintiff in that one Dinkins, who was still living, was a member of the firm of Weber & Rush, and was not joined as a party.

[1, 2] The defendant showed, by the cross-examination of the plaintiff and by the lease from the owner of the Mohawk Theatre, that said lease, was made to "L. Lawrence Weber and Edward F. Rush, * * * comprising the firm of Weber & Rush and Thomas W. Dinkins"; that on the 20th day of July thereafter, Weber, Rush, and Dinkins made an agreement in writing by which they became copartners from that date and during the remainder of the term of said five-year lease of the Mohawk Theatre, and that it was therein provided that Weber & Rush should *jointly* contribute 75 per cent. of the expenses of the copartnership and Dinkins the remaining 25 per cent., and that all profits and losses should be proportioned in the same manner. During the trial, and before the plaintiff completed his proof, counsel for the defendant raised the point that the action could not be maintained without the joinder of Dinkins as a party plaintiff, and the court thereupon so ruled and directed the dismissal. It is quite clear that the court erred in so ruling. The defendant bound itself to Weber & Rush, and therefore it cannot defend an action, brought in their right, on the theory that by some other agreement, to which the defendant was not a party, and in which it was in no manner interested, a third party is interested with the plaintiff in the subject-matter of the action, for by the express terms of the contract the plaintiff and his assignor only were entitled to have it performed, and if another was interested with them they certainly could maintain the action as trustees of an express trust, and a settlement with or recovery by them would discharge the obligation, and they would be accountable to those interested with them. Considerant v. Brisbane, 22 N. Y. 389; Clarkson v. Carter, 3 Cow. 84; Mutual Life Ins. Co. v. Nicholas, 144 App. Div. 95, 128 N. Y. Supp. 902; Howe v. Savory, 49 Barb. 403; Meinhardt v. Excelsior Brew. Co., 98 App. Div. 308, 90 N. Y. Supp. 642; Davidge v. Guardian Trust Co., 136 App. Div. 78, 120 N. Y. Supp. 628; reversed on other grounds 203 N. Y. 331, 96 N. E. 751; and section 449, Code of Civil Procedure. If others were interested in this contract it was not necessary for the plaintiff expressly to allege that he sues as trustee of an express trust, for since he and Rush made the contract, that would

establish their right to maintain the action as such trustees, which distinguishes the case from *Natter v. Blanchard*, 153 App. Div. 814, 138 N. Y. Supp. 969, on which counsel for respondent appears to rely.

[3] It was evidently intended to execute the contract under seal, for in the witness clause it is recited that the defendant has caused "its corporate seal to be hereto affixed," and that "the second parties have hereunto set their hands and seals." The contract was executed for the defendant by one Mack, its president, and it was signed by the parties of the second part, the firm name only. The firm signature was affixed opposite two statutory substitutes for seals, which were type-written. If, as is quite likely, this makes the lease a sealed instrument (*G. V. B. Mining Co. v. First National Bank of Hailey*, 95 Fed. 23, 36 C. C. A. 633; *Rusling v. Union Pipe & Construction Co.*, 5 App. Div. 448, 39 N. Y. Supp. 216, affirmed 158 N. Y. 737, 53 N. E. 1131), the action could be maintained *only* in the right of the parties who are, by express terms, parties thereto (*Henricus v. Englert*, 137 N. Y. 488, 33 N. E. 550; *Porter v. Baldwin*, 139 App. Div. 278, 123 N. Y. Supp. 1043. See, also, *Spencer v. Huntington*, 100 App. Div. 463, 91 N. Y. Supp. 561, affirmed 183 N. Y. 506, 76 N. E. 1109). But in the view we take of the other point it is unnecessary to decide whether or not it is to be deemed a sealed instrument.

It follows that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event. All concur.

(160 App. Div. 678)

BLOCK v. NUSSBAUM.

(Supreme Court, Appellate Division, First Department. February 20, 1914.)

1. LIBEL AND SLANDER (§ 94*)—PLEADING—ANSWER—JUSTIFICATION.

Where the complaint alleged the writing of a letter by defendant, in which he stated that R. felt that plaintiff had obtained money from him by false representations, and should be punished, that he concurred in that view, and, after stating the basis on which they would settle, that plaintiff could consider himself most fortunate, with an innuendo that defendant meant that plaintiff had committed larceny and would be fortunate to be able to settle without being prosecuted therefor, an answer, alleging certain representations by plaintiff promissory in their nature, was insufficient, as the representations would not support a criminal or civil action, and the justification was therefore not as broad as the charge.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 219-225; Dec. Dig. § 94.*]

2. LIBEL AND SLANDER (§ 97*)—PLEADING—ANSWER—RELEASE.

In an action for libel, a defense pleading a general release was not demurrable, though plaintiff claimed that it was confined to a different matter, and did not extend to the cause of action for libel; this being a matter to be pleaded by way of reply.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 234-236; Dec. Dig. § 97.*]

Appeal from Special Term, New York County.

Action by Louis Block against Myer Nussbaum. From an order overruling demurrers to two separate defenses, plaintiff appeals. Modified and affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Kindleberger & Robinson, of New York City (E. Crosby Kindleberger, of New York City, of counsel), for appellant.

William B. Ellison, of New York City, for respondent.

CLARKE, J. This is an action for libel. The complaint is based upon a letter dictated by the defendant to a stenographer employed by him, and written out in typewriting, and read over by said stenographer before being signed by the defendant, and thereafter sent through the United States mails to the person to whom it was addressed, then acting as attorney for the plaintiff, who thereupon read the same. The portion of the letter complained of is as follows:

"In respect to proposition of purchase of stock in the Universal Sanitary Appliance Company of Mr. Riley and myself at the outset I want to make this observation: Mr. Riley has consulted counsel and I fear I cannot handle the situation as readily as I thought last Friday; he feels that Block has obtained moneys from him by false representations and that he should be punished for same. I most heartily concur in that view and feel as he does about it. I am, however, endeavoring to put through the proposition to purchase our stock, as I told you, to get rid of it, but it must be done on a different basis than proposed, that is, your proposition should be modified as follows: [Then follow nine paragraphs of details.] In conclusion I simply desire to add what I have already stated, that under all the circumstances Block can consider himself most fortunate."

The innuendo is that defendant meant that Riley felt that plaintiff had committed the crime of larceny by false representations, for which he should be sent to state prison as a thief, and that the defendant concurred in that view, and that the plaintiff, should the various terms of settlement be accepted, would be most fortunate and lucky to be able to settle without being prosecuted for larceny. The first separate defense by way of a complete defense and justification for said letter details, at considerable length, a certain transaction between plaintiff and his wife and Riley and the defendant. For a second separate defense the answer sets up a general release under seal. Plaintiff demurred to the first and second separate defenses upon the ground that they were insufficient in law upon the face thereof, and from the order overruling said demurrers appeals.

[1] The demurrer to the first separate defense stated as a complete defense was improperly overruled. If the facts alleged had been stated as a partial defense, or in mitigation of damages, it would have been good. But, if the statements in the letter are taken, as charged by the innuendo, as alleging the criminal offense of obtaining money by false representations, for which plaintiff should be convicted and sent to jail, or, as a civil offense which would support an action for deceit upon false representations, the facts set forth in the separate defense are insufficient as a complete defense. They do not meet the charge. The representations are promissory in their nature, hence insufficient to support either the criminal or the civil action. The justification is not as broad as the charge.

[2] The demurrer to the second defense was properly overruled. The general release, on its face, was sufficient in law. If such general release was intended to be confined to the transaction in regard to which the contract (Exhibit A attached to the answer) had to do, to wit, the purchase and sale of the stock and the repurchase thereof, and is not to be extended, notwithstanding the generality of its language, to a cause of action for libel which plaintiff at the time he executed did not know he had, as claimed by the appellant, this must be shown by way of reply, or by an equitable action to reform, limit, or set it aside. It is good enough upon its face to withstand demurrer.

The order appealed from should be modified by providing that the demurrer to the first separate defense should be sustained, and, as modified, affirmed, with \$10 costs and disbursements to the defendant, with leave to the defendant to serve an amended answer within 20 days of the service of the order to be entered hereon, upon payment of \$10 costs of motion. All concur.

(160 App. Div. 832)

JERMYN v. SEARING et al.

(Supreme Court, Appellate Division, First Department. February 20, 1914.)

1. APPEAL AND ERROR (§ 569*)—SETTLING CASE ON APPEAL.

Code Civ. Proc. § 25, provides that after a judge is out of office he may settle a case in an action tried before him while he was in office, and may be compelled to do so by the court in which the action is pending, while section 997 declares that when a party intends to appeal from a judgment rendered after a trial on an issue of fact, or to move for a new trial, he must make a case and procure the same to be settled by the judge, or, in case of the death or disability of the judge, in such manner as the court directs. After judgment in an equity case for plaintiff, the judge resigned from the bench, accepted an appointment as ambassador to a foreign court, and removed to the foreign country. Thereafter defendant appealed, and served its proposed case on appeal. *Held*, that as an ambassador in a foreign country was not susceptible to an order of a local court, there was a case of disability, and the case should be settled in the manner in which the court shall, by its order, direct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2530-2545; Dec. Dig. § 569.*]

2. APPEAL AND ERROR (§ 569*)—PROPOSED CASE—ORDER FOR SETTLEMENT.

A motion for an order directing the settlement of a proposed case on appeal upon the disability of the judge who tried it is premature, when made before the time for the allowance of proposed amendments to the proposed case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2530-2545; Dec. Dig. § 569.*]

Appeal from Special Term, New York County.

Action by Joseph J. Jermy against Frederick F. Searing, the Empire Trust Company, and others. There was a judgment for plaintiff, and Empire Trust Company appeals from an order directing the manner of settling a case on appeal. Order reversed.

See, also, 139 App. Div. 933, 124 N. Y. Supp. 1118.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William D. Guthrie, of New York City (Thomas F. Gilroy, Jr., and Abraham Tulin, both of New York City, on the brief), for appellant. Montgomery Hare, of New York City (Effingham N. Dodge, of New York City, on the brief), for respondent.

CLARKE, J. This was an equity action tried before Mr. Justice Gerard, and a judgment was entered in favor of the plaintiff on June 30, 1913. The defendant Empire Trust Company has appealed from said judgment, and served its proposed case on appeal on October 17, 1913. The time for the plaintiff to serve proposed amendments had not expired when this motion was made. After the entry of judgment Mr. Justice Gerard resigned from the bench, and accepted the appointment of American ambassador to the German Empire, and is now residing in the city of Berlin, exercising his official functions.

[1] Upon this state of facts appellant made a motion for an order directing in what manner the case on appeal herein should be settled and signed. Section 25 of the Code of Civil Procedure provides:

"After a judge is out of office, he may settle a case or exceptions, or make any return of proceedings, had before him while he was in office, and may be compelled so to do, by the court in which the action or special proceeding is pending."

The usefulness of an order or judgment of the court depends upon the power to enforce its obedience. It is obvious that the American ambassador to Germany, while performing his duties at Berlin, cannot be "compelled" to perform an act by process of this court.

Section 997 of the Code of Civil Procedure provides:

"When a party intends to appeal from a judgment, rendered after a trial on an issue of fact, or to move for a new trial of such an issue, he must, except as otherwise prescribed by law, make a case, and procure the same to be settled and signed, by the judge, justice or the referee, by or before whom the action was tried, as prescribed in the general rules of practice; or, in the case of the death or disability of the judge, justice or referee, in such manner as the court directs."

Upon the termination of the term of office of a judge, while his general judicial powers and jurisdiction cease *eo instanti*, yet, by the provisions of section 25 of the Code of Civil Procedure, *supra*, his judicial power, limited to the settlement of a case upon appeal, is expressly preserved. Therefore he comes within the provisions of section 997 of the Code of Civil Procedure, *supra*, and, in the event of disability, the case on appeal is to be settled in such manner as the court directs.

When Ambassador Gerard accepted his appointment from the United States government, left the jurisdiction, and took up his abode abroad for an indefinite period under that appointment, a case of disability contemplated by section 997 arose. Litigants may not have their substantial rights jeopardized or delayed by the voluntary action of a former justice. They are not to be compelled to follow him wherever he may be called by duty or pleasure over the known world, nor is the court to be left helpless to enforce its order.

[2] We are of the opinion that the motion was prematurely made

because before the proposed amendments to the proposed case on appeal were served, it was impossible to determine whether any and, if so, how serious a controversy would arise between the parties. When that situation develops, an application may be renewed to the Special Term for settlement in such manner as it may direct, either before the justice there presiding, or, if necessary, a referee may be appointed.

The order appealed from is therefore reversed, without prejudice to such further motion, as indicated, as may be determined upon, and, under the circumstances, without costs to either party. All concur.

WORCESTER-BROOKLYN REALTY CO. v. BAILEY.

SAME v. MILLBOURNE REALTY CO.

(Supreme Court, Appellate Division, Second Department. February 13, 1914.)

SET-OFF AND COUNTERCLAIM (§ 8*)—EQUITABLE SET-OFF.

Where a vendor who was insolvent, in order to give the land he was desiring to sell a false and fictitious value, executed a mortgage thereon without consideration, which plaintiff assumed as part of the purchase price, and after the sale the mortgage was assigned to another, plaintiff was not limited to pleading the fraud as a defense to the mortgage, but was entitled to sue to recover damages for the fraud, for the purpose of setting off the same against the mortgage, which was a cloud on his title.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 9-11; Dec. Dig. § 8.*]

Appeal from Special Term, Kings County.

Actions by the Worcester-Brooklyn Realty Company against Edward Bailey and against the Millbourne Realty Company. From interlocutory judgments overruling a demurrer to the amended complaint in each action, defendant appeals. Affirmed.

This action has been brought by plaintiff, the owner in fee, of a parcel of vacant land in Kings county, for the cancellation of a certain alleged second mortgage of \$25,000, secured on said parcel of land. The cancellation of said mortgage is asked for *upon the ground that said mortgage was made by plaintiff's grantor to one Edwin E. Bolton, without consideration, and for the purpose of giving a false, fictitious, and deceptive value to said parcel of land with intent to deceive and defraud plaintiff in the purchase of same*, and represented a part of the purchase price of said parcel of land, at the time of the sale and conveyance to plaintiff of said parcel of land by said grantor, subject to said mortgage, and which said mortgage has since been assigned, *without consideration and subject to plaintiff's equities*, by said Bolton to the defendant Millbourne Realty Company, which company is now the holder thereof; that said mortgage was fraudulent in its inception; was made without consideration; is a cloud upon plaintiff's title to said parcel of land; is void and unenforceable owing to the fraud and consequent damage perpetrated on plaintiff by said grantor in the sale to plaintiff of said parcel of land, which said damage, amounting to upwards of \$35,000, plaintiff, by counterclaim, set-off, and recoupment, affirmatively sets off against the whole of said mortgage, plaintiff's said grantor being insolvent so that a money judgment in favor of plaintiff and against said grantor for the amount of said damage would be worthless, and that said mortgage should be delivered up and surrendered to plaintiff for cancellation, and be canceled of record.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The following is the opinion of Blackmar, J., referred to in the opinion:

The amended complaint, in addition to pleading with more particularity the facts set forth in the original complaint, alleges that the vendor of the land is insolvent. The plaintiff has also called my attention to the case of *Davis v. Rosenzweig Realty Co.*, 192 N. Y. 128, 84 N. E. 943, 20 L. R. A. (N. S.) 175, 127 Am. St. Rep. 890, with which I was not familiar. The added allegation of the insolvency of the vendor, who perpetrated the fraud, and the doctrine in the case cited, to the effect that the vendee of land who rescinds the contract for fraud of the vendor in the sale cannot have a lien on the land for the purchase price paid under the contract, so affects the efficacy of the vendee's remedy by rescission that I am induced to once more examine the question.

Assuming the truth of the allegations of the complaint, a grievous fraud has been perpetrated on the plaintiff by the vendor. The false representations were of material facts, and entitle the plaintiff to such remedies as the law accords to a vendee who has been defrauded in the purchase of the land. It is elementary that such a vendee may either affirm the contract or rescind it. If he rescinds, he must tender back what he received, and he may recover the money he has paid on the purchase price. If he does not rescind, the contract is valid, and his remedy is an action at law for deceit. If, however, the purchase price is not fully paid and the vendor brings an action to recover it, the vendee may counterclaim the damages he has suffered from the vendor's fraud. This right existed at common law and was called recoupment. "At common law, and independently of the statutes of set-off, a defendant is in general entitled to retain, or claim by way of reduction, all just allowances or demands accruing to him, or payments made by him, in respect of the same transaction or account, which forms the grounds of action." So Judge Cullen quotes from *Chitty on Pleadings in Deeves & Son v. Manhattan Life Insurance Co.*, 195 N. Y. 336, 88 N. E. 395. The defendant's right to recoup was limited to claims growing out of the transaction which constituted plaintiff's cause of action. The right of set-off of other independent claims was not known to the law, but was ahead of equity jurisdiction. *Nichols v. Dusenbury*, 2 N. Y. 286; *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 355; *Vassear v. Livingston*, 13 N. Y. 248. A claim for damages for deceit in a sale could, at common law, be recouped in an action for the purchase price. *Peck v. Brewer*, 48 Ill. 54; *Carey v. Guillo*, 105 Mass. 18, 7 Am. Rep. 494; *Cole v. Colburn*, 61 N. H. 499; *Avery v. Brown*, 31 Conn. 398; *Harrington v. Stratton*, 22 Pick. (Mass.) 510; *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810; *Beecker v. Vrooman*, 13 Johns. 302; *McAllister v. Reab*, 4 Wend. 483; *Batterman v. Pierce*, 3 Hill, 171; *Van Epps v. Harrison*, 5 Hill, 63, 40 Am. Dec. 314; *Kingsland v. Haines*, 62 App. Div. 146, 70 N. Y. Supp. 873; *Delano v. Rice*, 21 Misc. Rep. 714, 48 N. Y. Supp. 130, affirmed in 23 App. Div. 327, 48 N. Y. Supp. 295.

Recoupment was therefore a right in the vendee to defend against the vendor's action for the purchase price, or to reduce the amount of it to the extent of the damages suffered by him through the vendor's fraud or breach of covenant of warranty. At common law an assignee of a chose in action must sue in the name of the assignor. The remedy of recoupment was consequently available against an assigned claim for the purchase price. In this respect the common law is unchanged by our statute. A counterclaim as authorized by the Code includes recoupment. Section 501 of the Code (*Deeves & Son v. Manhattan Life Insurance Co.*, supra), and it may be asserted against the assignee of a cause of action (section 502 of the Code).

At the time of the sale the mortgage now held by the defendant was owned by the vendor the *McLaughlin Real Estate Company*, and represented a part of the purchase price. The vendee in his deed assumed and agreed to pay the mortgage as part of the purchase price. An action against the present plaintiff to enforce the mortgage would be an action for the purchase price. In such an action the vendee could recoup the damages for fraud. The right of the plaintiff to resist the recovery of the purchase price, or, what is the

same thing, the foreclosure of the mortgage, by recouping its damages arising from the fraud in the sale of the property, is an equitable right which follows the mortgage into the hands of an assignee, and may be asserted against such assignee. *Littlefield v. Albany County Bank*, 97 N. Y. 581; *Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Bush v. Lathrop*, 22 N. Y. 535.

We now reach the question whether the plaintiff, having the right to recoup its damages for the fraud against the mortgage, may maintain this action for that purpose. One who has a defense against a mortgage may maintain an action to have it canceled as a cloud upon title. *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. 741. But a right of recoupment is not a defense but a counterclaim. *Deeves & Son v. Manhattan Life Insurance Co.*, 195 N. Y. 324, 88 N. E. 395. It is true that it is nearly akin to a defense, for it arises out of the same transaction, and the rule that it could be proved only under the allegations of a counterclaim was not established until the *Deeves Case*. Under some circumstances an action in equity may still be maintained to set off one claim against another. The modern action in equity is much broader in its scope than the old equitable suit for set-off. That could be maintained only where the claims did not arise out of the same transaction, and where they were both liquidated. No such limitations apply to the modern action for a set-off. The modern action depends primarily on the inadequacy of the legal remedy. Notwithstanding the statute allowing counterclaims, conditions arise where equity will entertain an action to set off one claim against another. Such conditions usually are that there is no adequate remedy at law; that the two debts were contracted, one on the faith of the other, and there is some equitable reason why one should be deducted from the other. In case of an assigned claim, the insolvency of the assignor is an important and sometimes controlling consideration in determining whether a suit in equity to set off may be maintained. *Smith v. Felton*, 43 N. Y. 419. It seems to me that all the conditions which would justify an action in equity for a set-off of plaintiff's claim for damages for the fraud of the *McLaughlin Real Estate Company* in the sale against the claim of the defendant, as assignee of the *McLaughlin Company* for a portion of the purchase price represented by the bond and mortgage, exists in this case. The assignor is insolvent, and the remedy against it by an action at law for deceit, or by an action in equity for rescission, and the recovery of the purchase money, would be futile. The obligation of the plaintiff was incurred in reliance upon the fraudulent representations of the vendor, and it is inequitable that the obligations for the purchase money should be enforced without allowing a deduction therefrom of the damages caused by the false representations. The remedy which the law gives of interposing a counterclaim under section 502 of the Code is not adequate, for in the meantime the plaintiff has on its hands a tract of vacant property which it cannot sell except subject to the defendant's mortgage. Under all these circumstances I think that an action may be maintained by the plaintiff which combines the remedies of an action to remove a cloud upon title and an action in equity for a set-off. *Davidson v. Alfaro*, 80 N. Y. 660; *Rothschild v. Mack*, 115 N. Y. 1, 21 N. E. 726; *Lindsay v. Jackson*, 2 Paige, 581; *Gay v. Gay*, 10 Paige, 369.

I am inclined to think that this action cannot be maintained upon the theory that the *McLaughlin Company* is accountable to the plaintiff for the mortgage in question as representing profits made upon the sale of the property under the doctrine of *Colton Improvement Co. v. Richter*, 26 Misc. Rep. 26, 55 N. Y. Supp. 496, and *Midwood Park Co. v. Baker* (Sup.) 128 N. Y. Supp. 954. In this case, the *Worcester Parties*, who organized the purchasing company, knew that they were purchasing from the *McLaughlin Real Estate Company*, which held the title by its dummy, *McLaughlin's sister*. The cause of action is based upon the fraudulent representation, as I read the complaint, and cannot be maintained upon the theory that the mortgage represents a concealed profit illegally obtained by parties who owed a fiduciary relation to the plaintiff.

The demurrer does not raise the question whether all necessary parties are before the court, and therefore this question is not considered.

The demurrer is overruled, and judgment directed for the plaintiff, with

costs, and with leave to the defendant to withdraw the demurrer and answer on payment of said costs within 20 days.

Argued before JENKS, P. J., and THOMAS, CARR, STAPLETON, and PUTNAM, JJ.

Thomas G. Flaherty, of New York City, for appellant.
Samuel Evans Maires, of Brooklyn, for respondent.

THOMAS, J. It appears by the opinion of Mr. Justice Blackmar that the action can be maintained only for the purpose of set-off, and that conclusion is approved. For that purpose the second mortgage is regarded as valid. The plaintiff as grantee seems to have assumed but one of the second mortgages. This does not preclude the maintenance of the action. The counterclaim is based upon a cause of action for deceit, which is connected with a cause of action for the foreclosure of the mortgage. In such action for foreclosure the holder of one of the mortgages could not have judgment for deficiency against the present plaintiff, but such judgment could deprive it of the naked title to the land, which carried with it the equity of redemption. As the complaint shows the grantee bought the right of redemption upon a representation that the second mortgage entered into the cost of the land, and in this same transaction the grantor delivered the title of the land, which carried the right to redeem from the mortgage, so, while the grantor would foreclose upon a mortgage that involved no personal claim against the grantee, yet the judgment would oust the grantee from the possession of the land covered by the mortgage, and destroy his title and right to redeem, which rights are—

“connected with the subject of the action, and grew out of the same transaction as the cause of action to foreclose the mortgage so far as the grantee is related to it.”

In *Seligman v. Dudley*, 14 Hun, 186, it is said—

“that a party to an action to foreclose a mortgage, against whom either a personal judgment or one which may operate to transfer his estate in the land is sought, has a right to set up a counterclaim as a defense to the action, and that the case of *Agate v. King*, 17 Abb. Prac. 159, so far as it asserts a contrary principle, ought not to be approved. *Lathrop v. Godfrey*, 3 Hun, 739.”

In *Lathrop v. Godfrey*, 3 Hun, 739, it was presumed that the defendant was liable for the deficiency, and it was considered that the damages for deceit could be set off against the mortgage under foreclosure, or, as is stated, “at all events, upon the personal covenant of Mrs. Godfrey.” It is also stated that:

“The right of a defendant in a foreclosure suit, who is personally liable for the debt, or whose land is bound by the lien, to introduce a set-off to reduce or extinguish the claims was recognized by Comstock, J., in *National Fire Insurance Co. v. McKay*, 21 N. Y. 191, and see *Hunt v. Chapman*, 51 N. Y. 555.”

The cogent reasoning of Blackmar, J., is applicable even in the absence of personal liability on the part of the plaintiff, resting alone upon the subjection of the land to the mortgage. Although the defendant has not suggested that there is a defect of parties, the trial court

may find that there is such defect as to make it inequitable to adjudge the set-off without bringing in other parties. If, for illustration, the Bailey action should be first tried, and the plaintiff should establish its damages and set them off against the amount due on the mortgage owed by Bailey, the damages so recovered should be credited on the plaintiff's demand in the Millbourne Case. Perchance such damages may extinguish the Bailey bond and mortgage, and let the Millbourne mortgage go free; or perchance there may be no recovery, or such a recovery in the Bailey Case as would not extinguish the mortgage. May the Millbourne action then proceed? The defendant in one action will not be privy or bound by a judgment in it. But the trial court will deal with difficulties as they arise.

The interlocutory judgment in each case should be affirmed, with costs, with leave to the defendant to plead over upon payment of costs. All concur.

DISBROW v. DISBROW et al.

(Supreme Court, Special Term, Westchester County. January, 1914.)

1. WILLS (§ 734*)—LEGACIES—INTEREST.

A legacy to plaintiff, which was not payable until the death of testator's widow, did not carry interest until that time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. § 734.*]

2. REFORMATION OF INSTRUMENTS (§ 45*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action to reform a trust deed, conveying property in trust to pay plaintiff a certain sum upon the sale of the premises, evidence held not to show that a provision for the payment of interest to plaintiff upon such sum was omitted by fraud or mutual mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

3. REFORMATION OF INSTRUMENTS (§ 45*)—PROOF.

To authorize the reformation of a written instrument it must appear, by clear and convincing evidence, that the mutual agreement, claimed to have been made, was in fact made, and that the instrument fails to express such agreement, either by mutual mistake or by mistake of one party induced by the fraud of the other.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

Action by Griffin V. Disbrow against George A. Disbrow and others. Judgment dismissing the complaint.

Humphrey J. Lynch, of White Plains, for plaintiff.

Leslie J. Tompkins, of New York City, for defendants.

TOMPKINS, J. This action is brought to reform a trust deed of premises in New York City, made by Robert N. Disbrow and Clara R. Disbrow, his wife, and Griffin B. Disbrow, and George A. Disbrow, on November 1, 1893. The premises were owned by Benjamin G. Disbrow, who died in 1892, leaving a widow and four sons, Griffin

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

B., George A., Robert N., and Charles A. Just before his death Benjamin G. Disbrow conveyed said premises to one of his sons, Robert N. Disbrow, and after his death controversies arose between the widow and the children, it being claimed, among other things, that Robert N. Disbrow had procured the conveyance to him by his father of said premises by means of undue influence; and at the same time, a claim was asserted by Griffin B. Disbrow against the estate for moneys claimed to have been loaned to his father, which claims were represented by promissory notes held by him aggregating over \$4,000. Benjamin G. Disbrow had executed three or four last wills and testaments, one of which was probated, by which the decedent devised said real estate to his widow and children, leaving to the widow the income for life, and providing that upon her death it should be divided into four equal parts; and by said last will and testament, the plaintiff, Griffin B. Disbrow, was given a legacy of \$1,500, and his brother Charles A. a legacy of \$500; neither, however, was to become payable until the death of the widow. All of the disputes and controversies between the parties finally culminated in a compromise, and the making of the trust deed in question, which provided that the grantees, Griffin B. Disbrow and George A. Disbrow, were—

"to have and to hold the above granted premises unto the said parties of the second part and their successors forever, in trust nevertheless, and to and for the uses, purposes and interests hereinafter limited, described and declared, that is to say: upon trust to lease the said premises, to receive and collect the rents, issues and profits, and after paying all taxes, assessments, interests on encumbrances, insurance, repairs and other expenses incidental to the care and management of said premises, to apply the net income thereof to the use of Sarah M. Disbrow, the widow of Benjamin G. Disbrow, late of the City of New York, deceased, for and during the term of her natural life, and at and after the death of said Sarah M. Disbrow, to sell the said premises at private sale or at public auction, and out of the proceeds to pay the said Griffin B. Disbrow the sum of \$7,148.37, and to pay to Charles A. Disbrow, of Harrisburgh, in the state of Pennsylvania, the sum of \$500, and to divide the balance remaining into four equal parts, and to pay one of such parts to the said Griffin B. Disbrow, or his legal representative, one of such parts to the said George A. Disbrow, or his legal representatives, one of such parts to the said Charles A. Disbrow, or his legal representatives, and one of such parts to the said Robert N. Disbrow, or his legal representatives."

The widow lived until 1912, and during her lifetime the net income of said premises, which amounted to about \$600 a year, was paid to her, and was practically her only means of support.

The plaintiff now seeks to reform the said trust deed by inserting therein the provision for the payment to him of interest at the rate of 5 per cent. per annum, upon his claim of \$7,148.37, from the date of the execution of said trust deed, his claim being that provision for interest was omitted from said trust deed by mistake, and by fraud and deceit on the part of his brothers, and he further claims that on several occasions, after the execution of the trust deed, and before his mother's death, he demanded interest upon his said claim, of his brothers George A., and Charles A., and that they said, in substance, that there was not income enough to pay such interest, and that he would have to wait until their mother's death. The trust deed was prepared by Charles H. Shaw, Esq., attorney for Robert N., and

Charles A. He had several conferences with Jacob F. Miller, Esq., who acted as attorney for the plaintiff, and they, with the plaintiff, George, and the mother, "went over it very carefully and made some changes," and the changes suggested by the plaintiff's counsel, Mr. Miller, were adopted and inserted in the trust deed before it was executed. Respecting the plaintiff's claim against the estate at that time, Mr. Shaw testified:

"The interest was computed and added to the sum he was ultimately to receive under the terms of the trust deed."

There was nothing in the preparation and execution of the trust deed to show or suggest fraud, deceit, or artfulness. On the contrary, it seems to have been the careful and deliberate act of all parties concerned in the consummation of the settlement that they had willingly agreed upon of all controversies that had arisen among them.

The items that made up the plaintiff's claim against the estate, the aggregate of which was the sum of \$7,148.37, were as follows: Four promissory notes, \$4,450.86; interest on these notes from their respective dates to the date of the trust deed, at 5 per cent. per annum, \$697.51; the legacy given by the will of Benjamin G. Disbrow, \$1,500; balance due from grandfather's estate, \$500—total, \$7,148.37. The claim of the defendants that, at the time of the settlement and execution of the trust deed the plaintiff agreed to waive interest thereafter on said sum of \$7,148.37 is borne out by the circumstances and probabilities of the case. In the first place, if that amount was to bear interest, it would have been expressly stated in the trust deed, which was prepared, revised, and executed with the advice and under the immediate direction of the plaintiff's very capable lawyer. It is inconceivable that such an important item as future interest on the amount of the plaintiff's claim would have been omitted from the deed, if it had been understood that he was to have it.

Besides, it is improbable that the other parties of the settlement would have agreed to pay the plaintiff interest upon the interest that had already accrued upon said promissory notes and was included in his claim, or interest upon the legacy of \$1,500, which, under the terms of the will of his father, the plaintiff was not entitled to receive until his mother's death, and therefore, of course, would not draw interest, until that time.

[1] Further, it seems hardly likely that the parties agreed to pay the plaintiff interest on the amount of his entire claim, which would have amounted to about, or more than, one-half of the net income of the property, which, under the trust deed, was to go to the widow for her support. The use of the word "interests" was the mistake of the typewriter, so Mr. Shaw, the draftsman of the trust deed, testified. In any event the connection in which the word is used indicates to me that it had reference only to the mortgage on the premises. The plaintiff's claim is not an incumbrance on the premises; his legacy may have been, but that was not payable until the widow's death, and hence did not carry interest. The notes had not been put

in judgment; therefore were not liens or incumbrances upon the premises.

[2] I have carefully read all the testimony and examined the exhibits and considered all the circumstances to which my attention has been called, on the part of the plaintiff, and upon the whole case I am satisfied that the trust deed accurately states the exact agreement that was made by the parties in November, 1893, and that there was no mutual mistake or any fraud or deceit on the part of the defendants, or either of them.

[3] To justify the reformation of a written instrument, it must appear, by clear and convincing proof, that the mutual agreement alleged to have been made was in fact made, and that the written instrument fails to express that agreement, either because of a mutual mistake of all the parties, or by reason of a mistake on one side, induced by fraud on the other. *Southard v. Curley*, 134 N. Y. 148, 31 N. E. 330, 16 L. R. A. 561, 30 Am. St. Rep. 642; *Simpkins v. Taylor*, 81 Hun, 467, 31 N. Y. Supp. 169. Such clear and convincing proof has not been furnished by the plaintiff; on the contrary, the testimony on the part of the defendants, supported by the circumstances and probabilities, furnish a fair preponderance of evidence against the plaintiff's contention.

Judgment for the defendants upon the merits, dismissing the complaint, with costs.

(160 App. Div. 764)

BROWN v. UNITED STATES EXPRESS REALTY CO. et al.

(Supreme Court, Appellate Division, First Department. February 20, 1914.)

1. MASTER AND SERVANT (§ 117*)—INJURIES TO SERVANT—MACHINEBY AND APPLIANCES—ELEVATOR.

A master was not negligent because there was a space of 2¾ inches between the floor of an elevator and that of the hall, through which a heavy piece of iron slipped and injured plaintiff below, where it was not shown that such space was excessive or unusual.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 177, 208; Dec. Dig. § 117.*]

2. MASTER AND SERVANT (§ 159*)—INJURIES TO SERVANT—FELLOW SERVANT.

Where a servant working in an elevator shaft was injured by a heavy piece of iron, which fell through the space between the elevator and the landing, he could not recover if the accident was caused by the negligence of the elevator operator in not stopping on a level with the landing, or of his other fellow servants, who were removing the piece of iron from the elevator.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 318-325; Dec. Dig. § 159.*]

3. MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT—ANTICIPATION OF INJURY.

In an action by a servant for injuries sustained while working in an elevator shaft, caused by an iron plate falling through the space between the elevator floor and the landing, it was proper to charge that the master was not responsible for the failure of his servant in charge of the work

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to anticipate an accident which a reasonably prudent man would not have anticipated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

4. MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT—METHODS OF WORK—ELEVATORS.

A superior servant, who directed plaintiff to work in an elevator shaft, and promised to hold the elevator, was bound to take the necessary precautions to prevent the car from being so operated as to injure him, but it was not negligence to direct its use to carry to the floor above plaintiff an iron plate, which fell between the elevator and the landing while it was being unloaded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

Appeal from Trial Term, New York County.

Action by George E. Brown against the United States Express Realty Company and others. From a judgment for plaintiff, and an order denying a new trial, the defendant named appeals. Reversed, and complaint dismissed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

B. L. Pettigrew, of New York City, for appellant.

Edwin P. Kilroe, of New York City, for respondent.

SCOTT, J. The defendant is the owner of a large office building on Rector street in the city of New York. The plaintiff was in its employ, acting as elevator man, and also apparently as a useful man generally. He was directly under the orders of another employé named Keating, who had charge of the engines, boilers, and equipment, including the elevators, and who hired the engineers, firemen, oilers, etc., and had supervision and control of the management of the elevators. There were other agents who had general charge of the building and the renting of offices. On the day of the accident plaintiff was directed by Keating to go into the pit at the foot of one of the elevator shafts to make certain repairs. Before going into the pit plaintiff said to Keating: "Hold the car—keep that car dead until I am through." To which Keating replied: "All right. Go ahead, I will hold the car." While plaintiff was at work in the pit two of defendant's other employés, named Larkin and Greenberg, brought across the street from an opposite building a piece of iron, described as a trench plate. It was about 6 feet long, 18 inches wide, $1\frac{1}{4}$ inches thick, and weighed about 250 pounds. They brought this piece of iron into the main hall, and were instructed by Keating to put it into the elevator car operating in the shaft in which plaintiff was working, and to take it to the floor below, called in the evidence the Mezzanine floor, which was 18 or 20 feet above the place where plaintiff stood. The plate was accordingly placed in the car, which descended to the lower floor and stopped in such a position that its platform was slightly lower than the hall floor. There was a space of about $2\frac{3}{4}$ inches between the edge of the car platform and the edge of the hall floor. Greenberg

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

then started to "walk" the piece of iron out of the car; i. e., he held the plate in an upright position, advancing alternately one corner and then the other. Larkin stood in the hallway at the door of the car, ready to help carry the piece of iron to its destination. When the plate had been thus advanced to the car door it slipped out of Greenberg's hands and fell into the shaft between the car platform and the hall door, striking and severely injuring plaintiff. The action was tried as one at common law and the sole question is whether or not, upon the foregoing facts, any negligence was attributable to defendant.

If the jury had paid the slightest heed to the instructions of the court respecting the liability of the defendant, it could not have brought in a verdict in plaintiff's favor. It was doubtless confused and misled by the insistence on plaintiff's part, which is carried into the brief on this appeal, that Keating was the "vice principal" of the defendant, and some apparent color lent to that characterization in the charge. Without stopping to discuss just what does or does not make a superior servant a "vice principal" of the employer so as to attribute to the latter the negligence of the former, we may content ourselves with saying that we much doubt whether Keating held such a relation to the defendant. Whether he did or not is, however, wholly unimportant, because we are unable to discern any negligence on the part either of defendant or Keating.

[1, 2] The court charged, and rightly, as we think that defendant could not be found to have been negligent because of the space between the edge of the car platform and the car. It is manifest that there must always be some space, else the car could not be operated at all, and there was no evidence that the space in the case at bar was excessive or unusual. The respondent does not press this point in his brief. The court also charged that if the cause of the accident was the failure of the operator of the elevator to have the platform of the car on a level with the floor landing, the verdict must be for the defendant. Obviously this instruction was correct because that negligence, if negligence it was, was that of a fellow servant. For the same reason the court was right in charging that no liability could be fastened on defendant if the accident resulted from the negligence of Larkin or Greenberg in handling the plate. Nor was there any evidence that it was improper or negligent to use the car for carrying the plate from one floor to another.

[3, 4] It was also undoubtedly a correct statement to charge the jury, as the court did, that the defendant was not responsible for Keating's failure to anticipate an accident which a reasonably prudent man, looking at the situation before the accident, would not have anticipated. *Glasier v. Town of Hebron*, 131 N. Y. 447-453, 30 N. E. 239; *Hubbell v. City of Yonkers*, 104 N. Y. 434-439, 10 N. E. 858, 58 Am. Rep. 522. None of these propositions are seriously combated by plaintiff upon this appeal. His main proposition in support of the judgment appealed from is that Keating, by permitting the car to be used or operated at all while plaintiff was at work in the pit, was guilty of negligence which was the proximate cause of the accident. We do not so consider. It was undoubtedly Keating's duty, having directed plain-

tiff to work in the pit, to take the necessary precautions to prevent the car from being so operated as to injure him. Whether or not a failure to perform this duty would have rendered the defendant liable need not now be considered, because the evidence shows beyond contradiction that Keating did not so fail. There is not the slightest evidence in the case to show that plaintiff's safety could be endangered by operating the elevator, so long as the car was not permitted to descend below the Mezzanine floor, which, as has been said, was 18 or 20 feet above the place where plaintiff was at work. Plaintiff can take nothing by Keating's alleged promise to hold the car still, because this is an action for negligence, not for breach of contract. So long as Keating did not permit the car to go down to the foot of the shaft, he had done all that due care required. It is quite clear, as matter of law, that to operate the car as it was operated was not a negligent act, and it was error to permit the jury so to find. There is no other act contributing to the accident which can properly be called negligent, and consequently there is nothing to support a judgment against the defendant. It is apparent that the determinative facts cannot be changed upon a new trial.

Consequently, not only must the order and judgment appealed from be reversed, but the complaint must be dismissed, as it should have been upon the trial in response to defendant's motion to that effect, with costs to defendant in all courts. All concur.

(160 App. Div. 758)

YOUNGMAN v. NORTH ELECTRIC CO.

(Supreme Court, Appellate Division, First Department. February 20, 1914.)

1. BROKERS (§ 52*)—PERFORMANCE OF CONTRACT.

Under a contract by which plaintiff's assignor agreed to bring defendant and another together so that they could negotiate for the sale and purchase of patent rights owned by defendant, which provided that assignor should be paid a special commission "if a sale is made," assignor was entitled to a commission if a sale was actually made after he brought the parties together.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73; Dec. Dig. § 52.*]

2. BROKERS (§ 57*)—PERFORMANCE OF CONTRACT.

Where plaintiff was entitled to a commission under a contract with defendant, "if a sale was made" of patent rights after plaintiff had brought defendant and another together for negotiations, that the sale made was in the form of a license, which, however, was practically a sale, would not prevent plaintiff from recovering commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.*]

Ingraham, P. J., and Hotchkiss, J., dissenting.

Appeal from Trial Term, New York County.

Action by Walter L. Youngman against the North Electric Company. From a judgment for defendant and an order denying a motion for new trial, plaintiff appeals. Reversed, and judgment directed for plaintiff.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Howard Taylor, of New York City, for appellant.

Merton E. Lewis, of Rochester, for respondent.

SCOTT, J. In my opinion the case was tried and submitted to the jury upon an entirely erroneous theory. That theory is illustrated by the following sentence from the charge of the court:

"This is what we ordinarily call a brokerage case—a case in which a broker sues for a commission. The law is that a broker is entitled to a commission for a transaction, provided the transaction be procured, as we call it, or concluded, as it may be, through his effort and during the time of his employment. That practically covers the real issue that you will have to determine. Was this transaction concluded through the efforts of Mr. Dukelow, and was it concluded during the time of his employment?"

[1] As I read the evidence, this is in no wise an ordinary brokerage contract, because, while it is conceded that Mr. Dukelow was employed by defendant to render certain services, he was not employed, nor was he ever authorized to negotiate a sale. His authority and duty was apparently limited to negotiating between the parties and bringing them into a position where they could negotiate between themselves. Defendant owned patent rights for a device believed to be useful in telephony. A very obviously desirable, but apparently a very indifferent, customer was the American Telephone & Telegraph Company. The defendant's officers naturally desired to be brought into touch with that company, and plaintiff's assignor, owing to his personal relations with the vice president of the American Company, appeared able to bring the parties within negotiating distance of each other. This he did, and it was after he had done this that the contract was made to pay him a commission. That contract is evidenced by a letter which is not disputed. By it plaintiff's assignor was to be paid a special commission "if a sale is made," not if he effected a sale, because he was never put by defendant in a position to negotiate a sale—that matter was reserved by defendant's officers for their own management. Dukelow had then done all that he had apparently been employed to do—certainly all that he was asked or authorized to do. He had brought the parties together, and paved the way for the sale that was afterwards made. From that point there remained only to agree upon terms and price, and this the defendant kept in its own hands. Dukelow undoubtedly took the chance that no sale would be made. If it had not been, he would have been entitled to no commission. It was made, however, the condition of his contract was fulfilled, and he became entitled, by the very terms of the contract to his agreed commission.

[2] That the sale in the end took the form of a license, which one of defendant's officers testified was "practically a sale" does not, as I think, affect plaintiff's right to recover.

In my opinion the plaintiff's motion for the direction of a verdict should have been granted. The judgment and order appealed from

should be reversed, and judgment directed in favor of the plaintiff, with costs in this court and in the court below.

LAUGHLIN and CLARKE, JJ., concur.

HOTCHKISS, J. (dissenting). Briefly, the facts are as follows: Defendant was the owner of patents for an automanual apparatus, an electrical device. It had a factory at Ashtabula, Ohio, and its patents and other assets seem to have been for some time in the market for sale to any one who might buy. In 1908 one Dukelow, plaintiff's assignor, took up the matter of a sale of certain property or rights of the company to the American Telephone & Telegraph Company, with whose executive officers Dukelow was in touch. On December 27, 1909, Dukelow first met North, president of the defendant company, and then seems to have agreed with North on the terms of his employment, which North was to report to his directors, expressing, however, his own satisfaction therewith. Dukelow continued, both by correspondence and personally, in communication with defendant concerning the details of a sale. He also seems to have continued conferences and negotiations with Vail, president of the American Telephone & Telegraph Company, looking to the same end. Some time in February, 1910, Dukelow had a conference with the directors or executive committee of defendant, when the terms of plaintiff's employment were agreed on, and he was asked to put his understanding of them in writing, in pursuance of which, on March 14, 1910, Dukelow wrote defendant as follows, this being the contract relied on:

"Boston, Mass., March 14, 1910.

"Mr. Charles North, President North Electric Co., Cleveland, Ohio—Dear Sir: Complying with the request of the directors of your company that I should send you a letter confirming my agreement with your company regarding negotiations which I have been and am now having with officials of the American Telephone & Telegraph Company regarding the sale of the automanual apparatus, patents or other assets or stock of your company, I beg to state that my agreement is that if a sale is made to the American Telephone & Telegraph Company or to any of their associated companies or to parties in the interest of the American Telephone & Telegraph Company of automanual apparatus, patents, assets or stock of your company, I am to receive from your company, if the sale is made on the basis of \$1,000,000 a commission of 10%. Should the sale be made for a less amount than \$1,000,000, my commission is to be 7½%. Should a sale be made at a price exceeding \$1,000,000, I am to receive from your company a commission of 10% up to \$1,000,000 and 15% on the amount in excess of \$1,000,000.

"Yours very truly, Charles T. Dukelow."

It is conceded that no sale of anything was at any time actually consummated by Dukelow, although he claims that for some time after the date of this letter, he kept Vail within the sphere of his influence. There was evidence tending to show that on April 15, 1910, North, defendant's president, told Dukelow that negotiations with the American Telephone & Telegraph Company were off, and that negotiations with other parties were pending and would no longer be held in abeyance awaiting a sale to that company. This is denied by Dukelow, and there is documentary evidence strongly corroborating him.

But the question is not of present importance. Thereafter North took up negotiations with one Stevens, as the result of which, it seems, that Stevens organized a concern known as the Telephone Improvement Company, which purchased substantially all of the capital stock of the defendant company, and thereby acquired control of defendant, its assets, patents, etc. In 1911 Stevens employed one Johnson to open negotiations with the Western Electric Company, and in January, 1912, an agreement was effected between that company and the Telephone Improvement Company, by which they exchanged licenses to use certain of each other's patents, and the Western Company paid to this defendant \$375,000 in cash. This transaction took place about one year and nine months after the date of plaintiff's contract, and many months after plaintiff's negotiations, conferences, or other attempts to forward a sale had ceased. The Western Company is concededly a subsidiary of the American Telephone & Telegraph Company.

The court left to the jury the following questions: (1) Was Dukelow the procuring cause of the sale? (2) Did the contract embrace and authorize plaintiff to sell what was sold? (3) Was the sale concluded during the term of his employment, or had his service been ended by discharge or abandonment? There was a general verdict in defendant's favor.

I think the appeal must fail. Whether the sale of the license was within the subjects covered by Dukelow's authority to sell was determined against him by the jury; therefore the only grounds on which the judgment can be disturbed are that, as matter of law, the sale of a license was within the purview of Dukelow's contract, and also, without regard for the fact whether or no he was the procuring cause, he was entitled to his commission in the event any sale was at any time effected to a subsidiary of the American Telephone & Telegraph Company. If either of these questions is determined against him, the appellant cannot succeed. As to the first: The subjects of sale described in the contract were "apparatus, patents or other assets or stock of your company." A license is not included within any of the above subjects, unless it be "assets." While the right of a patentee to issue licenses may be in a certain sense an asset, it is certainly not necessarily, as matter of law, within the meaning of the phrase "or other assets" as used in this contract, the language of which would seem to contemplate a sale of all the company's property rather than a part. By the words, "apparatus, patents or other assets," the company's physical property is described, but to cover the contingency that the sale might take the form of a transfer of the indicia of ownership rather than the physical properties, the phrase "or stock" was added. But for other reasons I think the contract cannot be said to unequivocally embrace a license. The word "patents," being the greater and comprehending the less, would by inference seem to exclude the latter. Such a construction is most reasonable. The holder of a patent which is for sale may, for many reasons, prefer not to sell licenses for its use. If he sells his patent, all responsibility for subsequent infringements falls upon the pur-

chaser, who must bear the expense of sustaining his rights; whereas one who licenses another to use must protect his licenses from infringements, and also defend his invention if its legality is assailed. To put it another way: If after the owner of a patent had employed an agent to sell the patent, the owner himself should negotiate a license for a limited use of the patent by one with whom the broker had been negotiating for a sale of the patent, would the owner, as matter of law, be liable for brokerage on the proceeds of the license? To my mind the question answers itself. As to the second question: Had appellant at the trial taken the position that the contract was vague and its true meaning was only to be ascertained by the aid of the circumstances attending it, the verdict for the respondent could not be questioned. But he did not do this. At the trial, as on this appeal, he contended that the contract needed no aid from extrinsic evidence, and yet the major part of his argument is an appeal to this evidence. As I have hereinbefore said, the sole question is: Was Dukelow as matter of law entitled to commissions in any event? The contract does not say so. The contract says, "if a sale is made." The natural interpretation of these words, at least in the absence of any expression to the contrary, I think, would be to read them in the light of the law bearing upon the relations between broker and principal; under such circumstances and in this situation, the necessity for the broker to be the procuring cause is undoubted. That appellant had no control over the price, and that his customer was limited to the American Telephone & Telegraph Company as well as the numerous other facts given in evidence, and from which appellant ingeniously argues that the contract carried an obligation to pay whenever and however a sale was made to this customer, at best are but circumstances, and their weight was for the jury, in interpreting the intent of the parties.

Briefly, the contract does not contain words of such impelling import as to permit us to construe it as an obligation binding defendant to pay in any event.

The judgment and order should be affirmed, with costs.

INGRAHAM, P. J., concurs.

(84 Misc. Rep. 356)

PEOPLE v. ANSTETH et al.

(Supreme Court, Special Term, Erie County. February 14, 1914.)

1. INDICTMENT AND INFORMATION (§ 144*)—DISMISSAL—SUFFICIENCY OF EVIDENCE.

Under Code Crim. Proc. § 258, providing that the grand jury ought to find an indictment when in their judgment all the evidence, if unexplained or uncontradicted, would warrant a conviction, and section 389, providing that the defendant shall be presumed to be innocent until the contrary is proved, unless the evidence before the grand jury is sufficient to satisfy it beyond a reasonable doubt that defendants, accused of knowingly re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ceiving stolen goods, received the goods knowing that they had been stolen, the indictment may be dismissed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 488; Dec. Dig. § 144.*]

2. INDICTMENT AND INFORMATION (§ 144*)—DISMISSAL—SUFFICIENCY OF EVIDENCE.

Under Code Crim. Proc. § 399, a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the crime; and, where the only evidence before the grand jury tending to show a defendant's knowledge that goods received by him were stolen was that of an accomplice, the indictment will be dismissed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 488; Dec. Dig. § 144.*]

3. INDICTMENT AND INFORMATION (§ 144*)—DISMISSAL—SUFFICIENCY OF EVIDENCE.

The evidence of an accomplice and the corroborative evidence held sufficient to support an indictment for criminally receiving stolen goods, so as to prevent a dismissal of the indictment for insufficiency of the evidence before the grand jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 488; Dec. Dig. § 144.*]

J. Roland Ansteth and John S. Germain were indicted for receiving stolen goods. Motion to dismiss indictment for insufficiency of the evidence before the grand jury. Motion denied as to defendant Ansteth and sustained as to defendant Germain.

C. B. Moulthrop, of Buffalo, for the motion.

George W. Woltz, Asst. Dist. Atty., of Buffalo, opposed.

POUND, J. [1] The evidence before the grand jury, unexplained and uncontradicted, must be sufficient to satisfy the grand jury beyond a reasonable doubt that defendants received the goods *knowing that they had been stolen*; otherwise the indictment may be dismissed. Code Crim. Pro. §§ 258, 389. Absolute knowledge need not be proved, and the knowledge may be inferred from the circumstances surrounding the recovery. *People v. Schooley*, 149 N. Y. 99, 43 N. E. 536.

[2] A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence *as tends to connect* the defendant with the commission of the crime. Code Crim. Pro. § 399.

[3] No direct evidence of guilty knowledge on the part of defendant Ansteth appears from the minutes of the grand jury. O'Shea, the thief or the thief's accomplice, who sold the diamond to Ansteth, and so was, as to him, an accomplice, merely testifies to circumstances from which guilty knowledge may be inferred: Ansteth's refusal to talk to O'Shea except through the alleged go-between Germain, the man with "an upper lip"; his purchase of the ring for less than its value without inquiry as to how O'Shea came by it; his statement that the diamond must be reset "because it was a long stone, and could be easily recognized." But this is enough to warrant a conviction if there is corroborative evidence, not necessarily showing the commission of the crime, or even connecting defendant with it, which *tends* to connect the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant with the commission of the crime, i. e., tends to show guilty knowledge on the part of Ansteth. *People v. Mayhew*, 150 N. Y. 346, 44 N. E. 971.

Such evidence in corroboration before the grand jury need not be very strong or satisfactory, if in the judgment of the grand jury it is sufficient to warrant an indictment. *People v. Josephs*, 143 App. Div. 534, 536, 128 N. Y. Supp. 257.

Testimony tending to connect the defendant Ansteth with the crime of receiving the goods knowing them to be stolen, and thus corroborating O'Shea, is given by George W. Pound, who says that Police Captain O'Brien said to Ansteth in his presence, "Didn't you know better than to buy a valuable diamond pendant from two little crooks off the street?" to which Ansteth said, "I thought it was suspicious, but I thought that I had a right to buy jewelry *from anybody* that brings it to me." Thus it appears that Ansteth admitted that he was buying a valuable diamond pendant under suspicious circumstances, and without inquiry, from two little crooks off the street, disreputable characters. If a man buys property from a known thief for a quarter of its value, he may be charged with guilty knowledge, not of the particular theft, but of the stolen character of the property, especially when he makes no inquiry as to how the thief obtained the property, because any man of ordinary caution would, under such circumstances, probably be satisfied that the property was stolen. Willful ignorance may be the equivalent of guilty knowledge.

Defendant Germain is not shown to have had possession of the property, nor to have aided in its disposition, except by the evidence of O'Shea. Nothing else "tends to connect" him with the crime. As to him the indictment is dismissed, but as to defendant Ansteth the motion is denied.

(160 App. Div. 752)

REIT v. MEYER.

(Supreme Court, Appellate Division, First Department. February 20, 1914.)

1. APPEAL AND ERROR (§ 889*)—RECORD.

Where it is not claimed that, so far as the opening statement of plaintiff's counsel in a prosecution for malicious prosecution was broader than the allegations of the complaint, in that the statement recited that the criminal trial had actually begun when the indictment was quashed, while the complaint did not so allege, evidence of that fact would not have been admissible, the complaint must be deemed to have been supplemented by the opening statement in determining on appeal the status of the case when the prosecution was terminated by quashing the indictment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3621, 3622; Dec. Dig. § 889.*]

2. MALICIOUS PROSECUTION (§ 35*)—TERMINATION OF PROSECUTION.

For more than eight months after an indictment for larceny was found against plaintiff he was ready and anxious for trial, but the district attorney's motion to discharge plaintiff's bail was granted over plaintiff's objection, and an indorsement thereof made on the indictment, and more than two weeks thereafter plaintiff moved the indictment for trial and announced ready for trial, whereupon the district attorney after investigating the facts stated that he would have to move to dismiss the indict-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment for want of evidence, and thereupon plaintiff's counsel moved that the indictment be quashed, which motion was granted. *Held*, that the prosecution terminated in favor of plaintiff within the rule requiring such a termination, in order to support an action for malicious prosecution, and without such termination having been procured by plaintiff, within the further rule that such an action will not lie where the termination of the prosecution was voluntarily procured as a matter of favor to defendant therein.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 71-77; Dec. Dig. § 35.*]

3. MALICIOUS PROSECUTION (§ 35*)—TERMINATION OF PROSECUTION—PROCURING TERMINATION BY DEFENDANT.

The rule that an action for malicious prosecution will not lie where the termination of the prosecution is procured by defendant therein only applies where the prosecution is terminated as a matter of favor as by defendant's request, and not as a matter of right, or where it is terminated by compromise with the district attorney, or through accused's fraud.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 71-77; Dec. Dig. § 35.*]

4. MALICIOUS PROSECUTION (§ 35*)—TERMINATION OF PROSECUTION—ABANDONMENT.

The abandonment of a prosecution is a sufficient determination thereof in plaintiff's favor to lay the foundation of an action for malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 71-77; Dec. Dig. § 35.*]

Appeal from Trial Term, New York County.

Action by Anton J. Reit against Joseph Meyer. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial granted.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

Joseph T. Oashman, of New York City (William J. Dawley, of New York City, on the brief), for appellant.

Jay C. Guggenheimer, of New York City (Adam K. Stricker, of New York City, on the brief), for respondent.

LAUGHLIN, J. This is an action for malicious prosecution. The defendant was a member of the firm of Joseph Meyer & Co., which was engaged in the business of importing silk yarn, and the plaintiff was in their employ.

The sole point presented by the appeal is whether the allegations of the complaint supplemented by the opening of counsel for plaintiff sufficiently show that prior to the commencement of this action the alleged malicious prosecution had terminated in favor of the plaintiff, within the rule requiring such termination as a condition precedent to the maintenance of the action for malicious prosecution.

The plaintiff alleges in substance that, at the instigation of the defendant, he was charged with grand larceny in stealing goods of defendant's firm in conjunction with one Schutzman, of the value of \$100, and a warrant was procured from a magistrate upon which he was arrested and arraigned and after a hearing held to answer pending

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the presentation of the charge to the grand jury, and that he was indicted and arraigned on the indictment before the Court of General Sessions on the 10th day of March, 1911, and pleaded not guilty. The plaintiff further alleges that he "was then, and ever since has been, ready and anxious to stand trial of said indictment; but the district attorney acting in and for the county of New York, after consulting defendant and in compliance with his request against the will and protest of plaintiff, did, on or about the 13th day of November, 1911, move the said Court of General Sessions of the County of New York that the bail in this case, which plaintiff had given for his appearance at the trial, be discharged, and the same was duly indorsed upon the said indictment against plaintiff"; and that thereafter he "was ready and anxious to stand the trial on said indictment, but, because of the failure of the district attorney of the county of New York to bring him to trial, he moved the Court of General Sessions on the 27th day of November, 1911, to dismiss the indictment against the plaintiff, and the same was dismissed on said day by Otto A. Rosalsky, judge of the Court of General Sessions of the County of New York, without opposition from the district attorney, and the dismissal of said indictment was allowed and entered on record in said court." It is then alleged that the indictment, complaint, and prosecution, and each of them, "is wholly ended and determined in favor of plaintiff in the manner set forth" in the complaint as herein quoted.

Counsel for the plaintiff, in his opening, stated as bearing on the termination of the prosecution that the plaintiff "was later indicted by the grand jury and held for trial. The case came to the point of trial, on the motion of the counsel for Reit, and, when it was answered ready for trial, the district attorney, after hearing the testimony of Schutzman, and part of Reit's testimony, stated that he would move to discharge the bail, and that he would move to dismiss the indictment, as there was no case upon which to hold Reit, the plaintiff. He then moved to discharge the bail, and on motion of the counsel for Reit, the then defendant, now the plaintiff, the indictment was quashed." Counsel for the defendant, in moving to dismiss on the opening and for judgment in favor of the defendant on the pleadings on the ground that the complaint fails to state a cause of action, said that his point was:

"That it appears on the face of the complaint, and is now likewise stated by counsel in his opening statement, that the criminal prosecution was terminated by the procurement of the person accused, who is the plaintiff in this case. Your honor will recall first the statement which my adversary made, that on motion of counsel for Reit the court quashed the indictment, superseded by that statement that the case was moved for trial by Reit's counsel, and after it had been moved for trial he then moved for a dismissal. Now we practically find the same thing in the complaint. I particularly call the court's attention to that part of the complaint. My understanding of the law is that there must not only be a termination of a criminal prosecution, but there must be a favorable termination."

One statement in the opening of counsel for the plaintiff herein on the trial of the indictment would seem to indicate that, after he moved the case for trial, the trial was actually entered upon and witnesses

were sworn and examined. The statement of counsel for the defendant in moving to dismiss does not indicate that it was so understood. It is quite probable therefore that the opening remarks of counsel on that point had reference to the testimony in the return of the committing magistrate and to the reading thereof. In the view I take of the case, I shall assume that the trial of the plaintiff under the indictment was not entered upon.

[1] It is not claimed, however, that in so far as the opening is broader than the allegations of the complaint the evidence would not have been admissible; and therefore on this appeal the complaint must be deemed supplemented by the opening of counsel for the plaintiff.

[2] It thus appears that the plaintiff charges that he had been ready and anxious for trial at all times after the indictment was found against him, for a period of more than eight months, when on the 13th day of November, 1911, the district attorney moved to discharge the bail which the plaintiff had been required to give for his appearance for trial, and the motion was granted against his objection, and an indorsement thereof was made on the indictment; that two weeks thereafter, the district attorney having failed so to do, the plaintiff moved the indictment for trial and announced that he was ready for trial; and that thereupon the district attorney, after inquiring into the facts, announced, in effect, that he would be obliged to move to dismiss the indictment, inasmuch as there was no case against plaintiff, and thereupon counsel for plaintiff moved that the indictment be quashed, and the motion was granted.

[3] It is well settled that, where the termination of the prosecution has been procured by the party against whom the prosecution was instituted, an action for malicious prosecution will not lie (*Halberstadt v. N. Y. Life Ins. Co.*, 125 App. Div. 830, 110 N. Y. Supp. 188, affirmed 194 N. Y. 1, 86 N. E. 801, 21 L. R. A. (N. S.) 293, 16 Ann. Cas. 1102; *Langford v. Boston & Albany R. R.*, 144 Mass. 431, 11 N. E. 697; *Atwood v. Beirne*, 73 Hun, 547, 26 N. Y. Supp. 149; *Gallagher v. Stoddard*, 47 Hun, 101. That rule, however, is on principle applicable only where the prosecution has been terminated as a matter of favor as by his request, and not as a matter of right, or where it has been terminated as the result of a compromise or other arrangement with the district attorney, or through fraud, collusion, or connivance on the part of the accused. In the case at bar, the plaintiff charges that, after the people at the instance of the defendant had indicted him and held the indictment over him for the period of more than eight months, then the district attorney after conferring with the defendant discharged the bail, but still continued to hold the indictment over him and would not move it for trial, and that he himself was obliged, in order to have the prosecution terminated, to move the court for the trial of the indictment, and when he did so and announced to the court that he was ready for trial the district attorney informed the court, in effect, that he did not have sufficient evidence to warrant him in further prosecuting the indictment and that he would be obliged to move for the dismissal thereof, and that thereupon, without waiting for a motion by the prosecuting attorney, counsel for the plaintiff himself

moved that the indictment be quashed, and the motion was granted. The plaintiff, having been indicted, was entitled to a speedy trial. He could not have a judicial determination of the facts favorable to him unless the people saw fit to present evidence against him. The most that he could do was to insist upon a trial or on the dismissal of the indictment. See section 668, Code of Criminal Procedure.

[4] It has been held that the abandonment of a prosecution is a sufficient determination thereof to lay the foundation of an action for malicious prosecution. *Fay v. O'Neill*, 36 N. Y. 11; *Strehlow v. Pettit and another*, 96 Wis. 22, 71 N. W. 102; *Waldron v. Sperry*, 53 W. Va. 116, 44 S. E. 283. If therefore counsel for the plaintiff had waited and permitted the district attorney to carry out his expressed intention of moving to dismiss the indictment, it is clear that there would have been an abandonment of the prosecution. It is contended, however, that since counsel for the plaintiff submitted his rights to the court and insisted that he was entitled to a trial or to have the prosecution terminated, not as a matter of discretion or favor, but as a matter of right, the plaintiff is debarred from maintaining an action for malicious prosecution. I am of opinion that, in the circumstances of this case, the prosecution had terminated favorably to the plaintiff, within the rule applicable to actions for malicious prosecution, and that an application to the court by a party indicted for a trial or the dismissal of the indictment as matter of right is not the procurement by him of the termination of the prosecution within the rule which precludes the maintenance of an action for malicious prosecution where the accused has procured the termination of the prosecution. See Judge Hiscock's opinion in *Halberstadt v. N. Y. Life Ins. Co.*, supra, 194 N. Y. at pages 10 and 11, 86 N. E. 801; also, *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703; *Swensgaard v. Davis*, 33 Minn. 368, 23 N. W. 543. It may be said that the defendant had no control over the prosecution of the indictment. That is equally true with respect to the trial of an indictment, and yet a verdict of acquittal, or the voluntary abandonment of the prosecution by the people, is, as has been seen, a termination of the prosecution favorable to the accused. If, notwithstanding the termination of the prosecution, the plaintiff was guilty of the crime, that is a defense to the action for malicious prosecution, and neither the termination of the prosecution by the acquittal of the accused, nor otherwise, is binding on the defendant. See *Schultz v. Greenwood Cemetery*, 190 N. Y. 276, 83 N. E. 41.

It follows therefore that the judgment should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

PEOPLE ex rel. FULTON ST. R. CO. v. STATE BOARD OF TAX COM'RS
et al. (eight cases).

(Supreme Court, Special Term, New York County. February 23, 1910.)

1. TAXATION (§ 376*)—FRANCHISE ASSESSMENTS—VALIDITY.

Where a street railroad was operated by a second company under an agreement requiring the second company to pay the interest on the bonds of the first, amounting to \$20,000 annually, this annual payment, being over and above all operating expenses, must be regarded as earnings, and may be taken as earnings for the purpose of establishing the taxable value of the franchise.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629-631; Dec. Dig. § 376.*]

2. TAXATION (§ 376*)—FRANCHISE TAX—ASSESSMENTS.

Where a street railway company ran its cars over tracks which did not belong to it, revenue received from such operation, after deducting the operating expenses, must be considered as part of the earnings on which to estimate the value of its franchise for purposes of taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629-631; Dec. Dig. § 376.*]

3. TAXATION (§ 376*)—SPECIAL ASSESSMENTS—FRANCHISE TAXES.

In assessing the special franchise of a street railway company, a fair and reasonable return must be deducted from the net earnings of the company, and the balance gives the earnings attributable to the enjoyment of the franchise, which is to be capitalized at a fair rate.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629-631; Dec. Dig. § 376.*]

4. TAXATION (§ 376*)—SPECIAL ASSESSMENTS—FRANCHISE TAXES.

In assessing the franchise tax of a street railway company under the net earnings rule, there must be a deduction on account of the depreciation of the company's physical property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629-631; Dec. Dig. § 376.*]

Certiorari by the People, on the relation of the Fulton Street Railroad Company, against the State Board of Tax Commissioners and others, to review special franchise assessments. Assessments sustained.

H. A. Robinson, of New York City, for plaintiff.

E. R. O'Malley, of Buffalo, for defendants.

O'GORMAN, J. [1] These are certiorari proceedings instituted to review the special franchise assessments against the Fulton Street Railroad Company for the years 1901 to 1908, inclusive, in the following amounts: 1901, \$101,240; 1902, \$133,500; 1903, \$133,000; 1904, \$125,000; 1905, \$125,000; 1906, \$125,000; 1907, \$147,000; 1908, \$129,000. It is conceded that the relator's road was operated by the Metropolitan Street Railway Company from February 19, 1896, to June 1, 1908, under an operating agreement by the terms of which the Metropolitan Street Railway Company paid the interest on the bonds of the relator, amounting to \$20,000 annually. This \$20,000 annual payment to the bondholders was over and above all

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

operating expenses, and must be regarded as the net profit and earnings of the relator by reason of its ownership of the franchise in question, capitalized at 6 per cent.; this gives as the value of the franchise the sum of \$333,333.33, more than sufficient to sustain each of the assessments without taking into consideration the tangible property in the street.

[2, 3] The track owned by the relator was only 51½ per cent. of the total tracks traversed by its cars, and 48½ per cent. of its line was operated over tracks owned by other companies. The claim made by the relator that its earnings should be correspondingly apportioned cannot be entertained. Whatever rents or charges were paid by the relator for the use of the tracks of other companies would constitute an item of its operating expenses. The relator was entitled to all its earnings above its expenses and rentals paid to other companies; such net earnings constitute profit to the relator, and were the result of the ownership and operation of its franchise. Deducting from these net earnings a fair and reasonable return on that portion of the capital invested in tangible property, the balance gives the earnings attributable to the enjoyment of the special franchise; and, if this balance be capitalized at a fair rate, the value of the special franchise is ascertained. *People ex rel. Jamaica Co. v. Tax Com'rs*, 196 N. Y. 56, 89 N. E. 581.

[4] The relator's claim that the earnings applicable to the tangible property should not be reduced on account of the property's physical depreciation is unsound. The net earnings are to be apportioned between the tangible and the intangible property. If profit may be derived from the use of the franchise with a depreciated plant, the resulting profit must be attributed to the franchise, after deducting a fair return on the existing value of the tangible property used in the enterprise. In my opinion a rate of 6 per cent. as the rate of return upon the present value of the tangible property and as the rate of capitalization, and a rate of 4 per cent. for the sinking fund for depreciation, is reasonable and proper, and should be applied. *People ex rel. Third Ave. R. R. v. Tax Com'rs*, 136 App. Div. 155, 120 N. Y. Supp. 528 (Third Department, November, 1909).

The objections to the assessments are not sustained, and the assessments must be confirmed, with costs to the defendant.

(100 App. Div. 619)

BALL v. GERARD et al.

(Supreme Court, Appellate Division, First Department. February 13, 1914.)

1. PLEADING (§ 345*)—MOTION FOR JUDGMENT—COMPLAINT GOOD IN PART.

Where, though they were not separately stated and numbered, a complaint contained three causes of action, and no motion was made to separately state and number them or demurrer interposed for misjoinder of causes, judgment for defendants could not be granted on the pleadings on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 146 N.Y.S.—6

the ground that the action was barred by limitations, if any of the causes of action accrued within the statutory period.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.*]

2. LIMITATION OF ACTIONS (§ 100*)—COMPUTATION OF PERIOD—DISCOVERY OF FRAUD.

Limitations ran against a cause of action for damages for deceit by which plaintiff was induced to purchase corporate stock from the consummation of the fraud and not from the discovery thereof.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

3. LIMITATION OF ACTIONS (§ 55*)—ACCRUAL OF CAUSE OF ACTION—ACTIONS FOR DAMAGES FOR FRAUD.

Where plaintiff was induced by defendant's deceit to subscribe on December 1, 1906, for stock in a corporation, which subscription was thereupon accepted, and to pay one-half the price on that date and the balance on March 1, 1907, limitations ran against a right of action for damages from December 1, 1906; the falsity of the representations existing then, if at all, and plaintiff being then deprived thereby of the value of his contract.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

4. FRAUD (§ 12*)—REPRESENTATIONS CONSTITUTING.

Actionable false representations must be of existing facts.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 14; Dec. Dig. § 12.*]

Appeal from Special Term, New York County.

Action by Thomas H. Ball against Julian M. Gerard and William T. Harkness and others. From an order denying their motion for judgment on the pleadings, the defendants named appeal. Reversed, and motion for judgment granted.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Bowers & Sands, of New York City (John M. Bowers, of New York City, of counsel, and Latham G. Reed, of New York City, on the brief), for appellants.

Baylis & Sanborn, of New York City (Frederick H. Sanborn, of New York City, of counsel), for respondent.

CLARKE, J. This is an action at law for damages for deceit, and not an action to rescind.

The complaint alleges that on or about the 19th day of November, 1906, defendants fraudulently caused to be prepared, published, and delivered, and generally distributed, a prospectus, a copy of which was attached to the complaint, and fraudulently caused to be delivered to the plaintiff a copy of said prospectus, for the purpose of inducing the investing public in general and all persons into whose hands such prospectus should come, including the plaintiff, in reliance upon the statements contained therein, to invest in the shares of stock of the Barnes King Development Company, and to persuade said public and this plaintiff that the shares of said company would prove a safe and highly remunerative investment. It then sets forth the representa-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tions which are claimed to be false and fraudulent. It alleges that the defendants, having delivered or caused to be delivered to plaintiff the aforesaid prospectus, requested plaintiff to become a subscriber to the stock of said company, and thereupon, and on or about the 1st day of December, 1906, plaintiff believing all the statements contained in the said prospectus, and in sole and implicit reliance thereon, and in entire ignorance of the nature and character of the mining property referred to, subscribed to 1,000 shares of the stock of said company, agreeing to pay therefor at the rate of \$5 per share, and the said defendants thereupon accepted such subscription to the extent of 700 shares. It further alleges that plaintiff paid for said stock \$1,750 on December 1, 1906, and the balance of \$1,750 on March 1, 1907. Plaintiff further alleges that, continuing to rely solely on the statements contained in said prospectus, and believing the same to be true, he was thereby induced to and did, on December 27, 1906, purchase 300 further shares of said stock in the open market, paying therefor \$1,756.25, and on January 7, 1907, 1,000 further shares in the open market, paying therefor \$5,625. He alleges that the value of the shares of stock of said company was not at any time and is not now in excess of ten cents per share, although the par or face value thereof was \$5, and, if the representations made by the defendants in said prospectus had been true, said stock would at all times have been worth in excess of \$10 per share; that by reason of the premises this plaintiff has been damaged in the sum of \$20,000, for which he demands judgment with interest from January 2, 1907.

The answer, *inter alia*, set up as a defense that the action was commenced by the service of a summons on January 16, 1913, and that the alleged cause or causes of action did not, nor did any of them, accrue within six years next before the commencement of the action.

Being required by an order to that effect plaintiff replied, admitting that the action was commenced on January 16, 1913, and alleging that the cause of action set forth in the complaint did not arise, and the statute of limitations did not commence to run against the same until the date of the last payment made by the plaintiff under his said subscription, to wit, on or about March 1, 1907.

Defendants thereafter moved for judgment upon the pleadings, which motion having been denied, from the order entered thereupon this appeal is taken.

While stated in one count, there are three separate transactions set up in the complaint: A subscription for 700 shares of stock at \$5 per share, which by its acceptance became a firm contract December 1, 1906, under which payment was made in accordance with the terms of the subscription of \$1,750 on December 1, 1906, and of the balance of \$1,750 on March 1, 1907. (2) The purchase in the open market of 300 shares for \$1,756.25 on December 27, 1906. And (3) the purchase in the open market of 1,000 shares for \$5,625 on January 7, 1907.

[1] As no motion was made to separately state and number the various causes of action, and as no demurrer was interposed upon the ground of improper joinder of causes of action, we must, upon this

motion for judgment upon the pleadings upon the ground of the completed running of the statute of limitations, determine if any one of the three transactions contained in the complaint, although not alleged therein to be separate causes of action, accrued within six years prior to the beginning of the same, for, if any one of them did, the order appealed from was correct and defendants were not entitled to judgment upon the pleadings.

It is clear that the two purchases in the open market, one on the 27th of December, 1906, and one on January 7, 1907, were complete transactions at said dates. If plaintiff had any cause of action thereon, said cause of action accrued on said dates, and the statute of limitations had run at the time of the commencement of this action on January 16, 1913. The debatable question is upon the subscription for the 700 shares made on the 1st day of December, 1906, upon which date \$1,750 was paid; the balance being paid on March 1, 1907. When did this cause of action accrue? Upon the making of the firm contract on December 1, 1906, or upon the payment of the balance due thereunder on March 1, 1907?

[2, 3] The learned Special Term held that the cause of action accrued when the subscription was completed by the payment of the last amount due thereunder and the delivery of the certificates, and therefore that the statute of limitations pleaded was not a defense. This we think was error. It is conceded that the six-year statute applies. It is also conceded that the date of the discovery of the falsity of the statements contained in the prospectus does not affect the determination of the date when the statute began to run. That is, the statute begins to run from the consummation of the fraud, and not from the discovery thereof. This proposition is settled.

[4] The action is at law to recover damages for deceit in having been induced by false and fraudulent representations to make the contract for the purchase of stock. The representations had all been made prior to the subscription. Their falsity, if they were false and fraudulent, existed at that time, because it is not only so alleged in the complaint, but actionable false representations must be of existing facts. Therefore, on the 1st of December, 1906, the plaintiff made his contract and executed it by part payment thereon induced by the false and fraudulent representations of the defendants. Thereupon his cause of action accrued.

In *Northrop v. Hill*, 61 Barb. 136, plaintiff alleged that he was induced to purchase certain premises by means of fraudulent representations on the part of the defendant, who held a mortgage thereon, that there was no other incumbrance, when, in fact, there was, to defendant's knowledge, another mortgage thereon. At Special Term, Marvin, J., said:

"The position of the plaintiff's counsel is that the statute of limitations did not commence running in this case until there had arisen a cause of action for real and substantial damages; that no facts existed until the foreclosure of the Fellows mortgage, justifying an action for anything more than nominal damages, and it could not be presumed, until the foreclosure of that mortgage, that any other damages would ever arise; in short, that when the damages actually occurred, then the statute of limitations commenced running. * * * *Leonard v. Pitney*, 5 Wend. 30, is in point. It is there de-

added that the action must be brought within six years after the fraudulent representations. The attempt was there made to evade the running of the statute upon the ground that the fraud was not discovered until within six years. This was overruled. * * * In that case it was expressly said that the cause of action arose when the deceit was practiced at the sale, and that, being more than six years before the suit was commenced, the plea interposes a complete bar to the action. See, also [Troup v. Smith's Ex'rs] 20 Johns. 33."

At the General Term, Johnson, J., said:

"The fraud complained of was practiced upon the plaintiff in March, 1854, and this action was not commenced until June, 1869, nearly 15 years afterwards. * * * There can be no doubt that this cause of action accrued to the plaintiff the moment the bargain was completed by the conveyance of the premises to him. It is of no consequence, whatever that he did not discover the fraud within the six years. Had the defendant even concealed it from him, it would not have prevented the statute from running. * * * The cause of action was the single act of fraudulent misrepresentation, and the right of action accrued when that representation was made. It was not a continuous act, like a continuing trespass, or a nuisance. It was the act of misrepresentation which constituted the cause of action, and not the resulting damages. *Whitehouse v. Fellowes*, 100 E. C. L. 765."

In affirming the Court of Appeals said in (*Northrop v. Hill*) 57 N. Y. 351, 15 Am. Rep. 501:

"I think that it is clear that, when a party to a contract is guilty of fraud, he commits a wrong for which he is liable to the defrauded party, to pay, at least, nominal damages. The act of entering into contract relations implies that the parties are to deal in good faith with each other. On no other basis can the minds of the parties be expected to meet. If one of them, professing in this way to act in good faith, in fact, commits a fraud, he breaks the implied obligation he is under, and should be made to respond in damages. * * * It is familiar law that a party may have an action for breach of duty, though he sustains no positive damage and there is no intention to do wrong. * * * This principle was applied to a case of fraud in *Allaire v. Whitney*, 1 Hill, 484. The court said: 'But, take it that a man fraudulently draws another into a contract to accept and pay for a chattel a month after; the vendee discovering the fraud on the next day, is it to be tolerated that he shall not have an action immediately? If he pay anything, even no more than a cent, in earnest, there would be no doubt. But actual damage is not necessary to an action. A violation of right, with a possibility of damage, forms the ground of the action. * * * The plaintiff, accordingly, had a complete cause of action on the 24th day of March, 1854, when the purchase was completed. Any damage that subsequently followed was merely developed from the original wrong then committed, and was not a new cause of action.'"

The respondent seizes hold of the phrase "when the purchase was completed," and so cites this case as an authority in his favor. But this being a transaction involving real estate was required to be in writing, and so the bargain or contract was completed by the written conveyance.

In the case at bar the sale was completed when the contract was made. Reciprocal rights then became fixed. It made no difference that a subsequent part payment was to be made or that certificates were to be delivered. The contract had been made. Either party would have been entitled to sue upon a breach by the other. It was the value of this contract which the plaintiff was entitled to. It was this contract which had been made upon reliance upon the false and

fraudulent representations alleged, and it was the damage, caused to the plaintiff by the subject-matter of this contract not being as represented, for which he sues.

In *Miller v. Wood*, 116 N. Y. 351, 22 N. E. 553, the court said:

"The defendants, by false and fraudulent representations, induced the plaintiff to purchase a mortgage which was without actual value. The sale was consummated on the 12th day of April, 1878. On the 23d day of September, 1885, a little over seven years after the purchase, the plaintiff commenced this action by means of which she sought to recover the amount of damages sustained by reason of the fraud practiced upon her by these defendants. The trial court rightly determined plaintiff's claim to have been barred by the statute of limitations prior to the commencement of this action. The cause of action accrued to plaintiff when the sale and transfer were completed, to wit, April 12, 1878."

Here again is a real estate transaction and required to be evidenced by a written instrument, and of course for purposes of litigation the execution and delivery of that instrument fixes the time.

In *Isman v. Loring*, 130 App. Div. 845, 115 N. Y. Supp. 933, the complaint alleged prior negotiations between the parties for the sale of real estate resulting in the execution and delivery of a contract in writing on January 26, 1906, which contract was induced by false representations made by the defendants. The action was to recover damages. Mr. Justice Ingraham said:

"It is clearly settled in this state that, when there has been fraud in procuring a contract, the injured party has at once upon the execution of the contract an action for the fraud, and that that action is barred by the statute of limitations six years after the actual execution of the contract. * * *"

The statute of limitations had run at the time of the commencement of this action, and being pleaded is a complete bar. The order appealed from should be reversed, with \$10 costs and disbursements, and the motion of the defendants for judgment on the pleadings granted, with \$10 costs. All concur.

(160 App. Div. 625)

REUSENS v. GERARD et al.

(Supreme Court, Appellate Division, First Department. February 13, 1914.)

1. LIMITATION OF ACTIONS (§ 55*)—ACCRUAL—DECEIT.

An action commenced on January 16, 1913, for damages for deceit, in that, in reliance upon defendant's prospectus, plaintiff on November 30, 1906, subscribed to shares of the capital stock of a development company, the last payment on which was made on May 9, 1907, was barred by the statute of limitations; but an action based on the purchase of such stock on October 1, 1907, in open market in reliance on such prospectus was not barred; the right of action having accrued at the date of the purchase and not when payment was made.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299–306; Dec. Dig. § 55.*]

2. PLEADING (§ 343*)—MOTION FOR JUDGMENT ON PLEADINGS—DENIAL.

Where the petition set out two causes of action not separately stated or numbered, and there was no demurrer on the ground of improper joinder of actions, and where one of such causes of actions was not within the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

statute of limitations, a motion for judgment on the pleadings was properly denied.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048-1051; Dec. Dig. § 343.*]

3. FRAUD (§ 41*)—PERSONS LIABLE—CONSPIRACY TO SELL STOCK—FALSE PROSPECTUS.

A complaint, alleging that the defendant fraudulently conspired to acquire certain property and mining claims and by means of a corporation, then or about to be formed, to dispose of such property or claims and stock in such corporation, at prices greatly in excess of its real value by means of a fraudulent prospectus and false and fraudulent statements, representations, etc., and the execution of such means, etc., by fraudulently publishing a prospectus and distributing it to the investing public and to plaintiff, representing the stock as a safe and profitable investment, in reliance on which plaintiff in open market purchased such stock, stated a good cause of action for damages for deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.*]

Appeal from Special Term, New York County.

Action by Guillaume Reusens against Julian M. Gerard and William T. Harkness and others. From an order denying a motion for judgment on the pleadings, defendants appeal. Affirmed.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Bowers & Sands, of New York City (John M. Bowers, of New York City, of counsel, and Latham G. Reed, of New York City, on the brief), for appellants.

Baylis & Sanborn, of New York City (Frederick H. Sanborn, of New York City, of counsel), for respondent.

CLARKE, J. This is an action at law for damages for deceit similar to *Ball v. Gerard*, 146 N. Y. Supp. 81, argued at the same time and decided herewith.

[1] The facts differ, in this: That the plaintiff alleges that on November 30, 1906, on sole and implicit reliance upon the statements contained in said prospectus, he subscribed to 5,000 shares of the capital stock of the Barnes King Development Company, agreeing to pay therefor at the rate of \$4 per share, and paid therefor \$20,000 as follows: \$5,000 on the 21st day of December, 1906; \$5,000 on February 6, 1907; and \$10,000 on March 11, 1907; and \$248.50 on May 9, 1907. That continuing to rely solely upon the statements contained in said prospectus, and believing the same to be true, he was thereby induced to and did on or about October 1, 1907, purchase 2,500 further shares of said stock in the open market, paying therefor the sum of \$2,781.25; and thereafter on or about July 8, 1909, temporary certificates therefor were issued to this plaintiff, who is now the owner and holder thereof.

Two separate transactions are here set up in one count. For the reasons stated in the opinion in the *Ball Case* we think that the statute of limitations has run against the cause of action based upon the subscription, the action having been commenced on the 16th of January,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1913, but so far as the cause of action based upon the purchase in the open market on October 1, 1907, it is equally clear that the statute has not run.

[2] Therefore, as the causes of action are not separately stated and numbered, and as no demurrer has been interposed upon the ground of improper joinder of actions, and as there is a cause of action not within the statute, the order denying a motion for judgment on the pleadings was correct and should be affirmed if the cause of action as alleged for the purchase in the open market is good.

[3] As to that the complaint alleges that the defendant and other persons entered into a wrongful and fraudulent conspiracy to acquire control of certain property and mining claims and acting through or by means of a corporation then formed or about to be formed to dispose of said property or claims and the stock of such corporation to the investing public, including this plaintiff, at prices greatly in excess of its real or intrinsic value, and by means of false and fraudulent prospectus, statements, representations, and other false and fraudulent means and devices. And in pursuance of said conspiracy the defendants thereafter committed and performed the following acts set forth in articles hereof numbered "third," "fourth," "fifth," "sixth," and "seventh."

The complaint alleges that the defendants fraudulently caused to be prepared, published, delivered, and generally distributed a prospectus, of which a copy was annexed, and fraudulently caused to be delivered to plaintiff a copy of said prospectus for the purpose of inducing the investing public in general, and all persons into whose hands such prospectus should come, including the plaintiff, in reliance upon the statements contained therein, to invest in the shares of stock of the said the Barnes King Development Company in the manner herein-after described, and to persuade said public and this plaintiff that the shares of said company would prove a safe and highly remunerative investment, and therein and thereby fraudulently stated and represented among other things and matters as follows: (Setting forth the alleged fraudulent statement of facts.) Then follows the allegation of the subscription to the stock and sole and implicit reliance on the representations set forth and the purchase in the market continuing to rely solely upon said statements, and allegations of falsity, scienter, and damage.

The claim is made that no cause of action is made out for the purchase in the open market. I am of the opinion that a cause of action is sufficiently alleged. In *Ottinger v. Bennett*, 144 App. Div. 525, 129 N. Y. Supp. 819, reversed in 203 N. Y. 554, 96 N. E. 1123, on the dissenting opinion of Mr. Justice Miller, the action was brought by a purchaser of stock for damages upon the ground of false representations; the representations being the declaration of dividends which the complaint alleged to have been paid out of capital and not out of profits with intent to deceive the public and induce the public to purchase shares. Mr. Justice Miller said:

"The action is for fraud and deceit in inducing the plaintiffs to purchase shares of the capital stock of the American Ice Company. * * * It is

familiar law that a fraudulent representation may be effected by conduct, by acts as well as by words, by silence when there is a duty to speak, by half-truths calculated to mislead, or by reckless statements made without knowledge. (Citing cases.) It is equally well settled that the representation need not be made directly to the party injured by it (*Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376), and that one who is induced to enter into a contract by the false representations of a third party may have a right of action against the latter for the wrong (*Kujek v. Goldman*, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 Am. St. Rep. 670). * * * Tested by the application of those principles, the complaint in the case at bar alleges all the essentials of an action for fraud and deceit, i. e., a representation by acts for the public, and therefore for the plaintiffs, to act upon, falsity, scienter, deception, and injury. A declaration of a dividend by a going concern implies earnings from which to pay it, and the publication of the fact of such declaration is certainly calculated to induce the public to believe that the dividend has been earned and that the corporation is prosperous. If, intending the public to act thereon, the defendants had made and published a report expressly stating that the dividend declared had been earned, there would be no doubt of their liability to a person thereby deceived to his injury. The familiar cases of false prospectuses need not be cited."

If the declaration and payment of a false dividend upon the faith of which the purchaser bought stock in the open market was sufficient to support an action for deceit against the directors who knowingly declared the false dividend, it clearly follows that the allegations in the complaint at bar are sufficient to support the action upon the purchase in the open market alleged to have been on reliance upon the false and fraudulent representations of the prospectus delivered to the plaintiff and issued to him and to the general public for the purpose of inducing the investing public in general and all persons into whose hands such prospectus should come, including the plaintiff, in reliance upon the statements contained therein, to invest in the shares of stock of the said company and to persuade said public and this plaintiff that the shares of said company would prove a safe and highly remunerative investment. Therefore, as the plea of the statute does not reach the entire cause or causes of action set up in the complaint, the order appealed from denying defendant's motion for judgment on the pleadings was right and should be affirmed, with \$10 costs and disbursements to the respondent. All concur.

(160 App. Div. 525)

GANDY v. COLLINS, Sheriff.

(Supreme Court, Appellate Division, Second Department. January 16, 1914.)

1. REPLEVIN (§ 8*)—TITLE OF PLAINTIFF.

One has only an equitable right or lien against cars, which can be reduced to possession only by suit in equity, and so cannot maintain replevin for them; the owners having merely assigned to him as collateral security their right, title, and interest therein, and not turned over the possession.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 45-68; Dec. Dig. § 8.*]

2. REPLEVIN (§ 25*)—LAW GOVERNING.

Proceedings in rem to gain possession of or sell cars, which remained in New York, in the possession of the owners, notwithstanding they as-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

signed their right, title, and interest therein as security for their note, a contract of another state, must be governed by the *lex rei sitæ*.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 125-127; Dec. Dig. § 25.*]

3. TROVER AND CONVERSION (§ 64*)—CONSIDERING EQUITIES.

Any equities of the parties cannot be inquired into in an action at law for conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 284; Dec. Dig. § 64.*]

Appeal from Trial Term, Richmond County.

Action by George S. Gandy against John J. Collins, Sheriff of Richmond County. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the opinion of Kelly, J., at Trial Term:

[1] In this action I find for the plaintiff. It appears that at the time the 15 cars, title to which is in dispute, were taken in replevin by the defendant in the action of the Franklin Trust Company of Philadelphia against Brubaker, the trust company had no legal title to the cars, and had never been in possession of them. The cars were in the possession of G. S. W. Brubaker & Co., a New York corporation, which had the legal title and possession from the date of purchase from the city of New York. The relation between the trust company and Brubaker & Co. was that of lender and borrower. The trust company made a loan or loans to the latter company to enable it to purchase and carry the cars. The loan was secured by the promissory notes of Brubaker Company, renewed from time to time, with credits and additions, on the books of the trust company in Philadelphia, where the Brubaker Company kept its account. There is no question that Brubaker Company bought the cars from the city of New York at public sale in that city. As collateral security for the loan the Brubaker Company delivered to the trust company assignment of its right, title, and interest in the cars, but possession of the cars was never turned over to the trust company, nor did the cars ever leave the state of New York. They were stored on tracks in the yard of Milliken Bros., at Millikens, Mariners Harbor, Richmond county, N. Y. They were stored in the name of the Brubaker Company. They continued in that name to the date of the replevin. The trust company never possessed itself of the cars, or asserted a right to possession. If it be said that Brubaker promised to store them in the name of the trust company, it is clearly shown that they were not so stored, and the Franklin Trust Company knew it. The storage charges were paid by the Brubaker Company, repairs, etc., were made on the cars by the Brubaker Company, and the Brubaker Company maintained a watchman all in their own name. The trust company knew, or should have known, these facts, because statements of the items of these expenses were furnished to them by Brubaker.

At most, the trust company had an equitable right or lien against the cars, which was not reduced to possession, and could only be reduced to possession by suit in equity. *National Bank of Deposit v. Rogers*, 1 App. Div. 623, 37 N. Y. Supp. 365; *Wheeler v. Allen*, 51 N. Y. 42. The trust company had no right to sell the cars in the manner attempted in Philadelphia, because it had no common-law lien which involved possession of the cars, and it obtained no legal title by such attempted sale. *Duncombe v. R. R. Co.*, 84 N. Y. 190.

[2] While the transaction between the parties was carried on principally in Philadelphia, where the notes are dated and were made payable, and while I think the law of Pennsylvania may be binding on the parties so far as the nature of the agreement and its validity are concerned, I reach the conclusion that in dealing with the cars, to obtain possession or to sell them, the laws of the state of New York governed the situation. The attempted sale of the cars in Philadelphia was not in accordance with the laws

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the state of New York, as to sufficiency of the notice or the length or character of the advertisements. Lien Law, secs. 200, 201, 202. And indeed I cannot find that it was a lawful sale under the laws of Pennsylvania, if reasonable notice, or in fact any notice, was required. The sale in this case was advertised on the evening of the day preceding the transaction in one newspaper in Philadelphia. No details were given, the location of the cars was misstated, and no attempt was made by the vendor to protect the rights of the Brubaker Company, or to invite competition in bidding. The result shows that it was a pretended sale. Apparently no one knew of it. Brubaker attended and protested, but the sole object of the so-called sale appears to have been to go through the form of turning over title to the trust company. It was not a fair or reasonable sale under any law.

But this property never went out of the state of New York. The Brubaker Company, a New York corporation, purchased the cars in New York, and with the knowledge of participation of the trust company a payment for the cars was made in New York state. The cars remained in the state of New York; one reason, if not the principal one, being that to remove them to another state would require expensive alterations to comply with the requirements of the Interstate Commerce Commission, all of which was pointed out to the president of the trust company by Mr. Brubaker by his letters in evidence.

It is the trend of modern opinion that in such a case, so far as the enforcement of any proceeding in rem is concerned, it must be governed by the *lex rei sitæ*. And this from the necessities of the case, to maintain values and to avoid conflict of jurisdiction. The state of New York has enacted positive definite laws governing the sale of personal property within its territory, and these laws govern sales of property which has what has been described as an "implied locality." Public policy demands that foreign principles shall not be infused into the management of property definitely located here, and unless the *lex rei sitæ* be applied, there is no available decisive law. There is, of course, personal property which by its nature is governed by the law of its owner's domicile, property which he may carry about with him, or which has no definite situs. Or it may be property involved in domestic relations, or other special situations. But these cars had a definite fixed location in this state, they had never been removed from it, and, if removed or possession changed, I think the laws of this state were applicable and binding. Wharton, Conflict of Laws, vol. 1, § 308; Story, Conflict of Laws, § 383 et seq., and cases cited. If the trust company desired to enforce its equitable rights or to sell this property, I think it was bound to comply with the laws of New York. Whatever law governed its contract with Brubaker & Co., so far as possession of these cars was concerned, the trust company, as well as Brubaker, placed them and consented that they should remain in the state of New York, and I think they submitted themselves to its jurisdiction in this regard. Therefore I hold that the attempted sale in Philadelphia was null and void and ineffectual to transfer title.

[3] It follows that the taking and withholding of possession by the defendant sheriff was unlawful, and constitutes a conversion for which he, or those for whom he was acting, must respond in damages. It is no answer to argue that Brubaker owes the trust company money, or that he is insolvent, or that the business methods do not accord with the ideas of propriety which govern the bank. While I hold that no partnership existed between the trust company and the Brubaker corporation, the bank sought to obtain a share of the profits expected when Brubaker should sell the cars, one-third to the bank, two-thirds to Brubaker, and Brubaker, for some consideration not very clearly expressed, had agreed to share his two-thirds with some company in which the president of the trust company was interested. But when sales were slow and the profits did not immediately materialize, the sharing agreements were all canceled. The debt to the trust company remained unpaid, and in its desire to recoup itself, it make the mistake of taking the law into its own hands, reaching out to take forcible possession of property, which up to that time, for reasons satisfactory to its officials, it had allowed to remain in Brubaker's possession.

This is an action at law for conversion. The court in this case has no right to inquire into the equities between the trust company and Brubaker, or Brubaker's assignee, the plaintiff here, who took with full notice of the facts. The trust company has deliberately avoided a court of equity.

There is a radical difference of opinion as to the value of the cars. The plaintiff says they are worth over \$2,000 each. The trust company insists that they are only available as scrap. They were purchased at a public sale in New York for \$400 each. To make them salable required expenditures for painting, alterations, etc., and even then in three or four years only five cars were sold. While some of them brought figures which seem to support plaintiff's ideas of value to some extent, it would be an unfair standard to apply. I doubt whether there was any demand for them in one lot. The best that could be done was to peddle them out singly or in small lots. After considering all the evidence, I award the plaintiff \$900 a car for the lot, or \$13,500 in all besides the costs of this action.

I may add that after examining the authorities, I adhere to the ruling on the trial, admitting the evidence of the dealings between Brubaker and the trust company, and the statements made by him. I think all these transactions and declarations were part of the *res gestæ*, and that they were binding on the plaintiff. The plaintiff may have appropriate exception to this ruling wherever necessary.

Argued before JENKS, P. J., and THOMAS, CARR, RICH, and PUTNAM, JJ.

Alfred V. Norton, of New York City, for appellant.

Reeves & Todd, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs, on the opinion of Mr. Justice Kelly at Trial Term.

ALEX. CAMPBELL MILK CO. v. UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court, Appellate Division, Second Department. February 20, 1914.)

INSURANCE (§ 508½ New, vol. 4 Key-No. Series)—INDEMNITY—CONSTRUCTION.

In 1904 defendant executed a bond running for a term of one year, obligating itself to reimburse plaintiff for all losses sustained through the defalcations of an employé to the amount of \$2,500. Thereafter, on the payment of the required premium, three continuation certificates were issued, extending the policy down to the year 1908. The continuations provided that they should be subject to the provisions of the original bond, which declared that defendant should not be liable upon any previous bond; it being mutually understood that but one bond should be in effect at one time. The bond also provided that defendant should in no way be responsible to the employer to a greater extent than \$2,500. *Held*, that the bond and the renewal certificates constituted distinct liabilities rendering the guarantor liable for defaults made during the respective periods covered by the bond of the renewals, up to the amount of \$2,500 per annum.

Appeal from Trial Term, Kings County.

Action by the Alex. Campbell Milk Company against the United States Fidelity & Guaranty Company. From a judgment for plaintiff, and an order denying its motion for new trial, defendant appeals. Affirmed.

The opinion of Mr. Justice Stapleton, at Trial Term, referred to, is as follows:

This is a motion to set aside a verdict and for a new trial.

I am satisfied that the only question raised requiring any discussion other than occurred upon the trial relates to a construction of the provisions of the bond claimed by the defendant in exoneration of its liability.

The defendant, in consideration of \$12.50, executed a bond on December 8, 1904, obligating itself to reimburse and make good to the plaintiff an employer all and any pecuniary loss sustained by it through the defalcation of an employé, amounting to larceny, for the period from December 8, 1904, to December 8, 1905, limiting its liability thereunder to \$2,500. On November 1, 1905, for an additional premium of the same amount, it issued a continuation certificate reading as follows:

"Continuation Certificate No. 5—17010.

"Fidelity Department.

"Amount, \$2,500.00
"Premium, 12.50

"The United States Fidelity and Guaranty Company.

"Home Office, Baltimore, Md.

"In consideration of the sum of twelve & 50/100 dollars, the United States Fidelity & Guaranty Company hereby continues in force bond No. 1204-4 in the sum of twenty-five hundred dollars, on behalf of Clarence Wilson in favor of Alex. Campbell Milk Co. for the period beginning the 8th day of December, 1905, and ending on the 8th day of December, 1906, subject to all the covenants and conditions of said original bond heretofore issued, on the 8th day of December, 1904.

"Witness the signatures of the president and ass't secretary this 1st day of November, 1905.

John R. Bland, President.

"W. W. Symington, Ass't Secretary."

On November 1, 1906, it issued a similar certificate for the period beginning December 8, 1906, and ending December 8, 1907. On November 1, 1907, it issued a similar certificate for the period beginning December 8, 1907, and ending December 8, 1908.

On September 25, 1908, it was discovered by the plaintiff that its employé whose fidelity was assured by the defendant was a defaulter. An expert examination of his accounts revealed and the verdict here establishes that plaintiff's loss was and occurred during the periods as follows:

Plaintiff's loss under original bond was.....	\$1,480 00
Interest thereon to time of filing claim was.....	253 00
Plaintiff's loss under first renewal was (There was no interest on this loss for it exceeds \$2,500).....	3,590 00
Plaintiff's loss under second renewal was.....	458 00
Interest thereon to time of filing claim was.....	23 59
Plaintiff's loss under (third) (the last) renewal.....	2,161 28
Interest thereon to time of filing claim.....	7 92

Making a total of.....\$7,973 79

As, however, the loss under the first renewal was more than the liability, there must in any event be deducted from the above total the difference, viz.:..... 1,090 00

The result is.....\$6,883 79

The bond contained this provision:

"The company, upon the execution of this bond, shall not thereafter be responsible to the employer, under any bond previously issued to the employer on behalf of said employé, and upon the issuance of any bond subsequent hereto upon said employé in favor of said employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the

intention of this provision that but one (the last) bond shall be in force at one time, unless otherwise stipulated between the employer and the company."

The defendant's contention that plaintiff may not recover in excess of \$2,500 under the bond and the three continuation certificates because of this provision has been overruled by the courts of this state. *Hawley v. United States Fidelity Co.*, 100 App. Div. 12, 90 N. Y. Supp. 893, affirmed 184 N. Y. 549, 76 N. E. 1096.

The bond also contained the following provision:

"The company shall not in any wise be responsible to the employer, under this bond, to a greater extent than twenty-five hundred dollars."

Each of the continuation certificates contain the following provision:

"In consideration of the sum of _____ dollars the United States Fidelity and Guaranty Company hereby continues in force bond No. _____ in the sum of _____ dollars, on behalf of _____ in favor of _____ for the period beginning the _____ day of _____ 190—, and ending on the _____ day of _____ 190—, subject to all the covenants and conditions of said original bond heretofore issued."

Defendant insists that the association of these clauses by reference limits the liability in any event to \$2,500. I cannot so read the instruments. In my judgment the bond and the renewals establish distinct liabilities. The obligation of the bond is to make good the loss occurring during its term; the obligation of each renewal is to make good the loss occurring during its term. Each stands upon its separate consideration, and provides for its designated period of time. *United States Fidelity & Guaranty Co. v. Williams*, 96 Miss. 10, 49 South. 742, and cases cited.

By neither bond nor renewals in express terms or necessary implication is cumulative liability under all inhibited, or aggregate liability under all definitely fixed. Thus the cases construing bonds and renewals effectively containing such provisions have no application.

The plaintiff is entitled to recover upon his theory as submitted to and found by the jury as hereinbefore indicated.

It should have interest from January 1, 1909 (that date being three months after the claim was filed), the date when the obligation of the defendant to pay was perfected under the terms of the bond. This motion is denied. Plaintiff's motion for an extra allowance is denied.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

John Patrick Walsh, of New York City (Jerry A. Wernberg, of Brooklyn, and Robert Gray, of New York City, on the brief), for appellant.

James C. Cropsey, of Brooklyn (Charles C. Clark, of Brooklyn, on the brief), for respondent.

PER CURIAM. Judgment and order affirmed, with costs, upon the opinion of Mr. Justice Stapleton at Trial Term.

(166 App. Div. 673)

MOORE v. VULCANITE PORTLAND CEMENT CO. et al.

(Supreme Court, Appellate Division, First Department. February 20, 1914.)

1. COSTS (§ 97*)—PERSONS LIABLE—STATUTE—TRANSFeree OR PERSON BENEFICIALLY INTERESTED.

Under Code Civ. Proc. § 3247, providing that when an action is brought in another's name by a transferee or person beneficially interested, he shall be liable for the costs as though he were the plaintiff, persons having an interest in the action, who refused to join as plaintiffs, and being made defendants merely asked for their share of any recovery, could not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be held liable, since the action was brought by the plaintiff, and they had nothing to do with starting it.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 381, 382; Dec. Dig. § 97.*]

2. COSTS (§ 99*)—PERSONS LIABLE—STATUTE—PERSONS NOT PARTIES—TRANSFERS.

Under Code Civ. Proc. § 3247, providing that where, after the commencement of an action, the cause of action becomes the property of a person "not a party to the action," such person shall be liable for the costs the same as the plaintiff, persons made defendants, for whose benefit a portion of the judgment against the other defendant was assigned in trust to be paid when collected, could not be held liable for the costs upon reversal of the judgment, since they were not only parties to the action, but were not the owners of the judgment.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 388-391; Dec. Dig. § 99.*]

3. COSTS (§ 3*)—TAXATION—AUTHORITY—NECESSITY OF STATUTE.

Costs can only be taxed when awarded in pursuance of some statute, and there is no flexibility in the rule relating to costs in law actions, for nothing is left to the court's discretion.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5; Dec. Dig. § 3.*]

Appeal from Special Term, New York County.

Action by Albert S. Moore against the Vulcanite Portland Cement Company, Louis Hedden, and another. From an order directing the defendant Hedden and the third defendant to pay two judgments for costs recovered in this action against the plaintiff by the defendant Vulcanite Portland Cement Company, the defendant Hedden appeals. Reversed.

See, also, 134 App. Div. 964, 119 N. Y. Supp. 1135.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Eidlitz & Hulse, of New York City (Harry N. French, of New York City, of counsel), for appellant.

Wm. Forse Scott, of New York City (Francis J. McLoughlin, of New York City, on the brief), for respondent.

CLARKE, J. Plaintiff Moore brought an action against the Vulcanite Portland Cement Company, alleging that before May 1, 1902, Moore, Hedden, and Dunn entered into a copartnership agreement for the purpose of buying and selling cement, agreeing to share equally each one-third of the profits and losses of the business; that Dunn duly transferred all of his interest to the Northampton Portland Cement Company; that Hedden and the Northampton Portland Cement Company have been requested to join with the plaintiff as parties plaintiff, and have neglected and refused to do so, and are accordingly made parties defendant; that May 1, 1902, Moore, Hedden, and Dunn, through their agent, V. J. Hedden & Sons, entered into an agreement with the defendants, whereby it was agreed that the defendant Vulcanite Portland Cement Company should sell and deliver to the said agents of plaintiff Moore and defendants Hedden and Dunn, as—

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

signor of the Northampton Portland Cement Company, on demand, 25,000 barrels of high-grade vulcanite cement, and plaintiff and said defendants should accept through their said agent the same, and pay therefor \$1.02 per barrel f. o. b. the cars at Vulcanite, N. J., that is, at the factory of defendant, with the freight charges paid in advance upon all shipments, and on terms of credit of 30 days after delivery; that between May 2, 1902, and October 11, 1902, defendant Vulcanite Portland Cement Company duly delivered, under and according to the terms of said agreement, 3,600 barrels of vulcanite cement, and plaintiff and defendants duly paid therefor \$4,392; that during August, September, and October, 1902, plaintiff and said defendants were ready, and willing and duly offered to defendant the Vulcanite Company, to receive and pay for said cement pursuant to said agreement, and requested said company to deliver same and have otherwise duly performed; that the Vulcanite Company has neglected and refused to deliver, except 3,600 barrels, to the damage of plaintiff in the sum of \$14,992, for which plaintiff demands judgment. The defendants Hedden and the Northampton Portland Cement Company answered by a joint answer through one attorney. They admitted that Hedden and Dunn co-operated with plaintiff in buying and selling for their joint account, and on terms they agreed upon the cement mentioned in the complaint, and they demanded judgment awarding to them two-thirds of the amount of any recovery which might be had by the plaintiff and for their costs and disbursements. These two defendants were represented upon the several trials and appeals. Their counsel's name is on the brief to the Court of Appeals. They procured plaintiff's undertaking on appeal, and furnished the surety on that undertaking for the money to pay costs on that appeal.

On the second trial judgment was docketed in favor of the plaintiff January 28, 1907, for \$13,633.81 against the Vulcanite Portland Cement Company. On January 31, 1907, one-third interest in said judgment was assigned by plaintiff to one of their attorneys as trustee for Hedden and one-third as trustee for the Northampton Portland Cement Company, in trust to collect the same and pay two-thirds of the costs, disbursements, and attorney's fees to plaintiff or his attorney and the balance to Hedden and the Northampton Company. Both of said assignments were docketed in the county clerk's office on February 5, 1907. Upon appeal from said judgment this court reversed and ordered a new trial. 121 App. Div. 667, 106 N. Y. Supp. 393. On the new trial the complaint was dismissed, with costs to the defendant Vulcanite Portland Cement Company, which costs were taxed at \$785.-31. Upon appeal said judgment was affirmed (134 App. Div. 964, 119 N. Y. Supp. 1135) with costs taxed at \$122.71. On appeal to the Court of Appeals this judgment was affirmed. 204 N. Y. 680, 98 N. E. 1108. Thereafter execution was issued to the sheriff upon the several judgments for costs against the plaintiff, and returned unsatisfied, and no part of said judgments of the Trial Term and of this court has been paid. The defendant Vulcanite Portland Cement Company made a motion for an order to compel defendants Hedden and Northampton Portland Cement Company to pay the amount of the two judgments

aggregating \$908.02, with interest, in accordance with the provisions of section 3247 of the Code of Civil Procedure, and the moving affidavits state:

"From the above facts it clearly appears, and deponent alleges upon information and belief, that this action is brought in the name of the plaintiff by said defendants Louis C. Hedden and Northampton Portland Cement Company, who are beneficially interested therein, and for whom and for whose benefit the cause of action herein or part thereof has been transferred, and that after the commencement of this action the cause of action herein became the property of said two defendants, who were interested jointly with the plaintiff in any recovery herein, and entitled each to an undivided one-third part thereof."

From the order granting this motion this appeal is taken.

Section 3247 of the Code of Civil Procedure provides as follows:

"Where an action is brought, in the name of another, by a transferee of the cause of action, or by the other person, who is beneficially interested therein; or where, after the commencement of an action, the cause of action becomes, by transfer or otherwise, the property of a person, not a party to the action; the transferee, or other person so interested, is liable for costs, in the like cases, and to the same extent, as if he was the plaintiff; and, where costs are awarded against the plaintiff, the court may, by order, direct the person so liable to pay them."

[1] The section provides for two separate and independent contingencies, and is derived from two separate statutory provisions. The first applies to circumstances prior to the commencement of the action—

"where an action is brought, in the name of another, by the transferee of the cause of action, or by any other person, who is beneficially interested therein."

This action was brought by the plaintiff Moore, as appears by its title and by the positive averment of the moving affidavit. The complaint alleges that defendants Hedden and the Northampton Portland Cement Company have been requested to join with plaintiff as parties plaintiff in this action, and have neglected and refused to do so, and are accordingly made parties defendant. It was therefore not brought by a transferee of the cause of action or another person beneficially interested therein in the name of another, and the appellants cannot be held liable under the first clause of the section relied upon. *Thorn v. Beard*, 139 N. Y. 482, 34 N. E. 1100. The utmost that can be spelled out of these papers is that, while these two defendants refused to join in bringing the action, they took the position that if, notwithstanding that fact, plaintiff went on and procured a judgment, they wished to participate in it to the extent of the interest which he said they had therein. They did not transfer their claim to him, and they did not procure the institution of the suit. As a matter of fact the judgment which he obtained was for \$13,633.81, and provided that plaintiff have execution therefor.

[2] The second clause of the section is as follows:

"Or where after the commencement of an action, the cause of action becomes, by transfer or otherwise, the property of a person, *not a party to the action.*"

The cause of action did not become by transfer the property of said defendants, and they *were* parties to the action. Each of these defendants became beneficially interested in a portion of one-third of the judgment docketed in favor of the plaintiff January 28, 1907, and subsequently reversed under the assignment in trust to Lester; but, as stated in *Thorn v. Beard*, supra:

"Nor can he be made liable under the second clause of the section, on the ground that after the commencement of the action the cause of action became, by transfer or otherwise, his property. The judgment was not assigned to him, and he never owned it. He had an interest in it to the full amount due thereon, above \$750, by virtue of his assignment of the claim, which sum of \$750 was payable out of the judgment to another party, and the balance of the judgment payable to him was to be paid 'when collected.'"

[3] "Costs cannot be taxed unless they have been duly awarded, and they can only be awarded in pursuance of the provisions of some statute. * * * There is no flexibility in the rule relating to costs in actions at law, for nothing is left to the discretion of the court." *Stevens v. Central National Bank of Boston*, 168 N. Y. 560-566, 61 N. E. 904, 906.

We do not think that the appellant comes within the statute, and the order appealed from should therefore be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs to the appellant. All concur.

(84 Misc. Rep. 359)

BANDLER v. HILL et al.

(Supreme Court, Trial Term, Nassau County. February 24, 1914.)

1. STATUTES (§ 170*)—RE-ENACTMENT—EFFECT.

Under General Construction Law (Consol. Laws 1909, c. 22) § 95, providing that the provisions of a law repealing a prior law, which are substantial re-enactments of provisions of the prior law, shall be construed as a continuation of such provisions, modified or amended according to the language employed, and not as new enactments, the provisions of the Tax Law of 1909 (Consol. Laws 1909, c. 60) §§ 132, 140, 158, which substantially re-enacted the provisions of the Tax Law of 1896 (Laws 1896, c. 908), §§ 132, 140, 157, are to be deemed a continuation of the prior law, notwithstanding its formal repeal, and to have been in force continuously from the time the Tax Law of 1896 took effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 245, 248, 249; Dec. Dig. § 170.*]

2. TAXATION (§ 745*)—TAX TITLES—CANCELLATION OF SALES—CONSTRUCTION OF STATUTE.

Tax Law 1896 (Laws 1896, c. 908) § 140, re-enacted in Tax Law 1909 (Consol. Laws 1909, c. 60) § 140, authorizing the cancellation of tax sales and the refund of the purchase price, where such sale is invalid or ineffectual to pass title, is prospective in its language, and has no retrospective application.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 745.*]

3. TAXATION (§ 745*)—TAX TITLES—EFFECT OF DEEDS—CONSTRUCTION OF STATUTE.

The provision of Tax Law 1896 (Laws 1896, c. 908) § 132, re-enacted in Tax Law 1909 (Consol. Laws 1909, c. 60) § 132, regarding the effect to be given tax deeds, certificates, etc., theretofore executed, is wholly retrospective, but the provision as to cancellation of tax sales held prior

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or subsequent to its enactment is prospective, as well as retrospective, in its operation.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 745.*]

4. TAXATION (§ 770½*)—TAX TITLES—CANCELLATION—STATUTE.

Under Tax Law 1896 (Laws 1896, c. 908) § 140, re-enacted in Tax Law 1909 (Consol. Laws 1909, c. 60) § 140, authorizing the cancellation of tax sales on certain grounds upon application by the owner, or any person in interest "at the time of the tax sale," neither the successor of the owner nor of the purchaser may apply for a cancellation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1539; Dec. Dig. § 770½.*]

5. TAXATION (§ 770½*)—TAX TITLES—CANCELLATION—STATUTES.

Under Tax Law of 1896 (Laws 1896, c. 908) § 140, re-enacted in the Tax Law of 1909 (Consol. Laws 1909, c. 60) § 140, authorizing the cancellation of tax sales on certain grounds upon application "by the owner at the time of the tax sale," parties to whom the owner subsequently quit-claimed the property could not, by joining him with them in their application, have the sale canceled, since the statute contemplates an application by an owner who has retained some interest in the property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1539; Dec. Dig. § 770½.*]

6. TAXATION (§ 770½*)—TAX TITLES—CANCELLATION—STATUTES.

Tax Law 1896 (Laws 1896, c. 908) § 132, re-enacted in Tax Law 1909 (Consol. Laws 1909, c. 60) § 132, authorizing application to cancel a tax sale within a certain time, is a statute of limitations, but the bar of the statute need not be alleged in order to defeat an application to the county treasurer for the cancellation of a tax sale after the prescribed time, since the treasurer is not a court, and the rule that a statute of limitations must be pleaded to defeat a court's jurisdiction does not apply.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1539; Dec. Dig. § 770½.*]

7. OFFICERS (§ 107*)—POWERS—EXERCISE OF JUDICIAL POWERS.

Where an administrative officer is clothed by statute with judicial or quasi judicial powers, such powers can be exercised only in the manner and under the circumstances prescribed by the statute, and any attempted exercise thereof, in any other manner or under different circumstances, is a nullity.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 107.*]

8. TAXATION (§ 770½*)—TAX TITLES—CANCELLATION—STATUTES.

Under Tax Law 1896 (Laws 1896, c. 908) § 132, re-enacted in Tax Law 1909 (Consol. Laws 1909, c. 60) § 132, authorizing application for the cancellation of a tax sale within a certain time, the county treasurer was without jurisdiction to cancel a tax sale upon an application filed after the prescribed time.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1539; Dec. Dig. § 770½.*]

Action in ejectment by David Bandler against John R. Hill and another. Judgment for defendants.

Charles H. Stoll, of Richmond Hill, for plaintiff.

Maxson & Jones, of Hempstead (Henry L. Maxson, of Hempstead, of counsel), for defendants.

BENEDICT, J. This is an action in ejectment to recover two lots of land situated in the town of North Hempstead, Nassau county. Trial by jury was waived, and the case was submitted to the court upon an agreed statement of facts and testimony taken on the trial.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The facts set forth in such statement, briefly recited, are as follows: On or about December 17, 1912, Charles L. Sicardi and Henry F. Koch and their wives quitclaimed the premises in question, with other property, to one Bessie F. Goetschius for an "alleged" consideration of \$10 by deed recorded February 8, 1913. On June 16, 1913, said Bessie F. Goetschius purported to convey said premises, with other property, to the plaintiff, by deed recorded June 26, 1913. The consideration for this conveyance was \$3,000, but it does not appear how much "other property" was included in the conveyance, so that there is no means of estimating how much plaintiff paid for the premises involved in this action. In December, 1902, the county treasurer of Nassau county sold the two lots in question separately to John G. Kusch for the unpaid taxes of 1898, 1899, and 1900, and later executed to him tax deeds for the same, which were recorded October 23, 1905. Subsequently, and on February 6, 1911, said Kusch conveyed to the defendant John R. Hill one of said lots, and on October 3, 1911, Kusch conveyed to the defendant Edith H. Hill the other lot. The deeds for both of these conveyances were recorded July 30, 1913. The actual consideration in each case was \$125. About February 8, 1913, subsequent to the conveyance from Sicardi and Koch to Goetschius, but before the conveyance from Goetschius to the plaintiff, Sicardi, Koch, and Goetschius united in presenting a petition to the then county treasurer of Nassau county to cancel the tax sale of said lots, alleging that Sicardi and Koch had owned the said premises and other property from 1892 until December 17, 1912, the date of the conveyance to Goetschius, and that they had never resided either in Queens county or Nassau county. The county treasurer appointed a commissioner to take proof of the invalidity of the tax deeds and the assessments and sales on which they were based, and upon his report the county treasurer made an order on May 19, 1913, canceling the said deeds and tax sales upon the following grounds:

"That the assessments for 1898, 1899, and 1900 [of the property involved in said application, I assume] are not set out in a separate part of the assessment rolls for said years, for the listing of property of nonresidents; that the quantity of land assessed is not set down in the column provided for the same and for such purpose in the assessment rolls; that said assessment was assessed against individuals in some cases, and not assessed as nonresident land, the same being commingled with resident property; that the warrant attached to the assessment rolls for said years of 1898, 1899, and 1900 had the seals of the board of supervisors attached."

At the time of the commencement of such proceeding before the county treasurer, the tax deeds to Kusch had been recorded more than seven years; and the time to redeem said lots from the tax sales expired in December, 1903, more than nine years prior to such application. In the view which I take of the case the testimony given on the trial, relating chiefly to certain improvements on the premises, is unimportant. The statement of facts concludes as follows:

"It is further stipulated that if the county treasurer had no jurisdiction over the said proceedings instituted before him, and if his order made therein was void and of no force and effect, then the defendants are vested with title to said premises, and if said county treasurer had jurisdiction over said

proceedings and his order made therein is valid and of full force and effect, then the plaintiff is vested with title to said premises."

There is therefore but one question for the court to determine, and I have accordingly not considered the question whether or not the conveyance to plaintiff is void as champertous, nor have I considered whether or not plaintiff is entitled to succeed in this action on account of defects in defendants' tax titles, irrespective of the proceedings before the county treasurer.

[1-3] The Tax Law of 1896 (Laws of 1896, c. 908) contained two sections authorizing the Comptroller of the state in certain cases to cancel tax sales. The first of these (section 132) reads as follows:

"Effect of Former Deeds.—Every such conveyance (referring to conveyances authorized by section 131) heretofore executed by the Comptroller, county treasurer or county judge and all conveyances of the same lands by his grantee or grantees therein named, which have for two years been recorded in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the Comptroller, that shall have remained in force for two years after the last day allowed by law for redemption from such sale, shall be conclusive evidence that the sale and proceedings prior thereto, from and including the assessment of the lands, and all notices required by law to be given previous to the expiration of the time allowed for redemption, were regular and were regularly given, published and served according to the provisions of all laws directing and requiring the same or in any manner relating thereto, but all such conveyances and certificates, and the taxes and tax sales on which they are based, shall be subject to cancellation, by reason of the payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid, or by reason of any defect in the proceedings affecting the jurisdiction upon constitutional grounds, on direct application to the Comptroller, or in an action brought before a competent court therefor; provided, however, that such application shall be made, or such action brought, in the case of all sales held prior to the year eighteen hundred and ninety-five, within one year from the passage of this act; and in the case of the sale of eighteen hundred and ninety-five and of all sales hereafter held, that such application shall be made, or such action brought, within five years from the expiration of the period allowed by law for the redemption of lands sold at the particular sale sought to be canceled."

Section 140, the other section above referred to, reads as follows:

"Cancellation of Sales.—The Comptroller shall not convey any lands sold for taxes if he shall discover before the conveyance that the sale was for any cause invalid or ineffectual to give title to the lands sold; but he shall cancel the sale and forthwith cause the purchase money and interest thereon to be refunded out of the state treasury to the purchaser, his representatives or assigns. If the error originated with the county or town officers the sum paid shall be a charge against the county from which the tax was returned, and the board of supervisors thereof shall cause the same to be assessed, levied and collected and paid into the state treasury. If he shall not discover that the sale was invalid until after a conveyance of the lands sold shall have been executed he shall, on application of any person having any interest therein at the time of the sale, on receiving proof thereof, cancel the sale, refund out of the state treasury to the purchaser, his representatives or assigns, the purchase money and interest thereon, and recharge the county from which the tax was returned with the amount of purchase money and interest from the time of sale, which the county shall cause to be levied and paid into the state treasury. On any such application the Comptroller may appoint a commissioner with like powers and duties as in the case of an application for redemption; provided, however, that in any county which does not include a

portion of the forest preserve, such application for cancellation may also be made by the owner of the lands at the time of the tax sale."

These provisions were by section 157 of the same act made applicable to sales made by a county treasurer, and the county treasurer was in such cases invested with the same powers as the Comptroller. Sections 132, 140, and 157 of the Tax Law of 1896 have been substantially re-enacted in the Tax Law of 1909 (Laws of 1909, c. 62, §§ 132, 140, 158); and hence, notwithstanding the formal repeal of the former tax law by the latter, the provisions of those sections must be deemed to have been continuously in force since the Tax Law of 1896 took effect (June 15, 1896), and to speak from that time, or from the time when that act became a law (May 27, 1896), at least so far as the matters involved in the present action, which have all transpired since 1896, are concerned (Gen. Construction Law, § 95; *People ex rel. Donegan v. Dooling*, 141 App. Div. 31, 32, 125 N. Y. Supp. 783). The purpose and intent of sections 132 and 140 is not entirely plain. Section 140 seems to be prospective in its language, and there is nothing requiring a retrospective construction to be given it. Section 132, on the other hand, would appear to be wholly retrospective were it not for the use of the word "hereafter" in the last clause, which indicates that the words "all such conveyances" in the clause beginning "but all such conveyances and certificates and the taxes and tax sales on which they are based shall be subject to cancellation," etc., refer back to section 131 and the conveyances therein provided for, rather than to "every such conveyance heretofore executed," etc., at the beginning of section 132. Thus section 132, so far as it provides for an application to the Comptroller for the cancellation of a tax sale, is prospective as well as retrospective, and it is apparent that sections 132 and 140 to some extent overlap.

[4, 5] The application made by Sicardi, Koch, and Goetschius for the cancellation of the tax sales in question herein is stated in the agreed statement of facts to have been made under section 140, and this is obvious also from the procedure followed. It will therefore be pertinent first to inquire whether the county treasurer had jurisdiction under that section to entertain the application and make the order which he did make. The plaintiff must rely wholly on the last clause of the section, which was added in 1896; for the section as it read previous to that addition was held to authorize an application for the cancellation of a tax sale only by the purchaser and not by the owner (*People ex rel. Wright v. Chapin*, 104 N. Y. 369, 5 N. E. 64, 11 N. E. 383; *Oslander v. Darling*, 127 N. Y. 70, 27 N. E. 353; *People ex rel. Hamilton Park Co. v. Wemple*, 139 N. Y. 240, 34 N. E. 883; *People ex rel. Witte v. Roberts*, 144 N. Y. 234, 39 N. E. 85; *People ex rel. Millard v. Roberts*, 151 N. Y. 540, 45 N. E. 941; *People ex rel. Staples v. Sohmer*, 206 N. Y. 42, 99 N. E. 156. The owner who is permitted to make the application under the added clause is "the owner of the lands at the time of the tax sale." Such an application may not be made either by the successor in interest of the purchaser or by the successor in interest of the owner in those cases where the owner may apply. See Report of Attorney General, 1911, vol. 2, pp. 185-189.

There is no proof before me as to who was the owner at the time of the tax sale; except the statement in the agreed statement of facts that the petition in the proceeding before the county treasurer alleged that Sicardi and Koch owned the premises from 1892 until December 17, 1912. Prior to the application they had sold the property to Goetchius, and they were evidently joined in the petition in the attempt to comply with the provision of section 140, above quoted. In my opinion, however, section 140 contemplates an application by one who was the owner of the premises at the time of the sale, and who still continues to be such owner, or at least has some interest in the cancellation of the sale by reason of having given covenants of the title or otherwise. After a conveyance of all his rights in the premises by a deed without covenants (as in the case here) the owner at the time of the sale has no longer any interest in the cancellation of the same, and hence no standing to make application therefor; for the real party in interest on any subsequent application is not the owner at the time of the sale, but the owner at the time of the application in whose-soever name the petition is made. To permit him to apply in the name of his predecessor in title would be for the court to connive at a plain evasion of the statute.

[8] I find nothing in the recent case of *People ex rel. Staples v. Sohmer*, 206 N. Y. 39, 99 N. E. 156, inconsistent with the conclusion I have reached. In that case the relators, who claimed as owners of the premises, were denied relief upon the ground that the Comptroller could not cancel a tax sale, made prior to the Tax Law of 1896, without making the purchaser a party, for which section 140 contained no provision. I am therefore of opinion that the county treasurer had no jurisdiction under section 140 to set aside the tax sales in question in the case at bar. Did he, then, have jurisdiction under section 132? This question must also, I think, be answered in the negative, because of the lapse of more than five years between the expiration of the time to redeem and the making of the application. *Meigs v. Roberts*, 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322; *Halsted v. Silberstein*, 196 N. Y. 1, 89 N. E. 443; *Bryan v. McGurk*, 200 N. Y. 332, 335, 93 N. E. 989. As the sales here involved took place subsequent to 1896, no question as to the effect of section 132 of the Tax Law of that year as a curative statute can arise; but the section must be considered, for the purposes of the case at bar, as a statute of limitations. Hence, under the authorities last above cited, the question whether or not the defects for which the county treasurer canceled the tax sales were jurisdictional is immaterial. See also *Wallace v. McEchron*, 176 N. Y. 424, 68 N. E. 663. It is urged on behalf of the plaintiff that the county treasurer is placed by force of the statute on an equal footing with a competent court, and hence that as section 132 is a statute of limitation, the fact of the lapse of the five-year period does not affect that officer's jurisdiction to entertain the application and make the order canceling the sales, but constitutes merely matter of defense.

[7, 8] I cannot agree with the premise upon which this conclusion is sought to be founded, namely, that the county treasurer is invested with the powers and jurisdiction of a court. When an administrative

official is invested by statute with judicial or quasi judicial powers these powers can be exercised only in the manner and under the circumstances prescribed by the statute, and any attempted exercise of such powers in some other manner or under different circumstances is a nullity. Such an officer occupies a position so different from that of a court acting under its general jurisdiction concerning matters coming within the scope of that jurisdiction, or even acting in pursuance of a statutory jurisdiction, that there can be no proper comparison between the two. It will be noted that section 132 provides that "all such conveyances * * * and the taxes and tax sales on which they are based, shall be subject to cancellation" by reason of certain defects "on direct application to the Comptroller, or in an action brought before a competent court therefor." In case of an action brought in a competent court, to which the court would require all persons interested to be made parties, and in which the usual procedure in actions of like nature would be followed, it might very well be urged that the limitation of time provided for in the section would constitute matter of defense, and would not go to the jurisdiction of the court. But section 132 makes no provision for any method of procedure in the case of an application to the Comptroller or the county treasurer. It does not authorize him to issue any process to bring in the parties interested, nor to summon witnesses, nor to swear them, nor does it invest him with any of the incidental functions or powers which a court of law exercises in every action, whether the jurisdiction is inherent or conferred by statute, nor does it provide him with any of the machinery so necessary to the judicial determination of a controversy between parties. The language of Judge Danforth in *People ex rel. Wright v. Chapin*, supra, in relation to sections 83-85, c. 427, of the Laws of 1855 (which subsequently developed into section 140 of the Tax Law of 1896 and of the present law, above quoted) that the statute "gives no process to bring him [the purchaser] in confers no power to compel witnesses," and that "it creates no court, provides for a single transaction to which the Comptroller and the purchaser are the only parties," is equally applicable to section 132 so far as that section provides for action by the Comptroller or county treasurer. This language has been approved in numerous subsequent decisions. See cases cited supra, with *People ex rel. Wright v. Chapin*.

Although the action of the Comptroller or county treasurer in setting aside a conveyance on application of the owner, or taken in accordance with the statute, may be binding on the purchaser, even without notice or any proceedings judicial in their nature, where the sale has taken place since the enactment of the statute, on the ground that the purchaser takes his title "subject to just such limitations and conditions as the Legislature has prescribed" (*People ex rel. Staples v. Sohmer*, 206 N. Y. 45, 99 N. E. 156), nevertheless, as the purchaser has no opportunity under the statute to defend against the application, it can hardly be said that the period of limitation is matter of defense, but rather, and for that very reason, it would seem that the provision for a limitation of time was intended to prescribe a condition precedent to the exercise of jurisdiction. That the purchaser may in fact be notified

and may come in and be heard on the merits can make no difference in this respect, because such consent cannot confer on the officer a jurisdiction which the statute does not confer on him. But in the case at bar I find no evidence that the purchaser was notified or did appear, although there is a statement in plaintiff's brief that Kusch, then record owner of the tax title, had notice and appeared before the commissioner appointed by the county treasurer.

It is also urged that the five-year statute of limitations should have been pleaded—in the proceeding before the county treasurer, I assume. What has already been said is a complete answer to that contention, for the objection of want of jurisdiction of the subject-matter may be raised at any time. The invalidity of the order of the county treasurer, with the reason therefor, was set up in the answer in this action. The provision of section 140 relative to the appointment of a commissioner "with like powers and duties as in case of an application for redemption," even if applicable to a proceeding under section 132, does not change the views above expressed. The powers and duties of such a commissioner are set forth in section 137 of the Tax Law, and while they include "the same power to issue subpoenas and proceed with the examination of witnesses under oath as is had by a referee in a court of record," they do not include the power to summon as a party any person having or claiming an adverse interest. Notice to the applicant is specially provided for, but not notice to any other person, and this shows that section 140 in its present form, as well as section 132, contemplates an *ex parte* application to which the officer and the applicant are the only parties. The plaintiff suggests in his brief that section 141, authorizing the Comptroller (or county treasurer in a proper case) to set aside the cancellation of a tax sale on certain grounds, affords an opportunity for the purchaser, where a sale has been canceled at the instance of the owner, "to present as an affirmative defense the statutes of limitation contained in sections 131 and 132 of the Tax Law." Section 141 specifies four grounds for setting aside such a cancellation—fraud or misrepresentation, suppression of a material fact, mistake of fact, and want of jurisdiction or legal right to entertain the application. Only the last ground is applicable to the case at bar. Unless, therefore, the lapse of over five years from the expiration of the time for redemption goes to the jurisdiction of the officer, the defendants could have had no relief under this section on that account. If, as I have held, the lapse of time did deprive the county treasurer of jurisdiction, there is no merit in the contention that defendants, in order successfully to defend this action, ought first to have applied to have the cancellation of the tax sales set aside, and this for two reasons: First, because the parties have stipulated, as above set forth, that if the county treasurer did not have jurisdiction of the proceeding before him, then defendants have title to the property, in which case they are entitled to judgment; and, second, because the section does not afford an exclusive remedy, but merely an additional remedy to a party aggrieved by a void cancellation of a tax sale. It does not deprive him of any of his common-law rights or remedies. The same argument applies to want of jurisdiction under section 140, above considered.

I hold, therefore, that the county treasurer had no jurisdiction of the application to set aside the tax sales and conveyances in question in this action, and accordingly, in pursuance of the stipulation of the parties, judgment is awarded in favor of the defendants dismissing the complaint upon the merits. Settle decision and judgment on notice.

STEINERT v. STEINERT et al.

(Supreme Court, Appellate Division, First Department. February 20, 1914.)

PERPETUITIES (§ 6*) — DEVISES — SUSPENDING POWER OF ALIENATION — DRY TRUST.

Where a testator devised all of his real and personal property in trust for the benefit of his minor children, who were not self-supporting, with power in his executors to sell the same to support the children, and devised his insurance to his two daughters who were not self-supporting, the devise to the minor children is not void as creating a trust for their support during their entire lives, thus unlawfully suspending absolute power of alienation, but it creates a mere dry or passive trust, and the property passes immediately to the minor children; the executors merely having power of sale to insure a speedy disposition if the children's needs require it.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-47, 49-53, 56; Dec. Dig. § 6.*]

Appeal from Special Term, New York County.

Action by Henry N. Steinert, individually and as executor, etc., against Eugenie M. Steinert, as executrix and others, impleaded with Lillian E. O'Brien. From the judgment the last-named defendant appeals. Affirmed.

The opinion of Davis, J., at Special Term is as follows:

Action by an executor for the construction of the last will and testament of Henry Steinert. The testator died February 2, 1913, leaving him surviving four sons and four daughters, all of whom are of full age except two of the sons. His estate consists of both personal and real property. The will in question was dated and executed May 22, 1905. At this time the testator's children, Anna T., Walter G., John F., and Ambrose M., were, respectively, 14 years, 12 years, 6 years, and Ambrose almost 21 years. The other four children were Eugenie M., Alma C., Lillian O'Brien, and Henry N., all of full age. Of the latter the following were self-supporting at the time of the execution of the will, to wit, Henry N., Ambrose M., and Lillian O'Brien. Eugenie M. and Alma C. were not then self-supporting. The testator disposes of all of his property by the first paragraph of his will as follows: "First. After my lawful debts are paid, I give, bequeath and devise to my son Henry N. and my daughter Eugenie all my real and personal property which I may be possessed of, in trust for my children Anna, Walter and John, and I do hereby authorize my executors to sell my real estate and stocks for the purpose of maintaining and supporting my said children Anna, Walter and John; all moneys in bank should also be applied for said purpose. I bear the same affection towards all of my children; my insurance is divided between my daughters Eugenie and Alma; the children not provided for herein is for the reason that they have ample methods of maintaining themselves. I devise all my household furniture to my daughter Eugenie. I hereby appoint my son Henry N. and my daughter Eugenie to be executors of this my last will and testament, hereby revoking all former wills." Considering the language of the will in the light of the circumstances of testator's children at the date

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of its execution it is clear that the testator intended to give his property to those who were not self-supporting. He says "the children not provided for herein is for the reason that they have ample methods of maintaining themselves." And so he gives his insurance to his daughters Eugenie and Alma, two of the children not self-supporting, and his other property he leaves in trust for his minor children, Anna, Walter, and John. It is contended that the trust for the minor children is void as suspending unlawfully the absolute power of alienation. I think the testator had no intention to create a trust to support and maintain the three children during their respective lives. There is no language in the will indicating the duration of such a trust or the disposition of the property after the termination of the trust. I am of the opinion that the provision is a dry or passive trust, which is prohibited in this state. It follows that the testator's property passed directly to the three children Anna T., Walter G., and John F., and that the executors simply had a power of sale to insure a speedy and inexpensive disposition of the property as the needs of the children required it, and that no title vested in the executors. *Kelley v. Hogan*, 71 App. Div. 348, 76 N. Y. Supp. 5; *Ramsey v. De Remer*, 65 Hun, 212, 20 N. Y. Supp. 143; *Treat v. Vose*, 63 App. Div. 338, 71 N. Y. Supp. 507; *Matter of De Rycke*, 99 App. Div. 596, 91 N. Y. Supp. 159; *Donvan v. Van De Mark*, 78 N. Y. 244; sections 92 and 93, Real Property Law (Consol. Laws, c. 50). Judgment accordingly.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

G. H. Gray, of New York City, for appellant.

J. H. Deignan, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs on opinion of Davis, J., at Special Term. Order filed.

(160 App. Div. 838)

BIGUS v. LEHIGH & WILKES-BARRE COAL CO.

(Supreme Court, Appellate Division, Second Department. February 27, 1914.)

1. MINES AND MINERALS (§ 118*)—INJURIES TO THIRD PERSONS—MINE FOREMAN.

Where an accident in a mine was caused by the negligent failure of a worker in the mine to give warning of the approach of a car by which the injured person was struck, the proximate cause of the accident was within the control of the mining foreman employed under the statute, requiring the employment of a certified mine foreman who shall have control of the interior of the mine even to the exclusion of the master, except as to special duties of the master which may not be delegated.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 240; Dec. Dig. § 118.*]

2. MINES AND MINERALS (§ 118*)—PERSONAL INJURIES—MINE FOREMAN.

That a person injured from being struck by a car in a mine was not employed in the mine, but was merely there seeking employment, did not preclude the mineowner from being relieved from liability because the accident was due to negligence in respect to matters under the control of a certified mine foreman employed as required by statute.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 240; Dec. Dig. § 118.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Queens County.

Action for personal injuries by Mike Bigus against the Lehigh & Wilkes-Barre Coal Company. From judgment dismissing the complaint, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, RICH, STAPLETON, and PUTNAM, JJ.

Otto H. Droege, of New York City, for appellant.

Robert Thorne, of New York City (Gomer H. Rees, of New York City, on the brief), for respondent.

THOMAS, J. Plaintiff, 8½ years employed in coal mines, and for three years of the time in defendant's employment, interrupted his service for a brief time, and then entered defendant's mine to get work. He rejected proffered opportunity, and, while returning, stopped at a place called a gangway, through which was a car track, and from which one or more chambers radiated, through which cars came. Upon request he helped in the removal of a car from the gangway, and then stepped back upon the track therein, where he was hit by a miner's car moving upon such track. The car was unlighted, and the only lights were those on the heads of the miners. The oil in his own lamp was spent. He charges that no warning of the coming of the unattended car was given by the miner who started it on its way, or by the boys who open and shut intervening doors to let it pass. The plaintiff was experienced, and must be deemed acquainted with the purposes of the gangway.

[1] The complaint was dismissed upon the ground that the mine was under the control of a certified mine foreman, whose employment was imposed by the state. His power was as broad as the statute, and, during his retention, was beyond the interference of the owner of the mine, unless the incompetency of the mine foreman or his neglect was directly brought to the owner's notice. The questions involved are whether the proximate cause of the accident was within the control of the mineowner, and whether the plaintiff is affected by the act. The sway of the mine foreman, it is inferred, extends to all functions in operation. He rules in such regard the interior of the mine, even to the exclusion of the master, except as to special duties that the law places on the master and which may not be delegated. When, and whither, cars shall run, under what regulations, signals, warnings, or discipline, he determines, and his authority is exclusive. In such case the master, by compulsion of law deprived of participation in operation, is acquitted of responsibility. It would be illogical and unjust to confine the conduct of the works to the skill and discipline of a mine foreman and to impute his negligence to the owner constrained to surrender authority to him.

I find no decision of the courts of Pennsylvania that decides specifically that the owner is absolved from liability for injury caused by the negligent failure of a worker in the mine to give warning of the approach of the car, or by negligent omission to furnish lights, but the duty is so intimately interwoven with others in the operation of the mine that the conclusion is enforced. There are two statutes, one

(Act of June 2, 1891 [Pennsylvania Laws, p. 176]) relating to mining of anthracite coal, and one (Act of May 15, 1893 [Pennsylvania Laws, pp. 52, 61]) relating to bituminous coal, but the decisions falling under either statute ascribe similar power to the mine foreman, and correspondingly absolve the owner for any negligent act in the conduct of the mine falling under the control of the mine foreman.

In *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801, are stated the reasons for exempting the owner. In the opinion it said of the statute:

"Through it the lawmakers say to the mineowner: 'You cannot be trusted to manage your own business. Left to yourself, you will not properly care for your own employes. We will determine what you shall do. In order to make it certain that our directions are obeyed, we will set a mine foreman over your mines, with authority to direct the manner in which your operations shall be conducted, and what precautions shall be taken for the safety of your employes. You shall take for this position a man whom we certify to as competent. You shall pay him his salary. What he orders done in your mines you shall pay for.'"

It was decided that the owner was not responsible, notwithstanding the provision of the statute imposing liability. The case has been followed without interruption in decisions, for a review of which I recommend the opinion in *Pittsburgh-Buffalo Co. v. Cheko*, 204 Fed. 353, 124 C. C. A. 451. The authority of the earlier cases has not been diminished by decisions that there are duties prescribed by statute that are not delegable to the mine foreman (*O'Brien v. Penna. Coal Co.*, 237 Pa. 44, 85 Atl. 130), or that the master may be liable for failure to instruct inexperienced employes placed in the mine (*Bogdanovicz v. Susquehanna Coal Co.* [1913] 240 Pa. 124, 87 Atl. 295), or for negligent acts or omissions by the owner or his agent (*Reeder v. Lehigh Valley Coal Co.*, 231 Pa. 563, 80 Atl. 1121; *Pauza v. Lehigh Valley Coal Co.*, 231 Pa. 577, 80 Atl. 1126. But the primary decision is that a mine foreman is not the agent of the owner, but is a person whose skill and capacity is certified by the state, and of a class from which the owner must choose. I make excerpts from expressions indicating the breadth of the statute:

"The duty of the mineowner is to employ competent bosses or foremen to direct his operations. When he does this he discharges the full measure of his duty to his employes, and he is not liable for an injury arising from the negligence of the foreman." *Durkin v. Kingston Coal Co.*, *supra*.

"When the owner employs a certified mine foreman and puts him in charge of the internal workings of the mine, he has done all that the law requires him to do, and he is not required, through his superintendent, to inspect and look after the interior of the mine." *Wolcott v. Erie Coal & Coke Co.*, 226 Pa. 204, 210, 75 Atl. 197, 198.

"In other words, by command of the statute, the interior of the mine is taken out of the possession and control of the owner and placed in charge of a certified foreman, with whom the owner's superintendent is forbidden to interfere, and who has power to compel compliance with his directions so far as they relate to the safety of the employes engaged in the mine." *Dempsey v. Buck Run Coal Co.*, 227 Pa. 571, 76 Atl. 745.

"But it is argued it was the duty of the mine foreman to see that the trolley wire was maintained in good repair, and if there was any negligence in this respect it was the negligence of the mine foreman, for which appellant is not liable. It has been held in a long line of cases that the mineowner is not liable for the negligent acts of a mine foreman committed in the

discharge of duties imposed upon him by law and in and about those workings over which he exercises supervision. From *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432, and *Durkin v. Kingston Coal Co.*, 171 Pa. 193 [33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801], to *Golden v. Mount Jessup Coal Co.*, 225 Pa. 164 [73 Atl. 1103], this rule has remained unbroken." Reeder v. Coal Co., supra. The opinion further says: "We see no reason why the electric hauling system, like all other underground workings, should not be under the supervision of the mine foreman. Rule 1, of article 12, of the act of 1891, provides that the mine owner 'shall place underground workings thereof, and all that is related to the same, under the charge and daily supervision of a competent person, who shall be called "mine foreman."' Rule 2 provides for the employment of a sufficient number of competent assistants when the mine foreman cannot personally attend to all of his duties. These assistants, when so employed, are under the control and subject to the orders of the mine foreman. Rule 13 makes it the duty of the mine foreman, or his assistants when so employed, to examine at least once every day all slopes, shafts, main roads, travellingways, signal apparatus, pulleys, and timbering and see that they are in safe and efficient working condition. Clearly, therefore, the framers of the statute had in contemplation that all of the underground workings should be in charge of the mine foreman, and the wisdom of so providing is not open to doubt. In dangerous work of this character it is a wise precaution to have a competent mine foreman duly certified by the commonwealth with certain statutory duties to perform as a protection to the health and safety of the men thus employed, as well as to the property of the mineowner."

And after discussing the effect of the noncompliance with the statute in committing the whole of the plant to the mine foreman, it is added:

"We think it would be safer and wiser for all parties concerned if all the underground workings should be committed to the care and supervision of the mine foreman, and then there would be no division of authority."

In *Hood v. Connell Anthracite Mining Co.*, 231 Pa. 647, 652, 81 Atl. 56, 58, it is said:

"The character of his duties as mine foreman is not necessarily changed because he may hire or discharge men working under him, or suggest where and in what capacity the men shall work, or how the entries shall be driven, or the mines be developed. He may do all of these things and still be acting in his capacity as mine foreman. Indeed, if he is a competent mine foreman, which the law presumes him to be, he is better qualified to do all of these things than any one else. The test is not the particular acts he may do in connection with the underground workings, but whether he has the charge, control, and supervision of these workings to the exclusion of any other authority. When he has this exclusive supervision no one can dispute his authority as mine foreman, and even the owner cannot interfere with the performance of his duties. It is the duty of the mine foreman to see that all the statutory requirements intended to safeguard the health and lives of the men are properly enforced. * * * It sometimes happens that the mineowner does not commit the exclusive charge of the interior workings to the mine foreman, but, acting through his superintendent, undertakes to exercise authority over certain parts of the interior workings without reference to the duties of the mine foreman. When this is done the owner may be held liable for the negligent acts of his superintendent or those acting under his direct authority."

Further instructive decision is found in *Rafferty v. National Mining Co.*, 234 Pa. 66, 82 Atl. 1089; *Simmons v. Lehigh Valley Coal Co.*, 240 Pa. 354, 87 Atl. 568. It is unnecessary to follow the decisions. The doctrine was reiterated in *D'Jorko v. Berwind-White Coal Min-*

ing Co., 231 Pa. 164, 80 Atl. 77, where it was also decided that the Employers' Liability Act of June 10, 1907 (Pennsylvania Laws, p. 523), does not affect the law as announced by the decisions quoted.

One Jones was called as a witness for the plaintiff, and, after testifying that all the miners and runners and other people in the mine were in the employ of the defendant, who owned the mine, he was allowed to testify that he was a certified miner; that he employed the man with power to discharge; that he had charge of the operation of the mine underground.

"I did have charge of the operation of that mine underground. I did have full charge of it. I did have full and complete control of it. * * * I did have charge of the location of tracks in the mine. I did have charge of the rules and systems of signals that existed in the mines. In exercising the functions which I have just described, no one did exercise control over me."

Again he says:

"I can adopt any precautions that I see fit in that mine without regard to the wishes of the Wilkes-Barre Coal Company, and any system of signals that I desire I can institute, no matter whether it uses up all the profits or not."

The decisions have to do with physical matters in the mine, and specific reference is not made to warnings, signals, and the direction and command of men, yet the scope and power ascribed to the mine foreman is such that such duties must fall within it. It is true that in *Bogdanovicz v. Susquehanna Coal Co.*, supra, where the duty of instruction was involved, it is said that the owner can be relieved only "by pointing to a provision of the statute which imposes such duty on the mine foreman and relieves the owner or operator." But the case at bar falls within the statute as construed by the courts of the state.

[2] The next question is whether the statute is applicable to the plaintiff, who at the time was not regularly working in the mine, but who went there to obtain work. It may be considered that at the time he was hurt he was working in the mine, but I rest the conclusion on the broader consideration that the statute affected the plaintiff. As stated in *Pittsburgh-Buffalo Coal Co. v. Cheko*, 204 Fed. 354, 124 C. C. A. 451, the object of the act is expressed "in the title, namely, to provide for 'the lives, health, safety, and welfare of persons employed' in bituminous coal mines." It is urged that the exemption of the master is based upon the principle that the mine foreman is a fellow servant of the miners, and that, as the plaintiff was not a fellow servant, the doctrine is not applicable. It is true that the doctrine of fellow servant was and is used as a principle for exempting the master (*Lineoski v. Susquehanna Coal Co.*, 157 Pa. 153, 27 Atl. 577), and in *Durkin v. Kingston Coal Co.*, supra, the same consideration was advanced, but with the introduction that "the same conclusion may be reached by another road." But in priority of discussion the court adopted the broader theory that under the statute the foreman represented the commonwealth (see page 201 of 171 Pa., page 238 of 33 Atl. (29 L. R. A. 808, 50 Am. St. Rep. 801), and not the master, and that larger consideration was entertained in the later cases as a fundamental reason for exempting the master. If, now, the state through

its Legislature takes the mine from the control of the owner and vests it in the mine foreman so exclusively that the master may not interfere, it also prevents the master from making any provision for the protection of men who, from time to time, may go into the mine for the purpose of seeking work. For the purpose of such visit the whole system for conducting the mine, commanded by the state, cannot be recast and the control taken from the mine foreman and reinvested in the owner. The statute is for the benefit of miners, but the enjoyment necessarily places the mine for all purposes, and as to all men visiting it, under the dominion of the mine foreman, so far as the statute imposes duties upon him. Indeed, the plaintiff entered under the auspices of the foreman.

These conclusions lead to the affirmance of the judgment, with costs. All concur.

(160 App. Div. 771)

PEOPLE *ex rel.* EAST RIVER TERMINAL R. R. *v.* STATE BOARD OF TAX COM'RS (CITY OF NEW YORK, Intervener).

(Supreme Court, Appellate Division, Second Department. February 27, 1914.)

1. TAXATION (§ 117*)—SPECIAL FRANCHISE—DEFENSES—"LAND"—"REAL ESTATE"—"REAL PROPERTY"—"SPECIAL FRANCHISE."

Under Tax Law (Consol. Laws, c. 60) § 2, subd. 3, declaring that the terms "land, real estate and real property" shall include all surface or elevated railroads, including the value of all franchises, or permission to maintain the same on streets, and all railroad tracks, switches, etc., permitted to be laid in any public road, and that such franchise right or permission shall, for purposes of taxation, be known as a "special franchise," a terminal company, maintaining tracks upon public streets by permission of municipal authorities, must be deemed to operate such tracks solely by permission of the public authorities, and hence is liable to a special franchise tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 214; Dec. Dig. § 117.*]

2. TAXATION (§ 171½*)—FRANCHISE TAX—USE OF STREET—ESTOPPEL.

A terminal company which did not affirmatively assent to the contention of city authorities that some of the streets used by it were public streets, but which acted as if it acquiesced in such contention and under the permission of such authorities, was estopped, for the purpose of a proceeding to assess a special franchise, from claiming that they were not public streets.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 171½.*]

3. RAILROADS (§ 79*)—FRANCHISE—FORFEITURE.

Whether a terminal company is exceeding its corporate powers in attempting to operate tracks through certain public streets is a matter to be determined in an appropriate action by the Attorney General in the name of the people of the state.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 192, 193, 202, 203; Dec. Dig. § 79.*]

Appeal from Special Term, Kings County.

Certiorari by the People of the State of New York, on the relation of the East River Terminal Railroad, against the State Board of Tax Commissioners, in which the City of New York intervened

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(assessment of 1910). From a final order of the Special Term (140 N. Y. S. 722) dismissing the writ, relator appeals. Affirmed.

Argued before JENKS, P. J., and BURR, CARR, STAPLETON, and PUTNAM, JJ.

H. B. Closson, of New York City (Jarvis P. Carter, of New York City, on the brief), for appellant.

Curtis A. Peters, of New York City (Addison B. Scoville and William A. McQuaid, both of New York City, on the brief), for respondents City of New York and State Board of Tax Com'rs.

BURR, J. Prior to February 16, 1910, relator was maintaining certain railroad tracks upon and over certain streets in the borough of Brooklyn, and was operating cars over the same with steam as a motive power. Seven of these tracks crossed Kent avenue, between North Third and North Fourth streets; four of these tracks crossed Wythe avenue, which is the next avenue east of and parallel to Kent avenue, and were continuations of some of the tracks crossing Kent avenue to the west, and one track crossed North Fourth street diagonally between Kent and Wythe avenues, this being also a continuation of one of the first seven named tracks. In addition to these 12 tracks relator was also maintaining tracks and operating cars over the same with steam as a motive power, across Kent avenue between North Fifth and North Sixth streets, across Wythe avenue, between the same streets, and along North Fifth, North Sixth, North Seventh, North Eighth, and North Ninth streets for a portion of the distance between the river and Kent avenue, and also between Kent avenue and Wythe avenue. It would appear from the agreed statement of facts herein that the property bounded by North Third and North Fourth streets, the East river, and a line drawn parallel with Wythe avenue and more than 100 feet easterly therefrom, together with the greater portion of the property between North Fifth and North Tenth streets, west of Kent avenue, and between that and the East river, as well as a considerable portion of the property between North Fifth and North Sixth streets, between Kent avenue and a line drawn east of Wythe avenue and several hundred feet distant therefrom and parallel thereto, is owned or controlled by individuals or copartners, and is used by them or their transferees as an extensive freight depot and yard, which is almost entirely covered with tracks and switches, with some of which each of the tracks in the streets last above enumerated are connected, and that from this yard as a center 1,500,000 tons of freight are annually received and distributed.

In the year 1910, the State Board of Tax Commissioners assessed relator for a special franchise in connection with constructing, maintaining, and operating these tracks, and also certain scales used in connection therewith, situated in some of these streets, in the sum of \$75,000. Both relator and respondent agree that the use of the railroad crossings, hereinbefore specifically described as the 12 tracks between North Third and North Fourth streets, constitute a special franchise, subject to assessment for taxation at the amount of \$10,200. Relator denies that it is subject to assessment or tax as to the

remainder of the tracks across or upon either of the other streets, or upon the scales, but at the same time it does not dispute the amount of the assessment fixed by the State Board of Tax Commissioners, if it is liable to such tax. Relator was incorporated in November, 1907, under the then existing Railroad Law (General Laws, c. 39 [Laws of 1890, c. 565, § 2]), for the purpose of building, maintaining, and operating a steam railroad, to be operated as a freight railroad exclusively. Its route was thus described: Beginning at—

"a point on the easterly bank of the East river between North Third street and North Fourth street as its western termini [sic], running thence easterly about one-half mile to a point east of Wythe avenue between North Third and North Fourth streets, which said last point will be the eastern termini [sic] of said road."

Thereafter, and in June, 1908, it applied to the Public Service Commission of the First Department, under section 59 of the said Railroad Law, and section 80 of the Public Service Commission Law (Laws of 1907, c. 429), for a certificate of public convenience and a necessity, which, on December 4, 1908, was granted. In March, 1909, it obtained from the city of New York, pursuant to the terms of a contract entered into by it with said city, bearing that date, and which was authorized by the Board of Estimate and Apportionment of said city, the right and privilege to construct, maintain, and operate said 12 railroad tracks hereinbefore described, and thereafter, and in June, 1909, it obtained from the Public Service Commission, pursuant to the provisions of section 53 of the Public Service Commission Law (supra), its permission to exercise the right given to it under said contract. In the succeeding September, the Board of Estimate and Apportionment adopted a resolution relative to the tracks upon the remaining streets hereinbefore described, asserting that such use was without authority, and calling upon those who were operating the same to obtain legal right to do so. It would appear that the firm of Havemeyers & Elder, or those claiming under them, had for several years maintained this freightyard and these tracks, and operated cars over the same. As to some of these streets the said firm contended that they were the owners of the land within the boundaries thereof, and that said streets between Kent avenue and the East river had never been legally opened, and that as to the other streets in preceding years the board of aldermen of the former city of Brooklyn had adopted resolutions giving authority to them, or those through whom they claimed, to construct such tracks. Thereafter the corporation counsel of the city advised the Board of Estimate and Apportionment that whether or no all of the streets had been opened by legal special proceedings, they had become public streets by dedication and acceptance, and that the resolutions adopted by the board of aldermen of the city of Brooklyn were wholly ineffectual to confer any right to construct or maintain tracks over or upon such streets. Apparently acquiescing in this contention, steps were then taken in behalf of those using said streets to obtain a legal right to maintain such tracks and operate cars over the same. The East River Terminal Company, the relator here, to whom the previous franchise had been

granted, having obtained the necessary consents of abutting property owners, filed a paper designated as a certificate of extension, under section 90 of the Railroad Law, in which it designated, as extensions of its then existing and operated railroad, such portions of the tracks used in connection with those tracks in the freightyard above described as lay within the boundaries of the several streets north of North Fourth street. Asserting the fact of the filing of such certificate of extension, it then applied to the Board of Estimate and Apportionment for authority to maintain and operate tracks in said streets as said tracks were then constructed (with some slight changes, here unimportant), and such consent was granted, and the mayor was authorized in behalf of the city of New York to execute a contract with relator, similar in form to that which was executed with reference to each of the 12 tracks between North Third and North Fourth streets, and thereupon each of the resolutions theretofore adopted by the board of aldermen of the city of Brooklyn, purporting to confer authority to maintain such tracks, was by resolution of the said Board of Estimate and Apportionment expressly rescinded. Pursuant to such authority, on December 27, 1909, relator and the city of New York executed said contract, and by it the former was given authority to construct and maintain said tracks and operate cars over the same, upon certain terms and conditions, and upon the payment of certain specified sums, which terms and conditions relator accepted and agreed to perform, and which payments it agreed to make. Up to the time when the tax for the special franchise for the year 1910 was imposed, no application had been made to the Public Service Commission for a certificate of public convenience and a necessity. Subsequently, and in August, 1911, such application was made upon a petition by relator, addressed to it, alleging that it had procured from the city of New York a consent or "franchise to construct, maintain and operate a steam railroad in the streets and avenues hereinafter mentioned," and then follows a specification of the streets and avenues referred to in said contract and in its certificate of extension of route. This petition omitted to state any proceedings on the part of the relator to file the so-called certificate of extension, or to procure by such filing a right from the state to construct and maintain said tracks. The Public Service Commission called attention to such omission, and suggested the amendment of the petition. It does not appear that anything further has been done in connection with the procuring of such certificate. Although relator is still maintaining and operating a railroad over and through such streets, it now contends that its so-called certificate of extension, filed in the autumn of 1909, purporting to amend its charter, is inoperative and void: First, because the right to file such certificate of extension is given only to street surface railroads, and not to a steam road (Railroad Law, §§ 90, 91); second, that when the route or main line of a railroad is less than two blocks in length, the construction of additional tracks paralleling the main road, at the lateral distance of one, two, three, four, or five blocks from such main road, each nearly as extensive as the main road itself, neither of which can be said to be an appendage of the others nor

connected with each other, nor with the main road, cannot be "such additions, betterments and facilities as may be necessary or convenient for the better management, maintenance or operation" of the original railroad (Railroad Law, *supra*, § 7, as amended Laws of 1905, c. 727); third, that as the contract of December 27, 1909, contained a provision that it should not limit the present or future jurisdiction of the Public Service Commission, and was upon the further and express condition that the provisions of the Railroad Law pertaining thereto should be strictly complied with, in the absence of a certificate from the Public Service Commission the relator cannot be said to have secured any such right to operate its railroad in said streets as subjects it to a tax for a special franchise.

We believe none of these contentions to be well made. Whether relator's original certificate of incorporation has been properly amended, whether these additional tracks may be said to be betterments and facilities necessary or convenient for the management, maintenance, and operation of its original railroad, and whether the consent given by the city of New York is complete or imperfect until the Public Service Commission has also acted, we need not now determine.

[1-3] The terms "land," "real estate," and "real property," as used in the Tax Law, include, among other things—

"all surface, underground or elevated railroads, including the value of all franchises, rights or *permission* to construct, maintain or operate the same in, under, above, on or through, streets, highways or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures *permitted* or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground. * * * A franchise, right, authority or *permission* specified in this subdivision shall for the purpose of taxation be known as a 'special franchise.'" Tax Law, Consol. Laws, c. 60 (Laws of 1909, c. 62) § 2, subd. 3.

It seems to be the fact that the relator, when this tax was imposed, was maintaining and operating over these tracks upon these various streets, at least by *permission* of the municipal authorities having to do with the subject-matter, and that this is its only present authority for so doing. It asserts that it is not a trespasser. Then whence comes its privilege in these streets? If it did not affirmatively assent to the contention of the city authorities that the land within the lines of some of the streets had been dedicated to public use, and such dedication accepted, so that they became public streets, at least they did not assert or stand upon any right to use the same, independent of their consent. It proceeded to act as if it acquiesced in their contention, and for the purposes of this proceeding it must be deemed estopped from claiming that they are not public streets. People *ex rel.* N. Y. C. & H. R. R. Co. v. Priest, 206 N. Y. 274, 99 N. E. 547. If it did not admit that the authority attempted to be conferred by the resolutions of the board of aldermen of the former city of Brooklyn was valueless, it did not assert any right thereunder, or seek to review or control the action of the Board of Estimate and Apportionment in attempting to destroy any semblance of authority thereunder by re-

scinding the same. If, on the other hand, these resolutions were valid, these might constitute such necessary permission by the public authorities as would make such use of the streets a special franchise. If relator is exceeding its corporate powers in attempting to maintain and operate a railroad through these streets, that is a matter to be determined in an appropriate action, brought by the Attorney General in the name of the people of the state. *City of New York v. Bryan*, 196 N. Y. 158, 89 N. E. 467. So long as this color of authority exists, and the privileges attempted to be conferred thereby are not withdrawn, and so long as relator does not remove its tracks and cease to operate its railroad upon these streets, but insists upon so doing, it must be deemed to so operate solely by favor of the public authorities and by reason of their permission, and not by reason of any estate or interest in the land itself over which it is operating its road, or with any other right as its basis. *People ex rel. Met. St. Ry. Co. v. Tax Com'rs*, 174 N. Y. 417, 67 N. E. 69, 63 L. R. A. 884, 105 Am. St. Rep. 674. In so doing it avails itself of a privilege to do something in the public streets and places not permitted to citizens generally, and this not by virtue of any independent right or authority in the matter (*People ex rel. Long Island R. R. Co. v. Tax Com'rs*, 148 App. Div. 751, 133 N. Y. Supp. 348, affirmed on opinion below, 207 N. Y. 683, 101 N. E. 1117; *People ex rel. R. R. Co. v. Tax Com'rs*, 203 N. Y. 119, 96 N. E. 435; *People ex rel. N. Y. C. R. R. Co. v. Woodbury*, 203 N. Y. 167, 96 N. E. 431. In *People ex rel. Retsof Mining Co. v. Triest*, 75 App. Div. 131, 77 N. Y. Supp. 382, affirmed 175 N. Y. 511, 67 N. E. 1088), relator had no colorable right or permission to use the public streets from any governmental or political body having authority in proper cases to grant such right; and in *People ex rel. Abraham v. Perley*, 67 Misc. Rep. 471, 123 N. Y. Supp. 436, affirmed 143 App. Div. 915, 127 N. Y. Supp. 1137, and 202 N. Y. 620, 96 N. E. 1125, the privilege there conferred was conferred for private purposes, upon individuals, and not for any public use upon a public service corporation.

We think that the order made in this case was right, and that it should be affirmed, with \$10 costs and disbursements. All concur.

FITZSIMMONS v. NEW YORK STATE ATHLETIC COMMISSION et al.

(Supreme Court, Special Term, New York County. January 27, 1914.)

1. INJUNCTION (§ 75*)—OFFICIAL ACTS—DETERMINATION OF ATHLETIC COMMISSION.

The determination whether a prize fighter who applied to the State Athletic Commission for permission to engage in a boxing contest was capable of safely competing in such contest because of his age, physical condition, etc., was primarily for the State Athletic Commission rather than for a court of equity, in a suit to enjoin the enforcement of the order of the Commission prohibiting the contest.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 143, 144, 150; Dec. Dig. § 75.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PRIZE FIGHTING (§ 1*)—OFFENSES—"PRIZE FIGHTING."

The offense of prize fighting was not known at common law, though persons engaged in such contest were answerable for assault and battery, breach of the peace or riot; "prize fighting" being defined as the act of fighting for a prize or boxing in public for a reward or wager.

[Ed. Note.—For other cases, see Prize Fighting, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5614, 5615.]

3. CONSTITUTIONAL LAW (§ 274*)—DUE PROCESS OF LAW—DEPRIVATION OF LIBERTY.

Laws 1911, c. 779, creating the State Athletic Commission and authorizing it to regulate boxing contests, is a lawful exercise of the police power, so that a pugilist, prohibited by the Commission from taking part in a boxing contest, cannot claim that he was thereby deprived of his "liberty" without due process of law, if the Commission did not abuse its discretion in its ruling.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 726; Dec. Dig. § 274.*]

4. CONSTITUTIONAL LAW (§ 255*)—DUE PROCESS OF LAW—DEPRIVATION OF "LIBERTY."

The word "liberty" as used in the state and federal Constitutions means, in a negative sense, freedom from restraint, but in a positive sense, it involves the idea of freedom secured by the imposition of restraint, and it is in this positive sense that the state, in the exercise of its police powers, promotes the freedom of all by the imposition upon particular persons of restraints which are deemed necessary for the general welfare.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 746-761; Dec. Dig. § 255.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4126-4130; vol. 8, pp. 7705, 7706.]

5. CONSTITUTIONAL LAW (§ 120*)—IMPAIRMENT OF CONTRACT.

If an order of the State Athletic Commission, prohibiting a prize fighter from taking part in a boxing contest under the auspices of an athletic club, is a lawful exercise of the Commission's discretion, it cannot be claimed that the order is not valid on the ground that it impairs a contract by the pugilist with the athletic club for holding the contest; since if prize fighting is prohibited by law, an agreement to engage in a prize fight is illegal.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 279-285, 292; Dec. Dig. § 120.*]

6. THEATERS AND SHOWS (§ 1*)—REGULATION BY ATHLETIC COMMISSION—VALIDITY OF DECISION.

Laws 1911, c. 779, created the New York State Athletic Commission, and section 3 vested in it the sole discretion and control over all boxing exhibitions, and provided that no such exhibitions should be held except by its authority, and that it should issue licenses to associations under the auspices of which such contests are held, which shall be revocable upon its order. Pursuant to such authority, the Commission adopted rules providing that in all boxing exhibitions, contestants, etc., should be under its control, and that any association which violated such rule should forfeit its license. *Held*, that in absence of a showing that the Commission was actuated by improper motive, the court would not interfere with the exercise of its discretion in prohibiting a prize fighter who was 51 years of age from engaging in a boxing contest on the ground that, because of his age and physical condition, he was not qualified to take part in such contest; the order having been made upon the advice of a com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

petent physician that it would be dangerous to permit him to take part in the contest.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 1; Dec. Dig. § 1.*]

Action by Robert Fitzsimmons against the New York State Athletic Commission and others. On motion for injunction pendente lite. Motion denied.

Motion for an injunction pendente lite in an action in which plaintiff seeks to restrain defendants from enforcing an order addressed to the Atlantic Garden Athletic Club, prohibiting it from allowing plaintiff to engage in a boxing contest under its auspices.

George C. Norton, of New York City (Sam L. Cohen, of New York City, of counsel), for the motion.

Thomas Carmody, Atty. Gen. (William A. McQuaid, Deputy Atty. Gen., of counsel), opposed.

SEABURY, J. This is an application for an injunction pendente lite in an action in which the plaintiff seeks to have the defendants restrained from enforcing a certain alleged order addressed to the Atlantic Garden Athletic Club, prohibiting it from allowing the plaintiff to engage in a boxing contest under its auspices. The papers now before the court show that the plaintiff has engaged in the vocation of boxing for the greater part of his life; that he has engaged in about 370 ring contests, and has held the title "champion of the world" and is now "the light heavyweight champion boxer of the world." The affidavits set forth with great detail the many boxing contests or prize fights in which this plaintiff has engaged and a long record of his achievements in this sphere of activity. The defendants named in the complaint are the New York State Athletic Commission and the individual members who now compose that Commission. The plaintiff on December 24, 1911, entered into a contract with the Atlantic Garden Athletic Club, wherein he agreed, in consideration of 45 per cent. of the gross receipts received by the club from said contest, to box any person deemed suitable by the parties to the contract. The Atlantic Garden Athletic Club has been licensed by the defendant the New York State Athletic Commission to hold boxing exhibitions, and the said defendant has served upon its licensee the order against which this plaintiff complains. The order of the defendant is as follows:

"December 30, 1913. Atlantic Garden Athletic Club, 50-52 Bowery, New York City. The State Athletic Commission, after discussing the question of Bob Fitzsimmons appearing, in its various angles, have decided unanimously it is for the best interests of the boxing game that he should not be permitted to box in this state, and I have been instructed by the Commission to write and inform you of their decision prohibiting Bob Fitzsimmons from boxing in this state, and hereby advise you to that effect. Yours very truly, Charles J. Harvey, Secretary."

[1] The affidavits submitted on behalf of the defendants show that the plaintiff is 51 years of age, and that in the opinion of the members of the Commission and of the physician whom they consulted the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff is incapacitated, by reason of his age and physical condition, from competing in a boxing contest. These allegations as to the plaintiff's physical condition are controverted by the plaintiff, and by the evidence of physicians who have examined him. The issue of fact thus created is primarily for the determination of the State Athletic Commission rather than a court of equity. The plaintiff asserts that said order deprives him of his right to pursue a lawful calling without "due process of law," and deprives him of his "liberty" as that term is used in the fourteenth amendment to the federal Constitution; that it impairs the obligations of the plaintiff's contract with the Atlantic Garden Athletic Club, and that it is in excess of the jurisdiction conferred by law upon the New York State Athletic Commission. It is necessary to determine whether these claims have merit. The first contention urged that the order of the defendants deprives the plaintiff of his right to pursue a lawful calling without "due process of law," and deprives him of his "liberty" as that term is used in the fourteenth amendment to the federal Constitution, is the plea which is so frequently urged against every police regulation which either our state or federal government attempts to enforce.

[2] The specific offense of prize fighting was unknown to the common law (*Sullivan v. State*, 67 Miss. 346, 7 South. 275), although those engaged in such a contest were answerable for assault and battery, breach of the peace or riot, dependent upon the circumstances of the case. Prize fighting has been defined as the act of fighting for a prize, or boxing in public for a reward or wager. Several of the states have either prohibited prize fighting altogether, or strictly prescribed the conditions under which such contests can be conducted. In this state the Legislature, in creating the New York State Athletic Commission, has attempted to legalize boxing when conducted under the jurisdiction of the State Athletic Commission. Confronted with the question as to whether it should prohibit prize fighting or sparring altogether, or leave such contests unaffected by legislation, the lawmaking body of this state has adopted a middle course, and has legalized boxing when conducted under state control. Two main purposes have prompted such legislation: First, the desire to prevent as far as possible certain brutal and degrading features which have in the past sometimes attended such contests, and, second, to promote and protect such contests when conducted within the legitimate limits of a sport. To achieve those purposes the state has created the Athletic Commission and authorized that Commission to prescribe stringent rules governing the conditions under which such contests can be held. Section 1710 of the penal law (Consol. Laws, c. 40) of this state makes prize fighting and sparring a crime, but section 12 of the act, creating the defendants the New York State Athletic Commission, excepts from the operation of the penal law boxing contests conducted by clubs licensed by the defendants the New York State Athletic Commission. Reading these two statutes together, it is apparent that the vocation of prize fighting or sparring is an occupation subject to governmental control. While the prohibition contained in the penal law against such contests does undoubtedly impair the liberty of those who desire to

pursue such a vocation, it does so only in the sense that other provisions of the penal law restrain persons from the exercise of a liberty which is deemed harmful to the community.

[3] A glance at the penal law of the state will reveal a variety of occupations and activities in which the citizen is denied the right to exercise his liberty. No matter how comprehensive and elastic the provisions of the fourteenth amendment of the federal Constitution may have been held to be, these provisions do not protect those liberties which civilized states regard as properly subject to regulation by its penal law. Whenever the state declares that certain acts theretofore legal shall constitute a crime, it removes such act from the free field and brings it within the law. The effect of such a law is to restrict the liberty of those who desire to perform such acts, but if the law is within the police power of the state it cannot be held unconstitutional merely because it restricts the liberty of a citizen by making unlawful acts which were formerly regarded as lawful. It is not long ago that the sale of opium and cocaine were uncontrolled by law, or that lotteries were permitted and prize fighting and pugilism were not prohibited. These are examples of acts which, while formerly deemed lawful, are now prohibited by the state in the exercise of its police power.

[4] "Liberty" is a word with a double meaning. In a negative sense it means freedom from restraint. In a positive sense it secures freedom by the imposition of restraint. It is in this positive sense that the state, in the exercise of its police and general welfare powers, promotes the freedom of all by the imposition of such restraints upon some as are deemed necessary to secure the general welfare. In view of the character of the occupation in which the plaintiff is engaged, he has the right to pursue it only in so far as the state authorizes him so to do. The limitations imposed by the laws of this state upon the pursuit of this particular vocation renders it lawful only when pursued under the control and jurisdiction of the State Athletic Commission. It will be necessary to inquire as to the extent of the jurisdiction of the State Athletic Commission, in order to determine whether the order against which the plaintiff complains was within its lawful authority.

[5] Before doing so it is necessary to make brief reference to the contention of the plaintiff that the order of the Athletic Commission impairs the obligations of the plaintiff's contract with the Atlantic Garden Athletic Club. In reference to this contention, it is only necessary to point out that if the order is a valid order, and lawfully prohibits the licensee from allowing the plaintiff to engage in a boxing contest under its auspices, the fact that such order makes impossible the carrying out of a contract which the plaintiff has already made is of no legal significance. Where prize fighting is prohibited by law an agreement to engage in a prize fight is a conspiracy to engage in a crime, and as such illegal and void. *Seville v. State*, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516.

[6] It is necessary to determine the extent of the authority which the defendant Athletic Commission possesses under the law creating it,

in order to ascertain whether the order against which the plaintiff complains is in excess of its jurisdiction. The New York State Athletic Commission was created by chapter 779 of the Laws of 1911. That act defines the scope of its authority. Section 3 of that act vests in the Commission the sole direction, management, control of and jurisdiction over all boxing and sparring matches and exhibitions held within the state, and provides that no boxing or sparring match or exhibition shall be held within the state except pursuant to its authority. It also provides that the State Athletic Commission shall issue licenses to clubs, corporations, or associations under whose auspices such contests are held, and that every license shall be subject to such rules and regulations as the Commission may prescribe. Under this act the Commission has general authority over all boxing and sparring matches and exhibitions. To it is committed "the sole direction, management and control of and jurisdiction over" such contests. It is empowered to make such rules for the administration of its duties not inconsistent with the statute as it may deem expedient. Every license which it issues is subject to such rules and regulations as it prescribes. The licenses issued, pursuant to its authority, are by their terms revocable upon the order of the Commission. Pursuant to this ample authority the State Athletic Commission has adopted certain rules and regulations governing such contests. Rule 23 in part 1 of such regulations provides that—

"In all boxing or sparring matches or exhibitions, *contestants*, referees, time-keepers, seconds and examining physicians shall at all times be under the control and direction of the Commission."

Rule 26 in part 2 of such regulations provides that any club, corporation or association which shall violate rule 23 of part 1 of such regulation shall forfeit its license. The provisions of the statute referred to above, taken in connection with the legislative purpose in creating the New York State Athletic Commission, leave no doubt in my mind that the Commission was designed to impose such restrictions upon boxing and sparring contests as would promote its development as a sport, while at the same time this control should be so exercised that certain brutal or dangerous features which have sometimes attended such contests should, as far as possible, be done away with. In the case now before the court the order of the defendant State Athletic Commission, in prohibiting its licensee, the Atlantic Garden Athletic Club, from allowing the plaintiff to engage in such a contest cannot be said to be arbitrary or capricious. That order is based upon the judgment of the members of the Commission after having taken the advice of a competent physician, that to allow the plaintiff to engage in such a contest would be to run the risk of serious injury to him. The risk to the plaintiff in engaging in such a contest is not a consideration purely personal to him. In the absence of proof that the Commission were actuated by unworthy motives, the court should not interfere with the exercise of the discretion which the Legislature has directed it to use. The members of the Commission have presumably been selected because of their special knowledge as to matters pertaining to such contests, and I know of no reason why the uninstructed judgment of the

court upon this subject should be deemed superior to the judgment of the Commission.

I conclude that the Commission had jurisdiction to make the order against which the plaintiff complains, and that, as there is no evidence that the Commission in making such an order were actuated by unworthy motives, or that they have acted arbitrarily or capriciously, there is no ground for interference by a court of equity with the operation of the order of the Commission.

Motion denied.

(83 Misc. Rep. 495)

PEOPLE ex rel. JENNY v. BROWN, County Treasurer.

(Supreme Court, Special Term, Monroe County. January, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 86*)—ESTATE OF DECEASED INFANT—PROCEEDS OF SALE—DISPOSITION—NECESSITY OF COURT ORDER.

Where, in a proceeding in the County Court for the sale of an infant's real estate, the proceeds are deposited with the county treasurer, an order of such court is a prerequisite to the payment by the county treasurer of any portion of the proceeds to the infant's administratrix, though the treasurer admits the infant's death; such order being required by the express terms of Code Civ. Proc. § 751, and section 2359, relative to the proceeds of the sale of an infant's realty, not being inconsistent therewith.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 359-383; Dec. Dig. § 86.*]

2. MANDAMUS (§ 10*)—ESTATE OF DECEASED INFANT—PROCEEDS OF SALE—DISPOSITION.

Where an infant dies after the sale of his real estate and deposit of the proceeds thereof with the county treasurer, and there has been no adjudication by the surrogate of the validity of certain alleged debts in any proceeding in which the infant's heirs were cited or represented, his administratrix's application for a peremptory writ of mandamus directing the county treasurer to pay over such proceeds, with interest, less fees, pursuant to an order made by the surrogate under Code Civ. Proc. § 2359, will be denied.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37; Dec. Dig. § 10.*]

Application for mandamus by the People, on the relation of Mary Jenny, as administratrix, etc., against Charles J. Brown, as County Treasurer, etc. Denied.

Bernhard & Truesdale, of Rochester, for relator.

George Y. Webster, of Rochester, and Henry S. Kahn, of Cohoes for respondent.

SUTHERLAND, J. The relator asks for a peremptory writ of mandamus directing the county treasurer of Monroe county to pay over to the relator, as administratrix of the estate of a deceased infant, the sum of \$2,920.49, with interest, less his fees, in conformity with the directions of an order made by the surrogate of Monroe county, under section 2359 of the Code of Civil Procedure. The treasurer has declined to comply with the surrogate's order, upon the ground that said money was paid into the County Court of Monroe county as the pro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ceeds of the sale of real estate belonging to the infant in a special proceeding taken for that purpose in the County Court, which has jurisdiction over the fund and has made no order for the payment of said money or any part thereof out of court, as is required to permit such payment by section 751 of the Code. The infant died after the sale and deposit of the money, before attaining his majority, and the relator is administratrix of his estate. Certain debts of the infant are said to be unpaid, and the object of the surrogate's order is to equip the administratrix with the means of paying the debts. The papers in the Surrogate's Court state that the debts amount to about \$998, but it does not appear that there has been any adjudication by the surrogate as to the validity of the alleged debts in any proceeding in which the heirs of the infant were cited or represented.

[1] The treasurer has been advised by his counsel and by the state comptroller that an order is necessary from the County Court permitting the same to be done, before the treasurer can properly pay over the money or any part thereof to the administratrix. On the other hand, the relator insists that upon the death of the infant, his heirs, under the statute of descent, became the owners of said moneys subject to claims thereon for debts and funeral expenses of the intestate, which are only ascertainable in the Surrogate's Court, and that the language of section 2359 is unqualified, giving the surrogate absolute control of the funds at the present juncture, and that no application to the County Court is necessary.

Section 2359, after declaring that the proceeds of the sale of infant's real estate disposed of in the special proceeding designed for that purpose in title 7 of chapter 17 of the Code shall be deemed real estate until the infant arrives at full age, continues:

*"If the infant should die before arriving at full age, * * * not leaving sufficient personal property to pay funeral expenses and expenses that may be necessary * * * then * * * the proceeds are to be deemed personal property so far as may be necessary to pay the funeral and other necessary expenses. The proceeds are to be paid upon order of the surrogate's court or court having jurisdiction of the estate of the deceased, to an administrator appointed by the surrogate to administer upon decedent's estate, and after paying all funeral expenses and expenses of administration and any indebtedness, the remainder, if any there be, shall, upon the order of the surrogate, be paid into the hands of the trustee who held the same, to be distributed as the law directs."*

Section 2359, in so far as it directs the proceeds to be paid to the administrator upon order of the Surrogate's Court, must be read in connection with section 751 of the Code of Civil Procedure, which says:

"No money, security or other property which shall have been placed in the custody of the court shall be surrendered without the production of a properly certified copy of an order of the court, in whose custody said money, security or other property shall have been placed, duly made and entered, directing such disposition. Each order must be countersigned by the presiding judge by whose direction it is made."

This money was placed in the custody of the County Court when the sale took place, and it seems to me clear that an order of the County Court is prerequisite to the payment by the county treasurer of any portion of this fund to the administratrix. Systematic and orderly pro-

cedure, in the nature of things, would seem to require it. Section 751 of the Code, in express terms, requires it, and section 2359 is not inconsistent therewith. Such construction will tend to keep the records of court funds complete and consistent.

[2] This infant was the ward of the County Court with respect to this very fund. See section 2360. An affirmative duty was placed by law upon that court to safeguard that fund until the infant's majority; and while the fact of the death of this particular infant is admitted by the county treasurer for the purposes of this case, nevertheless it would seem that the County Court is bound by law to be satisfied of the death of its ward in every case before it releases the custody of such a fund. The admission of the fact by the treasurer does not dispense with the necessity of a decision by the County Court of that essential fact. No other court can discharge that duty for the County Court. And the investigation of that fact might prove to be of vital importance in instances where the death of the infant is a matter of inference rather than direct proof. In a doubtful case, the County Court might refuse to find that the infant is dead, although the surrogate had issued letters upon his estate on an ex parte application of some one who would be entitled to be appointed administrator if the infant were dead. The issuing of letters of administration by the surrogate is not conclusive upon the County Court as to the fact of death, and the surrogate is without jurisdiction in the premises unless the infant is actually dead. *Matter of Killan*, 172 N. Y. 547, 65 N. E. 561, 63 L. R. A. 95; *Marks v. Emigrant Industrial Sav. Bank*, 122 App. Div. 661-664, 107 N. Y. Supp. 491; *Williams v. Post*, 158 App. Div. 818, 143 N. Y. Supp. 1027.

Therefore the application for a peremptory mandamus must be denied, and it will not be necessary to decide now the other question which was suggested on the argument, whether the County Court, in case it is satisfied, on an application duly made, that its infant ward is dead, can overrule the judgment of the surrogate as to the amount of money which should be turned over to the administrator. No costs are allowed.

Application denied.

(84 Misc. Rep. 437)

A. H. IVINS CO. v. MARTIN HOLDING CO.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

BROKERS (§ 64*)—RIGHT TO COMMISSIONS—CONTRACT.

Purchase of land being incomplete because the purchaser's assignee of his contract was unwilling and unable to complete it, the broker, whose contract with the seller made closing a condition precedent to right to a commission, unless the seller defaulted, cannot recover a commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 67, 97; Dec. Dig. § 64.*]

Appeal from City Court of New York, Trial Term.

Action by the A. H. Ivins Company against the Martin Holding Company. From a judgment on a verdict for plaintiff, and from an order denying a motion to vacate the judgment, defendant appeals. Reversed and dismissed.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Sproull, Harmer & Sproull, of New York City (Gormly J. Sproull and Hugh M. Harmer, both of New York City, of counsel), for appellant.

Black, Varian, Bigelow & Somers, of New York City (Warren Bigelow, of New York City, of counsel), for respondent.

GUY, J. This action was brought to recover broker's commissions for the sale of real property. After the recovery of the verdict, plaintiff obtained an order of the Supreme Court transferring the cause to that court. He then entered judgment in the Supreme Court upon the verdict for \$2,756.14, which judgment was vacated on the defendant's motion. Plaintiff then moved to vacate the order of removal and remand the action to the City Court, which motion was granted. Plaintiff thereafter entered judgment upon the verdict in the City Court for \$2,000 damages, besides costs. So long as the order of the Supreme Court vacating the order of removal and remanding the cause to the City Court stands, the City Court had jurisdiction to entertain the cause and enter judgment for whoever was entitled thereto within the pecuniary jurisdiction of the City Court.

In January, 1912, a contract of sale to one Scelsa was signed by defendant, whereby part of the purchase price was the taking of the premises subject to a first mortgage of \$190,000, which became due July 1, 1912, and to a second mortgage for \$25,000, which the contract stipulated became due on October 27, 1913. The contract provided that the seller agreed that plaintiff brought about the sale, and plaintiff signed the contract as evidence of its agreement that the 1 per cent. commission was to be paid when the title closed and not otherwise, unless the title failed to close through the default of the seller. On January 25, 1912, Scelsa signed the contract to a dummy. The second mortgage would have become due upon the calling of the prior mort-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gage, if that mortgage had been called between July 11 and October 27, 1912; but this was cured by the tender of an extension of the prior mortgage to October 27, 1912. To avoid litigation with an irresponsible dummy assignee of the contract, the deposit was returned by the seller to the assignee of the contract, who acknowledged that his objections were all frivolous and that he refused to close because he concluded he did not have an advantageous bargain. Thus the sale was lost.

The plaintiff has failed to make out a cause of action based on the provisions of the contract of sale signed by him. The contract made closing a condition precedent unless the seller defaulted. There is no evidence of default on the part of the seller; but it is shown that the assignee of the contract was both unable and unwilling to complete his purchase.

The judgment is reversed, with costs, and the complaint dismissed, with costs. Appeal from order dismissed, without costs. All concur.

(160 App. Div. 778)

MAUNE v. UNITY PRESS.

(Supreme Court, Appellate Division, Second Department. February 27, 1914.)

MASTER AND SERVANT (§ 30*)—EMPLOYMENT CONTRACT—CONSTRUCTION.

Where a person was employed as general manager of a company pursuant to a resolution specifying that the employment should be for 10 years, and that in case either party should "neglect or fail to faithfully and truthfully perform * * * it will cease to be binding upon either party hereto," the clause quoted was merely declaratory of the right of the party not in default, as against the one defaulting, and did not give the employer the right to arbitrarily discharge the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 30-36; Dec. Dig. § 30.*]

Appeal from Special Term, Kings County.

Action by Oswald Maune against the Unity Press. From an order directing judgment on the pleadings and dismissing amended complaint, and from the judgment thereon, plaintiff appeals. Reversed.

Argued before JENKS, P. J., and THOMAS, RICH, STAPLETON, and PUTNAM, JJ.

Cromwell G. Macy, of New York City, for appellant.

Charles K. Allen, of New York City, for respondent.

STAPLETON, J. The appeal is from an order directing a judgment on the pleadings in favor of the defendant, dismissing the plaintiff's amended complaint and the judgment entered thereon. The pleadings are an amended complaint and an answer. In the state of the pleadings the sufficiency of the amended complaint is the sole subject of investigation.

The action is to recover damages from an employer for the wrongful discharge of an employé, who asserts he has a contract for a fixed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

term, with specified compensation. In an action brought to recover for wages due the employé under that contract at the time of his discharge, the existence of a valid contract of employment was judicially recognized, its provisions considered, and its effect determined so far as necessary for the disposition of that case by this court. *Maune v. Unity Press*, 139 App. Div. 740, 124 N. Y. Supp. 504; s. c., 143 App. Div. 94, 127 N. Y. Supp. 1002.

There is in the complaint an allegation that the defendant, by its proper officers, employed the plaintiff pursuant to the following written resolution:

"On motion duly adopted Oswald Maune was appointed general manager of Unity Press and a contract authorized to be entered into between Oswald Maune and Unity Press which should contain the following conditions. That the said Oswald Maune shall agree to enter the services of Unity Press as general manager and promise faithfully, honestly and diligently to give and devote his time and labor exclusively to Unity Press for the space of ten years from April 19th, 1905. In consideration whereof the said Unity Press shall agree to allow and pay said Oswald Maune at the rate of one hundred (\$100) dollars per week and payable as follows, to wit: Not more than fifty (\$50.00) dollars per week in cash; the balance remaining due and unpaid being the difference between the whole amount paid in cash on account of wages and the total amount of wages at one hundred (\$100) dollars per week for the number of weeks that he shall have faithfully and truthfully performed the duties of manager, shall be paid by issuing to him in his name as many shares of the common stock of the company as the sum so due and unpaid will purchase at one hundred (\$100) dollars per share. The number of shares so issued shall at no time exceed one hundred; that if Oswald Maune or Unity Press refuse, neglect or fail to faithfully and truthfully perform any condition or conditions of this agreement that it shall cease to be binding upon either party hereto."

The complaint alleges faithful and full performance on plaintiff's part up to the time of discharge, and discharge without cause before the expiration of the term of employment.

The dismissal of plaintiff's complaint is predicated upon the assumption that a provision in the resolution had the effect of making the employment terminable at the will of either party, and that therefore no breach is alleged, and no cause of action is stated. These are the words:

"That if Oswald Maune or Unity Press refuse, neglect or fail to faithfully and truthfully perform any condition or conditions of this agreement that it shall cease to be binding upon either party hereto."

An indulgence in the assumption was doubtless encouraged by the following remark by the writer of the opinion in *Maune v. Unity Press*, 143 App. Div. 94, 98, 127 N. Y. Supp. 1002, 1005:

"The plaintiff in this case, relying upon the promise of the defendant to pay him \$100 per week, entered upon the discharge of his duties and performed them in good faith, so far as the record shows, until he was discharged from the employment, as he might be under the terms of that agreement without liability probably, for it makes default in either party a condition on which the contract may be avoided."

The statement was clearly unnecessary to a decision of that case, and must be considered as obiter dictum.

The literal meaning of the clause quoted from the complaint, considered apart from the entire resolution, would probably bear the interpretation placed upon it by the learned court at Special Term. We are, however, of the opinion that a less harsh and more reasonable construction of that clause, and one more likely to give effect to the intent of the parties, is to read it rather as declaratory of the right of the party not in default as against the one defaulting than destructive of the fixed term which the parties by precise words exactly prescribed.

It is unlikely that parties should, in words clearly expressive of a design to fix a long term of employment and service, agree in the same instrument to make it terminable at the will of either. Such a design should not be frustrated by giving a strict and rigid meaning to general words or expressions without regard to the context, the purposes expressed, and the inherent nature of the contract, particularly at the instance of the author of the instrument responsible for language wholly its own. *Gillet v. Bank of America*, 160 N. Y. 549, 55 N. E. 292. I advise a reversal.

Judgment and order reversed, with costs, and motion for judgment on the pleadings denied, with \$10 costs. All concur.

STERNAD V. WILLIAM MESSER CO.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. MASTER AND SERVANT (§ 332*)—INJURIES TO THIRD PERSONS—QUESTIONS FOR JURY.

Evidence that defendant was the contractor in charge of all the plumbing work in a building in course of construction and that a workman, who sawed off a piece of wood and permitted it to fall and strike plaintiff, was seen doing work in the nature of plumbing work upon such building, made a question for the jury as to whether he was defendant's employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.*]

2. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action for injuries to an infant struck while playing in the yard in the rear of the tenement house in which she lived by a piece of wood which fell from an adjoining building, where there was evidence that the house opened into the yard, that the children residing therein were accustomed to play there, and no suggestion that the yard was owned by defendant or the person who employed him, it was immaterial who owned it, and a dismissal because plaintiff had not proved the title to the yard, or shown that she was not a trespasser, was erroneous.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. § 122.*]

3. MASTER AND SERVANT (§ 332*)—INJURIES TO THIRD PERSON—QUESTIONS FOR JURY.

Whether it was negligence for a workman on a building to drop a piece of wood into an adjoining yard where children were at play was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
146 N.Y.S.—9

Appeal from City Court of New York, Trial Term.

Action by Sophia Strnad by her guardian ad litem, Anna Strnad, against the William Messer Company. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial ordered.

See, also, 142 N. Y. Supp. 314.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Otto H. Droege, of New York City, for appellant.

James B. Henney, of New York City (Floyd K. Diefendorf, of New York City, of counsel), for respondent.

SEABURY, J. This cause has been three times tried. The plaintiff, an infant, while playing in the yard in the rear of the house where she lived, was struck by a piece of wood which fell from an adjoining building. Several contractors were engaged with their workmen in constructing the adjoining building at the time of the accident. The judgment recovered in favor of the plaintiff upon the first trial was reversed because the charge of the court withdrew from the jury the issue of contributory negligence, and instructed the jury that the fact that the defendant was *charged* with negligence required the defendant to explain the occurrence. 137 N. Y. Supp. 914. Upon the second trial the court dismissed the complaint, and upon appeal the judgment was reversed and a new trial ordered. 142 N. Y. Supp. 314. Upon the last trial the complaint was again dismissed, and from the judgment entered upon such dismissal the plaintiff appeals to this court.

The case presented three issues of fact: First, whether the piece of wood was dropped by an employé of the defendant; second, if so, whether such act on the part of the defendant's employé constituted negligence; and, third, whether the plaintiff was guilty of contributory negligence. These questions were obviously for the jury, and that fact was plainly intimated in the two opinions of this court rendered upon the former appeals.

[1] It appeared from the evidence that the defendant was the contractor in charge of all the plumbing work upon the building then being constructed. A workman on the top floor of that building rested a piece of wood upon the window sill, and sawed off a part of it, and the piece sawed off fell and struck the plaintiff. It also appeared in evidence that the workman who sawed off the piece of wood that fell and struck the plaintiff was seen doing work in the nature of plumbing work upon the building. This evidence, while not strong, was sufficient to carry the issue to the jury whether the workman who allowed the wood to fall was an employé of the defendant.

[2, 3] The learned court below dismissed the complaint upon the theory that the plaintiff failed to prove whether or not she was a trespasser in the yard. There was no evidence in the case to show that the plaintiff was a trespasser, and the assumption was unjustified. The plaintiff was a dweller in a tenement house known as No. 1442 Avenue A. She was playing with another child in the yard in the rear of this tenement. In dismissing the complaint, the court said:

"There is no evidence before the court as to who was in possession or control of the property between the tenement house, where the infant plaintiff resided, and the building in course of construction. * * * The burden is upon the plaintiff to satisfy the court, by evidence, that the plaintiff was not a trespasser, and that the plaintiff was upon the property where she had a right to be. There is no evidence upon that point, except the mere statement that she was 'in her own yard' which, under the circumstances as developed in this case, is a mere conclusion of law. It was easily susceptible of proof as to who had title to the property upon which this accident occurred, and, upon the failure of counsel to produce that proof, the court is unable to determine whether the plaintiff was where she had a right to be, or whether she was a mere licensee, or trespasser; if she was a mere licensee, or trespasser, there is no evidence here of willful or wanton negligence."

The evidence established that the yard in which the plaintiff was injured was adjacent to the tenement house, and that the house opened into the yard, and that the children who resided in the house were accustomed to play in the yard. It was entirely immaterial who owned the yard. There is no suggestion that it was owned by the person who employed the defendant. Children were playing in the yard at the time of the accident, and it was for the jury to determine, under these circumstances, whether it was negligent for the defendant's workman to drop the piece of wood which struck the plaintiff. The plaintiff was under no obligation to prove the title to the yard. No one claims, and it was not suggested by the proof, that the plaintiff trespassed upon the property of the defendant. The whole subject was irrelevant to the issues, and the assumption that the plaintiff *may have been* a trespasser was gratuitous.

It seems to us that the issues involved in this case are simple; and, in view of the necessity for ordering a new trial, we have discussed the case thus extensively in the hope that these issues enumerated above may be submitted to a jury, and a jury be permitted to pass upon these questions of fact.

Judgment reversed, and new trial ordered, with costs to the appellant to abide the event. All concur.

(84 Misc. Rep. 412)

MILLER v. SAMSON.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

COURTS (§ 189*)—MUNICIPAL COURTS—DEFAULT—SETTING ASIDE.

A judgment by default in the Municipal Court of the City of New York will not be opened where the only excuse offered was that defendant's attorney handed plaintiff an affidavit to present when the cause should be called, which showed that he was in the City Magistrates Court for a client upon whom summons had been served, and, though plaintiff said that he would object to a postponement, he presented the affidavit and stated the circumstances under which he received it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 458; Dec. Dig. § 189.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Isaac L. Miller against Warren L. Samson. From a judgment for plaintiff and an order refusing to open his default and vacate the judgment, defendant appeals. Affirmed.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Osmond K. Fraenkel, of New York City, for appellant.

Miller & Hartcorn, of New York City (Isaac L. Miller, of New York City, of counsel), for respondent.

SEABURY, J. This is an action to recover one month's rent. The answer pleaded an alleged constructive eviction and a counterclaim, although the facts upon which the claim of eviction are predicated are not set forth. The trial was several times adjourned until December 10, 1913. On that day judgment by default was entered against the defendant. The defendant moved to open his alleged default, and this motion was denied. From the order denying his motion, the defendant appeals to this court.

The only pretense offered in lieu of an excuse is that defendant's attorney, knowing that the case was upon the Municipal Court calendar, desired to appear in the City Magistrates Court on behalf of a client upon whom a summons had been served. When defendant's attorney decided not to appear, he handed the plaintiff an affidavit showing that he was going to the Magistrates Court, and asked the plaintiff to present the affidavit to the court when the cause was called. The plaintiff told the defendant's attorney that he would present the affidavit, if desired, but that he would strenuously oppose an adjournment of the case because the case had been upon the calendar several times, and several of his witnesses were in court having come a long distance to be present. The defendant's attorney went to the Magistrates Court, and paid no further attention to the case pending in the Municipal Court. When the case was called, the plaintiff presented the affidavit of the defendant's attorney to the court, and stated the circumstances under which he had received it. The court ordered that an inquest be taken.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Instead of excusing his own negligence, the attorney for the defendant impugns the action of the plaintiff. It seems to us that the plaintiff acted with entire fairness. He did more than he was obligated to do, and all that he told the defendant's attorney he would do. No meritorious excuse for the default was offered in the court below, and the defendant's motion was properly denied.

In *Herbert v. Lorenzen*, 113 App. Div. 802, 99 N. Y. Supp. 937, Mr. Justice Gaynor said:

"The practice of opening defaults as a matter of course should not be continued. Such practice has lowered respect for and injured the administration of justice, and is also a wrong to diligent attorneys and litigants who conform to the rules of court, and are entitled to the protection and favor of the court against the opposite kind of attorneys and litigants. * * * They are not defaults, but abandonments."

This language is applicable to the facts now before the court and enunciates the rule in reference to these cases which, in the absence of meritorious excuse, this court will follow.

Order appealed from affirmed, with costs. All concur.

(160 App. Div. 819)

NEWCOMB v. LA ROE.

(Supreme Court, Appellate Division, First Department. February 20, 1914.)

1. WILLS (§ 703*)—ACTION TO CONSTRUCT WILL—EVIDENCE.

In an action for the construction of a will as to the effect of a legacy and an annuity therein upon defendant's claim for services to testator as a nurse during the last years of his life, evidence *held* to show that, if there were no contract between testator and defendant to the effect that the legacy should be in lieu of her wages, defendant had been paid in full.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 703.*]

2. WILLS (§ 703*)—ACTION TO CONSTRUCT WILLS—EVIDENCE.

In an action by an executor for the construction of a will as to the effect of a legacy and an annuity therein upon defendant's claim for services to testator as a nurse during the last years of his life, evidence *held* to show that it was the understanding between testator and the defendant that the legacy was in lieu of any claim by defendant for wages.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 703.*]

3. WILLS (§ 718*)—ELECTION—OPERATION AND EFFECT.

Where a legacy and an annuity were in lieu of any claim of the legatee for wages for services rendered the testator, the acceptance by the legatee of part of the legacy was a waiver of all her claim for services.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1717-1721; Dec. Dig. § 718.*]

4. PAYMENT (§ 63*)—PLEADING—ADMISSIBILITY OF EVIDENCE.

A plea of payment renders admissible evidence of payment, in any form, as by any agreement between the parties, which would operate as an extinguishment of the debt, such as a provision by will which has been accepted.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 152-161; Dec. Dig. § 63.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, New York County.

Action by Warren P. Newcomb, as executor of J. Victor Newcomb, deceased, against Jeanne La-Roe. From a judgment for defendant, plaintiff appeals. Modified and affirmed.

See, also, 155 App. Div. 894, 139 N. Y. Supp. 1135.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

D. Cady Herrick, of Albany (George Bell and Benjamin Patterson, both of New York City, on the brief), for appellant.

Nelson L. Robinson, of New York City, for respondent.

LAUGHLIN, J. This is an action brought by the executor of J. Victor Newcomb, deceased, for the construction of the will of the latter with respect to the effect, on a claim for services made by the defendant against the estate, of a legacy to her and an annuity for her in the will, to have the amount of her claim for services adjudicated in the event that it shall be decided that the acceptance of the legacy and annuity does not constitute a payment of her claim for services.

The testator died November 2, 1911. On the 10th day of June, 1912, the defendant presented to the executor a duly verified claim against the estate for professional services as nurse to the testator from April 27, 1907, to April 29, 1908, at \$30 per week, and from the last-mentioned date to November 2, 1911, as nurse and housekeeper at \$40 per week, aggregating \$8,880, less a credit of \$1,300.47 for "payments made on account." By a formal notice to the attorney for the defendant on the 10th day of July, 1912, the executor offered to allow her claim if she would release all claims as legatee and annuitant under the will, and in the event of her refusal so to do he rejected it. The action was commenced on August 14, 1912.

The testator had a wife and son, but they did not live with him. He maintained a separate household with several servants where he resided alone. On April 26, 1907, when he was about 60 years of age, he met with an accident by which one of his arms was broken, and on the same day the defendant, who was a professional nurse, was summoned to care for him, and she remained a member of his household until he died, administering to him at first as a nurse and later on in the capacity of housekeeper and nurse. The will was executed on June 4, 1910, and paragraph fourth thereof is as follows:

"Should Jeanne La Roe, registered nurse, remain in my employ as professional nurse, as she has done since my severe accident and illness in 1907, I give and bequeath to her four thousand (\$4,000) dollars, and a net income of fourteen hundred (\$1,400) dollars, per annum, to be paid by my executors in quarterly installments, and the principal of the fund necessary to produce such net income, shall be a first lien and mortgage upon my property. My relatives and close friends, herein mentioned and otherwise, know her fidelity and capacity in acting also, as housekeeper for me, thus enabling me to receive and entertain them and others and promoting thereby, my welfare, comfort and contentment, for I would not otherwise have been able to look after serv-

ants and the running of an establishment without a capable and honest woman, for no man can perform such duties so well as a woman can, in my estimation. This bequest attaches only, however, in case of her caring for me as a professional nurse, in my old age, until my death. And in order to carry out said bequest, I give to my executors herein nominated, or those who qualify, in trust in money derived from my estate, an amount which, in the opinion and discretion of my executors, will produce, when safely invested by them, an income equal to fourteen hundred (\$1,400) dollars, net per annum, to be paid by said executors quarterly to said Jeanne La Roe for her natural life for her sole use, contingent upon her remaining with, and caring for me during my life, as above mentioned, and my executors shall act for her as trustees until they shall select a trust company to succeed them as trustee, thereby relieving them as trustee, and said trust company shall pay to her said sum of fourteen (\$1,400) dollars, per annum, in quarterly payments, during her life, and upon her death, the principal of said fund shall revert to my residuary estate."

The defendant claimed both the legacy and the annuity and has received, accepted, and retained part of each. By a second amended answer, her last pleading, the defendant admitted payments made to her by the testator by checks and cash on account of wages aggregating \$51.13 in the year 1907, \$869.64 in 1908, \$280.75 in 1909, \$576.38 in 1910, and \$234.88 in 1911, aggregating in all the sum of \$2,012.78, which is over \$700 more than she credited in her claim. She likewise admitted, by the same pleading, that she received from him during the entire period the sum of \$75.50 for household expenses, and gifts in cash and checks aggregating \$289.90, and that he paid out on her account \$1,265.06 and gave her one check for \$20, for a bond coupon and three checks aggregating \$30, which she claims she cashed and gave the proceeds to him. She alleges in the same pleading that she advanced to the testator for household expenses various sums of money aggregating \$668.28, and in checks and cash for other purposes \$680, which includes the \$30, proceeds of checks cashed for him, and that she delivered to him two bond coupons aggregating \$45, which includes the one for which she received his check for \$20.

There is no evidence of an express agreement between the testator and defendant with respect to her wages; but another nurse, who was called first to attend the testator and remained for a time as day nurse after defendant came and was on duty nights, testified that defendant told her the testator agreed to pay her \$28 per week.

The trial court decided that the legacy and annuity given to the defendant by the will were not intended as a payment of any claim she might have against his estate for services, and decreed that she is entitled to the annuity as provided in the will, and awarded judgment in her favor for the balance unpaid on the legacy, and for the balance found by the court to be owing to her, on the theory that her services were worth \$30 per week, which plaintiff conceded to be the reasonable value thereof, for the entire period. The total amount earned by her during that period on the basis of \$30 per week would be \$7,054.28. There was no express evidence, other than the concession made in her answer, with respect to the amount she was

paid to apply on her services, except that two of the checks introduced in evidence by the plaintiff drawn by the testator to the order of the defendant, aggregating \$135, showed on the face thereof that they were on account of salary. In arriving at the balance owing to the defendant for services, the court did not take the amount which she concedes was paid to apply on her services, but deducted \$2,010.06, which is \$2.72 less than the amount so conceded. That amount was arrived at by accepting, without other proof, her answer wherein she purports to set forth the state of the account between herself and the testator, charging herself with moneys received and crediting herself with moneys which she claims to have disbursed for his account. It was not claimed in behalf of the plaintiff on the trial that defendant did not disburse the amounts as claimed by her; but it was there contended, and is contended here, that it is to be inferred that she received from the testator the amounts she disbursed over and above the amounts that she admits she received. The record indicates that during the trial the court intimates that, if it became necessary to consider whether the defendant was entitled to charge her disbursements, all questions with respect thereto would be determined on a reference after an interlocutory judgment. The court, however, disposed of the case without a reference or an interlocutory judgment.

[1, 2] The learned counsel for the plaintiff contends therefore that his client has been prejudiced by being deprived of an opportunity to offer evidence bearing on the amount of money received by the defendant from the testator. In the view we take of the case, we do not deem it necessary to decide that question. Aside from the provisions made for her in the will, it is inconceivable on the evidence that defendant would have allowed her claim against the testator to accumulate to the extent claimed, or that he would have permitted it. It is not probable that he would make gifts to her from time to time by checks and cash if he was indebted to her for wages. He left an estate valued at about \$70,000. During the entire period in question his monthly balance in a single bank in the city of New York in which he had a deposit account subject to checks ranged between \$4,709.31 and \$23,091.66, and on October 30, 1911, three days before his death, was \$11,142.08, and on November 29, 1911, \$10,642.08; and at times he had additional funds on deposit in other banks. He appears to have been accustomed to pay his bills promptly, and he paid the wages of all other servants regularly, and the only claims against his estate, other than that of the plaintiff, were for wages of servants during the month in which he died. The defendant within a year after she entered the employ of the testator became his housekeeper and presided at his table and gradually attained a position of trust and confidence with him, and he depended upon her not only for the running of his household but for looking after and paying his accounts connected therewith. The disbursements she made for him were mainly by his checks, but some of them were by cash received from him, and the evidence shows that he always carried money with him. He not only depended upon her, as stated, but he became very much at-

tached to her, and he wanted her near him, or within call all the time, or, as stated by a visitor at the house, he was timid and wanted her "within call night and day," and when he was not accompanied by relatives or friends she was his companion driving. Although she entered his employ as a servant, their relations soon became and continued to the end more like those of a fond father and devoted daughter.

The defendant concedes that some of the payments made to her for wages were by cash. It is highly probable, if there was not an understanding between them with respect to compensating her by his will, that he made other payments of the amount due her from time to time in the same manner. She would have the court believe that during the first 15 months of her employment, during which time she would be entitled to receive, on the basis of \$30 per week, about \$2,000, she actually received only \$51.13 to apply on her wages, and that, representing this man who was always in funds and with such a large bank balance, she was advancing moneys of her own from time to time for his household expenses, for which he did not reimburse her. Pending this action, the plaintiff sued the defendant for the sum of \$1,265.06, alleged to have been paid out and expended by the testator for her account. That included the sum of \$767.50 paid for a bond for her. This was not denied by her, but she pleaded payment and alleged the pendency of this action as a bar and that in her account annexed to her answer in this action she credited the plaintiff with said amount. The other action has been tried and is pending decision. The claims involved in that action are not involved in this. On that trial, under her plea of payment, she showed that she gave the testator her check for \$500. It appears by the testimony of the cashier of a firm of brokers given on the trial of this action that her said check was used by the testator in purchasing the bond for \$757.50, which by her account annexed to her answer herein defendant admits having received from him. At the times of the expenditure of said moneys by the testator for the defendant, and when she gave him her said check, he was, according to the claim on which she has recovered in this action, indebted to her in the sum of \$1,400 or more. It is to be inferred from the evidence that she was carrying a policy of insurance on which she was required to pay an annual premium of \$85.75. On the 4th of March, 1909, and the 4th of March, 1911, she paid these premiums with the testator's check for that amount. The premium due on March 4, 1910, was paid with her own check, but at that time she made her account, on which the check was drawn, good by depositing to her a check drawn by the testator payable to her for \$80. These three checks received by her from the testator are credited in her account as payments for wages. It is a reasonable inference that in making out checks for the defendant to apply on her wages the testator would have drawn them for the amount which he owed her at the time.

She does not claim to have kept any account at the time of the amount owing to, or received by, her for wages; but she claims to

have kept an account of the disbursements she made for the testator. Benjamin Patterson, who was the attorney for the testator, testified that on the 11th day of May, 1911, which was less than six months before the death of the testator, the defendant reported to him that the testator had had a serious attack and she was afraid he would die, and asked him whether she could "recover a claim" which she had against the testator "for \$1,250 wages" in the event that the widow should contest the will and succeed, to which he replied "Why, certainly, and why have any such question; if he owes you \$1,250, and you ask him for it, he will pay it to you," and that she said she would. She merely denies that she specified the amount of her claim to Patterson at that time. He also testified that the defendant at that time knew the provisions in the will made for her benefit. The learned counsel for the appellant argues that this indicates that the defendant at that time had conceived the idea of asserting the additional claim for \$10 a week as housekeeper which would approximate the amount she claimed, and that that was the claim to which she referred. We need not stop to inquire whether that be so or not, for we think the testimony of Patterson should have been accepted, and it, at least, indicates that she then, in effect, conceded that she had been paid far more on account of services than she had admitted by her pleading, or that there was an understanding that she was to be compensated therefor by the provisions of the will for her benefit. Patterson further testified that before the will was probated, and before a settlement was made with the widow of the testator, the defendant said that, "if the will was sustained, she would have no claim against the estate," and that at one time after the death of the testator she said to him that if she "got her annuity she had no claim."

The defendant did not specifically deny these conversations as narrated by Patterson, but gave a different version of her conversation with him which, perhaps, indirectly denied them. His testimony is, in the circumstances, highly probable, and should be accepted. It is corroborated by the testimony of the plaintiff, as will be seen presently. The plaintiff testified that a day or two after the funeral defendant asked him, "If the will is broken, shall I have to sue for my wages?" to which he replied that he did not expect the will to be broken, and that a few days later she asked him what she could do to help him, and he replied that she could help him "the most" by making out her claim for back wages, and that she then stated that she was unable to make out her claim until she saw the testator's checks, and also said, "if I receive my legacy, I shall have no claim against the estate." The defendant denied that she told the plaintiff that if she received her legacy she would have no claim against the estate, and testified that he asked her whether she would present her claim if she received her legacy and annuity, and that she answered that she did not know, and that he repeated the question, and she made the same reply, adding, "I suppose—" and began to cry and did not finish the sentence; whereupon he said that Patterson thought that the testator intended the legacy and annuity to be in payment of her

claim, and that she was crying and said, "I suppose—" without adding anything further.

The plaintiff, who is referred to as "Col. Newcomb," was the testator's cousin and was appointed executor of his will and was made sole residuary legatee. The defendant admitted that shortly after the death of the testator she said to Patterson:

"My filing my claim depends entirely on Mr. Newcomb's estate. If there is plenty there, if there is sufficient to pay Col. Newcomb handsomely for all his trouble, I shall file my claim and get every cent that is my due. I am dealing with Mr. Newcomb's friends and relatives, and not with Mr. Newcomb; and I intend to get every cent that belongs to me."

She further testified that before she made any claim for services Patterson suggested to her that there was no reason why the plaintiff as residuary legatee should have the surplus estate which would amount to \$15,000 or \$20,000, and that she should put in a claim for the entire period of her employment, and that she would have no trouble in proving her services, and that would take an assignment of her claims as security for money to be loaned to her in case the widow should succeed in a contest over the will, and her legacy and annuity "were thrown out"; that in March, 1912, she asked Patterson, in effect, whether the law required the payment of the debts before the widow had her third, to which he replied in the affirmative, and she then suggested that she present her claim, saying, "And then, if it goes against us, Col. Newcomb and I can fix that up together." It is proper to say at this point that Patterson did not take an assignment of her claim and denied the interviews as narrated by the defendant, but he admitted that he loaned her \$100 per month pending the probate of the will, and he testified that he advised her that he "could not pass any claim unless it was a just claim." It is important at this point to note that the defendant did not present her claim until she was advised that a settlement had been arrived at with the widow of the testator, so that there was no further danger of a contest over the will.

The will was drawn by Patterson, who testified that he had previously drafted wills for the testator, only one of which was executed, but that the defendant was not mentioned in any of them, and that after the execution of the last will he discussed its provisions with the defendant, and she said she was pleased that the amount she was to receive therein was increased over the amount given her by "the other will." She did not deny this. There is no other evidence relating to the execution of a former will. The testator may have executed a former will making provision for defendant, as indicated by her said statement; but in any event it is fairly to be inferred from her statement that he represented to her that he had done so. All of the evidence has been examined and considered in the light of the arguments of counsel thereon, but we do not deem it necessary to state it further.

I am of opinion that the evidence establishes two defenses to defendant's claim for services:

First. The learned counsel for the plaintiff argues with much plausibility, and force, on the authority of *Conkling v. Weatherwax*, 181 N. Y. 258, 268, 73 N. E. 1028, 2 Ann. Cas. 740, in view of the form of defendant's pleading by which she sets forth an account of moneys received and disbursed for appellant, as well as moneys received to apply on her wages and also moneys advanced for his account, and claims as a balance due and owing the difference between her wages for the entire period at the rates claimed by her and the total amount received not only to apply on wages but for wages and all other purposes, after deducting therefrom all disbursements which she claims to have made on his account, that the defendant has assumed the burden of proof as to the payments made to apply on her account for wages. It is immaterial, however, who had the burden of proof, for the reason that, if there was no change from the original contractual relations between the testator and the defendant, the evidence, viewed in the light of the authorities applicable to such claims against an estate, fairly shows that she was paid in full, or at least substantially so, and down to within a comparatively short period of his death, the same as appears with respect to his other servants and creditors. See *McDermott v. Conlon*, 153 App. Div. 69, 137 N. Y. Supp. 1105; *Lyon v. Smith*, 142 App. Div. 186, 126 N. Y. Supp. 994; *Reilly v. Burkelman*, 149 App. Div. 548, 134 N. Y. Supp. 13; *Steinau v. Scheuer*, 15 App. Div. 5, 43 N. Y. Supp. 1112; *Matter of Loomam*, 73 Hun, 177, 25 N. Y. Supp. 877; *Steitz v. Priddis*, 81 Hun, 229, 30 N. Y. Supp. 762; *Bennett v. Austin*, 5 Hun, 541.

[3, 4] Second. It is to be borne in mind that the testator was neither related to the defendant by blood, nor by marriage, and was under no moral obligation to make any provision for her in his will. The annuity he gave her approximates her annual earning capacity. According to her claim, he owed her for wages at the time he made the will about \$2,252.15. It is evident that the defendant's admissions prior to presenting her claim tend to show that the defendant and the testator had prior to that time arrived at an understanding by which she was to make her home with him until his death, and that the legacy of \$4,000 was intended to cover any indebtedness for wages then existing, or that might remain at the time of his death, and that by the annuity she would be provided for on substantially the same basis for the period of her life. The evidence gives rise to a presumption of a change in their contractual relations long before the will was made, by which she was to remain with him permanently and be compensated, over and above the moneys she might need to draw from time to time, by the legacy and annuity. Of course, if he failed to provide for her by his will, or revoked any will so providing for her, she would be entitled to recover for her services if she had not been paid in full. Here the provisions of the will relating to the legacy and annuity are preceded by the usual direction for the payment of debts which is ordinarily deemed sufficient to render the general rule, that a legacy to a creditor extinguishes an indebtedness which it equals or exceeds, inapplicable (*Matter of Arnton*, 106 App. Div. 326, 329, 94 N. Y. Supp. 471; *Reynolds v. Robinson et al.*, 82 N. Y. 103, 107, 37 Am. Rep. 555; Wil-

liams v. Crary, 5 Cow. 368; Id., 4 Wend. 443, 447; 18 Am. & Eng. Enc. of Law, 769, 776); but this was not an unliquidated claim, and the legacy is payable at once and the annuity commences at once, and they far exceed the claim, which facts distinguish the case, on one important ground, at least, from Phillips v. McCombs, 53 N. Y. 494, and both the legacy and annuity expressly relate to the services and are conditioned upon the rendition thereof to the end.

The will, construed in the light of the evidence of the relations between the testator and the defendant as disclosed by the evidence shows, I think, that the testator intended the legacy and annuity not only as a bounty, but also as payment in full of any unpaid claim she might have for services for caring for him until the moment of his death, which is one of the reasons assigned in the will for those provisions for her benefit. That is the consideration which he says moved him to give her the legacy and annuity, and they were conditioned upon her performing the services as contemplated by him. By accepting part of the legacy and annuity she has irrevocably elected to waive any claim she might otherwise have had for services. The plea of payment renders evidence of payment in any form, as by any agreement between the parties which would operate as an extinguishment of the debt, such as provision by will which has been accepted, admissible. *Farmers' & Citizens' Bank v. Shuman*, 33 N. Y. 69; *McLaughlin v. Webster*, 141 N. Y. 76, 35 N. E. 1081; *Uvalde Asphalt Paving Co. v. Nat. Trading Co.*, 135 App. Div. 396, 120 N. Y. Supp. 11.

These views require a reversal of findings 11, 12, 14, and 20, and the substitution of a finding of payment, and the reversal of the first conclusion of law and that part of the third conclusion of law to the effect that defendant is entitled to recover the balance owing for services, and the conclusion that defendant is entitled to recover costs and an additional allowance, and the substitution of conclusions that the defendant is not entitled to recover for services, otherwise than by recovering the legacy and annuity, and that plaintiff is entitled to recover costs to be taxed; and the judgment is modified accordingly, with costs to appellant. All concur.

WILLENSKY v. NASSAU ELECTRIC R. CO.

(Supreme Court, Appellate Division, Second Department. February 27, 1914.)

1. STREET RAILROADS (§ 99*)—CROSSING TRACK—CONTRIBUTORY NEGLIGENCE.

The plaintiff, who obeyed a motorman's order to drive his horse across the track, was not negligent in so doing, since the motorman knew the condition of his car and his ability to control it so as to permit the execution of his order.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 200-216; Dec. Dig. § 99.*]

2. APPEAL AND ERROR (§ 263*)—GROUNDS OF REVIEW—NECESSITY OF EXCEPTION.

Where the issue of plaintiff's negligence, in an action against a street railroad company, depended upon the charge as requested, the absence of an exception to its refusal or to the accompanying charge of the court should be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.*]

Jenks, P. J., dissenting.

Appeal from Trial Term, Kings County.

Action by Isaac Willensky against the Nassau Electric Railroad Company. From a judgment in favor of the defendant, and from an order denying his motion for a new trial, plaintiff appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and STAPLETON, JJ.

Samuel Fine, of New York City (Julius L. Pinnes, of New York City, on the brief), for appellant.

D. A. Marsh, of Brooklyn, for respondent.

PER CURIAM. [1] The motorman ordered the plaintiff to drive his horse across the track, and says that the accident happened because the plaintiff stopped on the track. The motorman knew the condition of his car and his ability to abate its speed so as to permit the execution of his order, and the jury should have been charged that, if the plaintiff crossed in obedience to the command, he was not negligent in so doing.

[2] There is no exception to the refusal or to the accompanying charge of the court, but, as the issue of the plaintiff's negligence depended upon the charge as requested, the absence of the exception should be disregarded.

The judgment and order should be reversed, and a new trial granted; costs to abide the event. All concur, except JENKS, P. J., who votes to affirm.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HESS v. METHODIST BOOK CONCERN.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

DAMAGES (§ 166*)—EVIDENCE—INJURIES TO PERSON.

Evidence of a conjectural and purely speculative character as to the possible future results of plaintiff's injuries may not be admitted, and the issue of his permanent injury thereon submitted.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 478, 479, 481; Dec. Dig. § 166.*]

Appeal from City Court of New York, Trial Term.

Action by Ella M. Hess against the Methodist Book Concern. From a judgment on a verdict for plaintiff for \$1,750, besides costs, and from an order denying a motion for new trial, defendant appeals. Affirmed conditionally.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Lemuel Skidmore, of New York City, for appellant.

Towne & Thomas, of New York City (Edward Owings Towne, of New York City, of counsel), for respondent.

GUY, J. This action was brought to recover for a personal injury resulting from the fall of the ceiling of a dressing room or clothes closet, which plaintiff described as a wooden clothes closet about 12 feet long, 5 feet in width and 6 feet in height, upon the ceiling of which were piled a large quantity of book covers and a ladder. The testimony shows this condition had existed continuously for a number of years prior to plaintiff's injury, without accident or any indication that the ceiling of the closet was overlaid. The evidence of negligence on the part of the defendant employer is very slight; but, assuming it to be sufficient to sustain a verdict in favor of plaintiff, the learned court erred in admitting, over defendant's objection and exception, much evidence of a conjectural and purely speculative character as to the possible future results of plaintiff's injuries, and specifically charging the jury that they might award damages for permanent injuries. This, as to which there was no competent proof, was highly prejudicial to defendant and necessitates a reversal unless the amount of the judgment is reduced.

Judgment reversed, and new trial granted, with costs to appellant to abide the event, unless the plaintiff stipulates within ten days after service of a copy of the order entered herewith with notice of entry of the same in the City Court to modify the judgment by reducing the same to the sum of \$1,000, together with costs and disbursements, in which event the judgment, as so modified, is affirmed, without costs of this appeal to either party. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BODOW v. LEVIN.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

COURTS (§ 189*)—MUNICIPAL COURTS—OPENING DEFAULT.

Where, in an action in a Municipal Court, after two judgments were entered against defendant by default and each default was opened, he again defaulted, and his attorney made no excuse for the default, except the failure of defendant to appear, and defendant gave no reason for his failure to appear, the court properly refused to open this last default, as the burden is on the party who defaults to show a substantial and meritorious excuse for the default, or he cannot be relieved of the consequences of his neglect.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 458; Dec. Dig. § 189.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Morris L. Bodow against Hyman Levin. From an order denying his motion to open a default, defendant appeals. Affirmed.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Samuel Dickstein, of New York City, for appellant.

Feltenstein & Rosenstein, of New York City (Abraham Rosenstein, of New York City, of counsel), for respondent.

SEABURY, J. The defendant appeals from an order denying his motion to open his default in consequence of which an inquest was taken against him. The plaintiff sued to recover \$87.53 claimed to be due him as commissions for sales made on behalf of the defendant. The defendant made a tender of \$23.94. This action has been pending in the Municipal Court since September, 1913. Judgment was entered upon the inquest against the defendant on December 1, 1913.

No substantial excuse is offered by the defendant's attorney for his default, except that his client did not appear upon the day set for trial, and the client gives no reason why he did not appear on that day. Upon two previous occasions judgments were entered against the defendant by default, and these defaults were opened. Under these circumstances, the defendant's present plea that he should be given "his day in court" is not persuasive. He has already been accorded three opportunities to try his case, and has neglected to avail himself of any of them. Defaults are not to be opened as a matter of course. Where a default has been entered, the burden is upon the party who defaulted to show a substantial and meritorious excuse for his default, or he cannot be relieved of the consequences of his neglect. No such excuse is shown in this case, and the court below properly denied the defendant's motion.

The order appealed from is affirmed, with costs. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(84 Misc. Rep. 435)

DOWNEY v. CITY OF NEW YORK.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

MUNICIPAL CORPORATIONS (§ 220*)—SALARY OF EMPLOYÉS—DEDUCTION FOR ABSENCE.

Under New York City Charter (Laws of 1901, c. 466) § 1543, providing that heads of departments may deduct from salaries of subordinates for absence without leave, the superior of a telephone operator in the Public Works Department could deduct the salary of such employé absent without leave on account of illness.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 599-608; Dec. Dig. § 220.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Patrick H. Downey against the City of New York. From a judgment rendered in favor of the defendant after a trial by the court, plaintiff appeals. Affirmed.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Theodore I. Schwartzman, of Brooklyn (Isidore Solomon, of Brooklyn, of counsel), for appellant.

Archibald R. Watson, of New York City (Clarence L. Barber, of New York City, of counsel), for respondent.

GUY, J. Plaintiff, a telephone operator in the Public Works Department in this city, sues to recover salary at the rate of \$750 per annum from May 10 to November 30, 1912, while he was absent without leave because of illness. Plaintiff suffered from tuberculosis to such an extent that he was unable to do any work from May 1, 1912, and he is still suffering therefrom, and was and still is a patient at the State Sanitarium known as Seton Hall at Spuyten Duyvil.

In May, 1912, plaintiff's wife and physician notified his superior of his condition. He was absent from his work from May 1 to November 30, 1912, by reason of such illness. On November 30, 1912, he was duly notified of his discharge, by reason of a reduction in force. For the ten days from May 1 to May 10, 1912, during which plaintiff was absent from duty while he had sick leave, he was paid. After May 10th he had no leave, and his name was, by his superior's order, duly marked on the pay rolls "absent without leave." Plaintiff was a city employé, not a city officer. Where a city employé is absent without leave on account of illness, his superior may deduct, and in the case at bar did deduct, his salary during the term of such absence without leave. Charter, § 1543; *People ex rel. Grimshaw v. Prendergast* (Sup.) 135 N. Y. Supp. 164, 165, affirmed 132 App. Div. 937, 116 N. Y. Supp. 1144, affirmed 197 N. Y. 538, 91 N. E. 1119; *Reilly v. City of New York* (Mun. Ct.) 139 N. Y. Supp. 718.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 146 N.Y.S.—10

A city employé absent from duty without leave cannot recover salary without service.

In the Brooklyn Special Term cases cited by appellant the employé was absent with leave.

Judgment affirmed, with costs. All concur.

BEEBE v. WORTH.

(Supreme Court, Equity Term, Monroe County. February, 1914.)

1. **PRINCIPAL AND AGENT (§ 146*)—UNDISCLOSED PRINCIPAL—LIABILITY OF AGENT.**

Where the principal is not disclosed by the written contract, which was signed by defendant as agent, plaintiff may proceed personally against the agent as the ostensible principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 521-527; Dec. Dig. § 146.*]

2. **MINES AND MINERALS (§ 53*)—CONTRACTS—TIME.**

In an option to purchase mining property, time is always considered to be of the essence of the contract on account of the liability of the property to great fluctuation in value.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 147, 148; Dec. Dig. § 53.*]

3. **ACCORD AND SATISFACTION (§ 2*)—WHAT CONSTITUTES.**

Plaintiff had an option with the secretary of a mining corporation for the purchase of a large number of shares of stock. Upon the mine proving a success, plaintiff, who had rendered services, requested the directors to issue him a large number of shares at a given price. The directors voted to issue him a number of shares at a given price, with the stipulation that the acceptance of such shares should be a waiver of all claims against the corporation and the secretary. *Held*, that the issuance and acceptance of such shares constituted an accord and satisfaction barring recovery against the secretary.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 14-21, 33; Dec. Dig. § 2.*]

4. **ACCORD AND SATISFACTION (§ 3*)—WHAT CONSTITUTES.**

If what is given by a stranger is accepted by the creditor in satisfaction of his claim against the debtor, the creditor cannot proceed against the debtor; and hence, where a corporation made the satisfaction of plaintiff's claim against its secretary on account of an option for the purchase of stock, a condition to the issuance of stock, the issuance and acceptance of the stock barred plaintiff's rights against the secretary, even though the corporation was a stranger to the transaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 22-30; Dec. Dig. § 3.*]

5. **ACCORD AND SATISFACTION (§ 5*)—WHAT CONSTITUTES.**

The value received in case of an accord and satisfaction does not affect its validity.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 40-45; Dec. Dig. § 5.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

6. ACCORD AND SATISFACTION (§ 20*)—EFFECT.

Where plaintiff, who had a contract with defendant for the purchase of corporate shares, accepted other shares, issued to him by the corporation on condition that he should waive his rights against defendant, and treated them as his own, with knowledge of defendant's power to transfer shares, the fact that at the time the settlement was made defendant misrepresented his power will not avoid the accord and satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 140-142; Dec. Dig. § 20.*]

Action by George H. Beebe against S. Harry Worth. Judgment for defendant.

Costello, Burden, Cooney & Walters, of Syracuse (Oliver D. Burden, of Syracuse, of counsel), for plaintiff.

Havens & Havens, of Rochester (Samuel M. Havens, of Rochester, of counsel), for defendant.

SUTHERLAND, J. The facts with reference to the controversy involved here have been stated in much detail in the formal decision filed herewith. It is due to the parties, and the learned counsel who have represented them with great ability, that the decision dismissing the complaint should be supplemented with a discussion of the reason why, in my opinion, the judgment should be for the defendant. That reason summarized is that the plaintiff's cause of action was settled in full in December, 1912, by the issue of 10,000 shares of the Seneca-Superior Silver Mines Company, Limited, to the plaintiff, with the knowledge and co-operation of the defendant, and accepted by the plaintiff as a full accord and satisfaction of his claim against the defendant.

About April 4, 1912, defendant gave plaintiff a written option, covering a total of 75,000 shares of stock of the Seneca-Superior Silver Mines Company, Limited. Of this amount 32,499 shares remain undelivered, and are the shares which plaintiff is endeavoring to procure by a decree of specific performance in this action. The option agreement, as I interpret the instrument, gives in reality eight distinct and severable options; the first seven covering seven distinct blocks of stocks of 10,000 shares each, and the eighth covering a block of 5,000 shares. The option agreement was unilateral, the plaintiff not being bound to take any of the stock, and by taking one block he did not obligate himself to take any more. Under its terms payments upon each block, if taken, were to be in four equal monthly installments, the first installment of \$437.50 on the first block being payable on the signing of the option; the second installment on the first block was due April 29th, on which day the first installment on the second block was due, if that block were taken. May 29th the third installment on the first block, the second on the second, and the first installment on the third block, were due. June 29th the final installment was due on the first block, the third on the second, the second on the third and the first on the fourth block; and so on thereafter on the 29th of July,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

August, September, October, November, and December, payments on the respective blocks fell due. October 29th the first payment was due on the last block of 5,000 shares, and January 29, 1913, was the day for final payment on that block. The option concluded with this clause:

"On the failure of said Beebe to make any of the payments herein specified this entire agreement shall, at the option of the undersigned, be void. On receiving the payments above specified the undersigned will turn over to the said Beebe or his nominee stock covered by said payments, fractional shares in all cases to be retained by the undersigned."

[1] The option was signed by defendant as syndicate manager, but the names of the syndicate members were not given in the option nor disclosed to the plaintiff. Accordingly the plaintiff may proceed upon the contract against the defendant personally if it is enforceable at all.

The option agreement does not make the plaintiff a member of the syndicate itself. The defendant agrees to deliver to the plaintiff stock of the mining corporation at 17½ cents per share, and not a participating share in the venture and assets of the syndicate.

The plaintiff made his first payment of \$437.50 April 4th, but paid nothing further until June 26th, when \$3,500 was paid, and July 8th, \$3,500 more. These last payments were for stock sold to Messrs. Chase and Wiard through the efforts of the plaintiff; and it has been contended on the part of the defendant that those payments should not be credited upon the option agreement. But it is made very clear by the correspondence between the parties that plaintiff and defendant both understood at the time that those payments were procured by the plaintiff and forwarded to the defendant in pursuance of the option. Chase and Wiard did not wish to accept the form of certificate which had been forwarded to the plaintiff for them, a form which was used for interim purposes by the defendant for syndicate stock that was purchased; and accordingly the stock for 40,000 shares was issued by the corporation directly to Chase and Wiard. To replace that stock the defendant returned to the corporation certificates for 40,000 shares, which he had procured and then held as syndicate manager. The drafts for \$7,000 which came from Wiard and Chase were payable to the order of defendant personally, and were turned over by the plaintiff to the defendant, who used \$4,625 of the proceeds in payment upon a note for money originally used by him for the purchase of syndicate stock, and the balance, \$2,375, defendant forwarded to the treasurer of the corporation in payment for additional stock, which was issued to him as syndicate manager; so only one conclusion can be drawn from the transaction itself—that the payments for the Chase and Wiard stock should be allowed to the plaintiff pro tanto upon the option.

About May 4 one share of the stock was issued by the corporation to the plaintiff. It seems probable that that single share was issued to qualify him on the books as a director, to which position plaintiff was elected about that time. No other formal certificate of stock had been

issued to the plaintiff up to that time; the certificate for the stock which plaintiff had paid for April 4th being held by the defendant as syndicate manager, who later gave plaintiff a receipt for the same in the form which was attempted to be used in the Chase and Wiard transaction. Treating the single share of stock issued May 4th by the corporation as a negligible factor in the case, the \$7,000 received from Chase and Wiard completed payment for the first, second, and third blocks of 10,000 shares each, paid the first three installments on the fourth block, and the first two on the fifth, leaving the sixth, seventh, and eighth blocks with nothing paid on them. Nothing further was paid, and no amount tendered in any form until November 30th, when a draft for \$3,500 was sent by the plaintiff to defendant, payable to his order as treasurer of the mining corporation. November 1st plaintiff wrote defendant that, as it was the first of the month, he was reminded that he ought to send defendant some more money, and that as it would be necessary for him to borrow the balance required under their agreement, he wished to know what he could safely figure on in the line of returns before January 1st. Defendant's reply does not contain any disavowance of any further rights under the agreement, and counsel for the plaintiff calls it "evasive." It contains no promise to accept further payments. Defendant was elected a director of the corporation in May, 1912, and was also then elected president, which office he has ever since retained, and was exercising the duties of treasurer as well in November, 1912. From the time the option was signed down to November 30th numerous letters passed between the parties with relation to the mine and its prospects, and the letters written by defendant recognized, apparently, that plaintiff had a material interest in the future success of the mine which, of course, he did, even if he held no more than 2,500 shares, but which would be much greater if he had the opportunity still open to buy more shares if the mine proved a success.

At the mine, on or about October 11, 1912, a thread of ore was broken into, which, it was later found, led into a vein which subsequently, as development went on, turned out to be very productive. October 15th a large amount of stock was issued to three individuals on the eve of a directors' meeting. Over 200,000 shares were thus disposed of, out of which 100,000 shares were issued to two nominees of the defendant for his benefit. About half of the 100,000 shares thus issued the defendant sold in the month of October to various persons; but none for more than $17\frac{1}{2}$ cents per share. The mining stock soon became very attractive; and, if plaintiff had the right to call upon defendant for 32,499 shares for $17\frac{1}{2}$ cents per share, it was a very valuable right.

After the Chase and Wiard money was received, there was no demand made by the defendant of plaintiff for more money, and nothing occurred in the nature of a repudiation by him of any further rights under the option until some time in November. Plaintiff's explanation of the form of the draft tendered November 30th is that earlier in that month, in a personal conversation, the defendant had told him

that he had no stock which he could deliver to him under the option, and that if he got more stock he would have to get it from the company.

[2] It is argued by the plaintiff's counsel with great earnestness that the acceptance of belated payments and the course of business, including the correspondence which has been referred to, constitute a waiver of the strict terms of the option so far as the time of payment is concerned; and, inasmuch as there was no demand made by defendant upon the plaintiff for money, and no notice of an intention to claim a default and terminate the option had been given by defendant, the defendant should not be permitted in equity to claim a forfeiture. On the other hand, it is contended with equal earnestness that nothing in the interval between the signing of the option in April and the 1st of November, 1912, was said or done by defendant before the final default occurred which was naturally calculated to put the plaintiff off his guard, or to invite delay in making other payments; that there was no inducement or holding out for delay, and hence no estoppel upon the defendant in claiming a forfeiture of the option; and in this respect defendant relies upon the familiar principle, which seems to be universally recognized that in an option to purchase mining property time is always to be considered to be of the essence of the contract, on account of the liability to great fluctuation in value, and that words are not necessary in the written option itself to make timely performance essential, for that is implied because of the nature of the property involved. *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; *Pomeroy on Contracts*, p. 459.

It is not necessary for the decision of this case that the court determine whether the defendant had waived strict performance as to the entire balance of the stock. To say the least, it is doubtful if the facts constitute a waiver or extension of time with regard to the blocks of stock on which nothing had been paid or delivered. As to blocks on which there had been partial payments, or out of which there had been partial deliveries, perhaps plaintiff might have been better fortified in claiming the right to the remaining shares; but, as to his right to all the undelivered stock, there was that uncertainty and doubt which furnished the inducement for the settlement of the whole matter thereafter affected.

[3] It seems that at and just prior to a meeting of directors held December 14, 1912, the plaintiff asserted to the other directors that, in view of his efforts in procuring capital that was utilized in the development of the mine and in making the discovery of rich ore possible, he was entitled to special consideration from the board of directors; and, although the stock was then believed to be worth more than 17½ cents per share, he asked for an allotment of 20,000 shares at that price as a return for his early faith in the enterprise and his contributions toward its success. It was also asserted by him, and known to the other directors, that he made some sort of a claim upon the defendant personally by reason of the option. There is a dispute as to what the plaintiff said with reference to his alleged claim against the defendant, but

that dispute is not material here, because the fact is made clear that some sort of a claim was asserted, and that the assertion thereof was understood by the directors. At the meeting, in the presence of plaintiff and defendant, one director stated that in his opinion 5,000 shares would be adequate as an allotment to plaintiff; but finally, after consideration and discussion, a resolution was introduced and carried as follows:

"That 10,000 shares of the company's treasury stock be allotted and issued to Mr. G. H. Beebe at 17½ cents a share, it being understood that same is in full satisfaction of Mr. Beebe's alleged claim against Mr. Worth or the company."

No protest was made nor objection taken by plaintiff to the wording of the resolution.

The 10,000 shares of stock then voted to the plaintiff were issued by the corporation and received and paid for by him December 27, 1912, at 17½ cents per share. At a stockholders' meeting held February 14, 1913, at Toronto, the issuing of these shares to the plaintiff at that price was discussed, and at his request his name was included with the names of all others who had received certificates prior to that time in a general resolution confirmatory of the issuance of all that stock. He continued to hold the 10,000 shares received December 27th until after the commencement of this action when, with full knowledge of all the facts surrounding the transaction, he disposed of that stock as his own to other parties, receiving 90 cents per share, and an additional sum for dividends which had been declared, but not yet paid over.

It seems to me that the effect of the receipt of the 10,000 shares December 27th and the retention thereof, and of the proceeds of the sale referred to, with full knowledge of the facts, constitutes an irrevocable accord and satisfaction of plaintiff's claim, and is a complete defense to this action.

[4] It is urged by the learned counsel for the plaintiff that issuance of the 10,000 shares by the corporation furnishes no consideration for the discharge of the obligation of defendant to plaintiff under the option. If the corporation were a mere volunteer in an attempted settlement of a claim against the defendant, he being in no way connected with the settlement by participation or subsequent ratification, the transfer of the stock of the corporation and its acceptance by plaintiff would not be a bar to the present suit. *Gordon Maltling Co. v. Bartels Brew. Co.*, 206 N. Y. 528-540, 100 N. E. 457, 461.

But in this transaction the defendant participated. He was present at the discussion of the board of directors, voted for the resolution as a director, and was interested in the consideration as a stockholder of the company, for the stock was then worth more than 17½ cents per share. In Mr. Thompson's treatise on Accord and Satisfaction, Cyc. 1, page 316, the learned author says:

"A number of the earlier decisions, both English and American, lay down the rule without qualification that satisfaction moving from a stranger cannot be pleaded in bar of the debtor's obligation. At the present time this is

not the law, either in England or in those states where the decisions were made. It cannot be doubted that if what is given by the stranger is accepted in satisfaction by the creditor, and his act is authorized or subsequently ratified by the debtor, there will be a complete accord and satisfaction of the debt or demand."

The case of *Rusk v. Soutter*, 67 Barb. 371, is directly in point; and such is assumed to be the rule by the Court of Appeals in the *Gordon Malting Company Case*.

[5] The comparative value of the stock issued to plaintiff by the corporation pursuant to that resolution, and the amount undelivered under the option, whether greater or less, does not in law affect the validity of the settlement of the claim against defendant. The acceptance of a certainty for an uncertainty is the moving and abundant consideration.

[6] In respect to this settlement it is insisted, also, that plaintiff should not be bound thereby because when he accepted the stock he did not know the real facts concerning the issue of the stock to plaintiff's nominees October 15, 1912, and the ability of defendant to deliver stock under the option. He had learned of his ability to perform at the time the action was commenced, and later, when plaintiff sold the stock at a large advance and pocketed the proceeds. This is an affirmation of the transaction with knowledge of all the facts; and, inasmuch as the defendant is personally interested in the consideration which passed between the corporation and the plaintiff, and is not unaffected by the failure of the plaintiff to offer to return the stock to the corporation, the plaintiff is in no position to maintain this action. If he was deceived into accepting the stock, he must offer to return it before attempting to enforce the claim in settlement of which the stock was transferred to him. *Gould v. Cayuga Co. Nat'l Bank*, 86 N. Y. 75.

(160 App. Div. 845)

GOETZ v. DUFFY et al.

(Supreme Court, Appellate Division, Second Department. February 27, 1914.)

1. LANDLORD AND TENANT (§ 165*)—FIRE ESCAPES—STATUTES.

Labor Law (Consol. Laws 1909, c. 31) § 82, provides for the installation of fire escapes on the outside of every factory consisting of three or more stories in height, which shall have balconies not less than six feet in length or three feet in width connecting with the interior by easily accessible and unobstructed openings. Section 94, which defines a tenant factory as a building, separate parts of which are used by different persons as factories, provides that the owner of the freehold shall be responsible for the observation of the statute relating to fire escapes. The owner of a building used for factory purposes equipped it with sufficient fire escapes, but the lessee sublet part of one of the floors, and in making partitions access from part of the floor to the fire escapes was rendered difficult. *Held*, that the owner was not liable to servants of the subtenants for injuries sustained in a fire by reason of the partition; the provision requiring the landing to be accessible and connected with the interior by unobstructed openings referring only generally to the interior.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630, 631, 633–637, 640, 641; Dec. Dig. § 165.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. HEALTH (§ 32*)—FIRE ESCAPES—"FACTORY."

A portion of one floor of a building, though used for manufacturing purposes, is not a factory, within the purview of Labor Law (Consol. Laws 1909, c. 81) § 82, requiring every factory, consisting of three or more stories in height, to be equipped with fire escapes.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 32; Dec. Dig. § 32.*

For other definitions, see Words and Phrases, vol. 3, pp. 2642-2643.]

3. LANDLORD AND TENANT (§ 165*)—LIABILITY OF LESSOR.

The Labor Law not having imposed any liability on the lessee of one floor of a building, who sublet a portion of it to another manufacturing company, the lessee is not liable for the death of a servant of its subtenant, who was killed in a fire owing to the inaccessibility of the fire escape; there being no common-law duty upon the lessee to render the building safe.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630, 631, 633-637, 640, 641; Dec. Dig. § 165.*]

Appeal from Trial Term, Queens County.

Action by Catherine Goetz, as administratrix of the estate of Michael J. Goetz, deceased, against Jane E. Duffy, individually and as executrix and others. From a judgment dismissing the complaint and denying her motion for new trial, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, STAPLETON, and PUTNAM, JJ.

Thomas J. O'Neill, of New York City (L. F. Fish, of New York City, on the brief), for appellant.

George M. Pinney, of New York City, for respondents Duffy and others.

George C. Austin, of New York City, for respondents Keep and others.

STAPLETON, J. On the 11th day of November, 1909, the plaintiff's intestate, with several other workmen, was burned to death in a fire that occurred in the six-story factory building at 129-131 West Thirty-First street, in the borough of Manhattan. The building stood on the north side of the street, facing south, and its width, front and rear, was 50 feet. The defendant Duffy was the owner. The sixth or top floor was leased to defendant H. V. Keep Shirt Company, which sublet to the defendant Hetzel Company a portion in the southwest corner thereof, consisting of a rectangular space in dimension 23 feet wide by 35 feet deep. This space included about one-half of the frontage of the building and extended back about two-thirds of the building's length. The Keep Company retained for its own use the entire rear part of the floor as well as the entire easterly half.

Through the center of the floor, extending from the front towards but not completely to the rear, was a hallway about 10 or 12 feet wide. Leading from this hallway, well towards the front, were a stairway and an elevator, and at the rear of the hall a swinging door led into the Keep workroom.

The space sublet to the Hetzel Company was partitioned off by the Keep Company, at the Hetzel Company's request, before the latter en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tered into possession and prior to the execution of the lease. There was also an inner partition that formed, in the southwest corner of the Hetzel premises, a room 7 feet wide by 18 feet long, running lengthwise from the front of the building and having the west wall of the hallway for its eastern side. This space was used as an office; the remaining space was used as a workroom. A door, 3 feet wide and 7 feet high (106), connected the office with the workroom, and another door, almost directly opposite the one just alluded to, led from the office into the hallway landing and to the stairs and elevator. The doors were fireproof. Where the rear partition of the Hetzel premises approached the west wall of the building, and extending diagonally from the partition to the wall, was an aperture characterized by the defendants as a door, by the plaintiff as a window, and by the court as an opening. It was 22 inches from the floor. There was an "opening" of similar shape on the Keep side of the partition; the two forming a triangle with the west wall as the base and the point where both met on the partition as the apex. In the east end of the partition was a small window seven feet from the floor. The partition extended from floor to ceiling, a distance of 10 feet. The building was equipped with fire escapes, erected on its rear wall. No part of the Hetzel premises opened directly on a fire escape; but had it not been for the condition of the door leading from workroom to office, to which allusion will be made hereafter, access to the fire escapes could easily have been had.

The business of the Hetzel Company was the manufacture of combs from ivory and celluloid. Six machines for that purpose were installed in the workroom, where, on the day of the casualty, the plaintiff's decedent and six others were at work. Scraps of celluloid were lying around; a bag containing celluloid stood near the door; and celluloid dust arose from the machines and settled upon the boards on which rested the switches by means of which the machines were started and stopped. When the switches were opened, sparks, engendered by electricity, would fly from them and alight upon the celluloid. One of those sparks fell upon some celluloid near the door and started the fire. An attempt was made to extinguish it with water, but without avail. The plaintiff's intestate ran to the door leading to the office—the obvious means of exit—but the door would not open. The door was closed most of the time, and when closed it locked automatically. The men evidently became panic-stricken. One ran to the V-shaped opening already described, and escaped into the Keep premises. He was badly burned. He attempted to make his exit by means of the hallway and stairs, but the flames had gained such headway that when he opened the door the flames leaped in and the fire escapes afforded the only means of safety. After emerging from the opening in the partition, he cast one look back and saw the plaintiff's decedent and the others struggling at the opening; each one trying to get out first through the narrow space.

[1, 2] The plaintiff, as administratrix, sued to recover damages, alleging that decedent's death was caused by actionable neglect. She alleged such neglect against the decedent's master, the lessee from whom the master had a sublease, and the owner of the building. Her com-

plaint against the lessee and the owner was dismissed, and from the judgment entered upon that direction this appeal is taken.

It is not asserted, and if asserted it could not be maintained, that any common-law duty was due to the decedent from the two defendants in whose favor the judgment went. The liability, if any, must have its foundation and limit in some statute. The plaintiff points to the Labor Law (Laws of 1909, c. 36). The provisions of that law which are pertinent to our inquiry are contained in sections 82 and 94. Section 82 reads:

"Sec. 82. Fire Escapes. Such fire escapes as may be deemed necessary by the commissioner of labor shall be provided on the outside of every factory in this state consisting of three or more stories in height. Each escape shall connect with each floor above the first, and shall be of sufficient strength, well fastened and secured, and shall have landings or balconies not less than six feet in length and three feet in width, guarded by iron railings not less than three feet in height, embracing at least two windows at each story and connected with the interior by easily accessible and unobstructed openings. The balconies or landings shall be connected by iron stairs, not less than eighteen inches wide, with steps of not less than six inches tread, placed at a proper slant and protected by a well-secured handrail on both sides, and shall have a drop ladder not less than twelve inches wide reaching from the lower platform to the ground. The windows or doors to the landing or balcony of each fire escape shall be of sufficient size and located as far as possible, consistent with accessibility from the stairways and elevator hatchways or openings, and a ladder from such fire escapes shall extend to the roof. Stationary stairs or ladders shall be provided on the inside of every factory from the upper story to the roof, as a means of escape in case of fire."

Section 94, so far as it is pertinent, reads:

"Sec. 94. Tenant-Factories. A tenant-factory within the meaning of the term as used in this chapter is a building, separate parts of which are occupied and used by different persons, companies or corporations, and one or more of which parts is so used as to constitute in law a factory. The owner, whether or not he is also one of the occupants, instead of the respective lessees or tenants, shall be responsible for the observance and punishable for the nonobservance of the following provisions of this article, anything in any lease to the contrary notwithstanding, namely, the provisions of sections seventy-nine, eighty, eighty-two, eighty-three, eighty-six, ninety and ninety-one, and the provisions of section eighty-one with respect to the lighting of halls and stairways; except that the lessees or tenants also shall be responsible for the observance and punishable for the nonobservance of the provisions of sections seventy-nine, eighty, eighty-six and ninety-one within their respective holdings. * * * The term 'owner' as used in this article shall be construed to mean the owner or owners of the freehold of the premises, or the lessee or joint lessees of the whole thereof, or his, her or their agent in charge of the property. The lessee or tenant of any part of a tenant-factory shall permit the owner, his agents and servants, to enter and remain upon the demised premises whenever and so long as may be necessary to comply with the provisions of law, the responsibility for which is by this section placed upon the owner; and his failure or refusal so to do shall be a cause for dispossessing said tenant by summary proceedings to recover possession of real property, as provided in the Code of Civil Procedure. And whenever by the terms of a lease any lessee or tenant shall have agreed to comply with or carry out any of such provisions, his failure or refusal so to do shall be a cause for dispossessing said tenant by summary proceedings as aforesaid. Except as in this article otherwise provided the person or persons, company or corporation conducting or operating a factory whether as owner or lessee of the whole or of a part of the building in which the same is situated or otherwise, shall be responsible for the observance and punishable for the nonobservance of the

provisions of this article, anything in any lease or agreement to the contrary notwithstanding."

We may rest upon the assumption conclusively established by the evidence, and, we think, conceded by the appellant, that were it not for the alterations made by the defendant lessee in connection with the sublease to defendant Hetzel, the sublessee, the defendant owner discharged faithfully and efficiently every duty imposed upon her by the provisions of the statute quoted. The plaintiff contends that the owner should be held liable because the statute provides that the fire escapes should be "connected with the interior by easily accessible and unobstructed openings." Her counsel concedes in his brief:

"It is true that the technical meaning of this language may seem to refer to the immediate interior; but the liberal import of the language is that it be connected with all parts of the interior."

This phrase last quoted may not be read as if excised from the context of the statute, but must be read in connection with its associate provisions. It clearly has reference to the openings through the wall attached to which are the fire escapes. It was not designed that the statute should regulate the interior division of a factory building, and it is not required that escapes should connect directly with every partitioned section of the structure.

Plaintiff's further contention is thus stated by counsel:

"The part partitioned off for the factory of the Hetzel Company constituted a separate factory; and hence there were no fire escapes on the outside, or stairs to the roof, as required by the statute. If the part occupied by Hetzel is a separate factory, this proposition is unanswerable; and there seems no legal reasons why it should not be deemed a separate factory within the meaning of the act."

The statute imposed the duty of providing fire escapes on the outside of "every factory in this state consisting of three or more stories in height." We cannot agree that the portion of the floor let to Hetzel is a separate factory, within this plain description.

[3] The owner discharged her full statutory duty; no negligence was proved against her; and her judgment must be sustained. The tenant who made the sublease owed no common-law duty to the decedent, and none was imposed upon it by the statute invoked. The judgment in its favor was properly directed. *Pauley v. S. G. & L. Co.*, 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194.

The judgment and order appealed from should be affirmed, with costs. All concur.

SPIELER V. CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. February 27, 1914.)

APPEAL AND ERROR (§ 1003*)—REVIEW—VERDICT OF JURY.

A judgment will be reversed, when based upon a finding of the jury which is against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

Ingraham, P. J., and Laughlin, J., dissenting.

Appeal from Trial Term, New York County.

Action by Isidor Spieler against the City of New York. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

Harry Crone, of New York City, for appellant.

Frank V. Johnson, of New York City, for respondent.

PER CURIAM. The judgment and order appealed from should be reversed, and a new trial ordered, with costs to appellant to abide the event, upon the ground that the finding of the jury that the plaintiff was free from contributory negligence was against the weight of the evidence.

INGRAHAM, P. J., and LAUGHLIN, J., dissent, and vote for affirmance.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(84 Misc. Rep. 396)

BACCARIA v. LANDERS.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. SALES (§ 87*)—CONSTRUCTION OF CONTRACT—TIME OF PAYMENT.

Where no time of payment for goods sold is fixed in the contract, the law presumes that payment was to be made upon delivery, and not that it was to be made at the buyer's convenience.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 239-247, 1046; Dec. Dig. § 87.*]

2. HUSBAND AND WIFE (§ 19*)—MUTUAL RIGHTS, DUTIES, AND LIABILITIES—NECESSARIES.

Where goods furnished a wife were necessities, in the absence of any contract that she alone should be liable and of proof that the husband had already supplied similar articles, or notified the seller not to give credit to her, the presumption is that she contracted as agent for her husband, and he is liable therefor, though the goods were ordered by the wife and the bill was sent to her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 109, 121-138, 142, 146, 322; Dec. Dig. § 19.*]

3. ACCORD AND SATISFACTION (§ 7*)—PART PAYMENT—IN GENERAL.

The rule that where a liquidated sum is due the payment of part only, although accepted in satisfaction, is not, for want of consideration, a discharge of the entire indebtedness, is confined strictly to cases falling within the rule.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 46-58, 66, 94, 95; Dec. Dig. § 7.*]

4. ACCORD AND SATISFACTION (§ 11*)—PART PAYMENT—CONSIDERATION.

Where there was no dispute as to the amount due, the debtor merely asking for a discount of 20 per cent. for immediate payment, although payment was already due, the acceptance by the creditor of a check for a sum less than the amount due, marked "In full of all demands to date," did not bar recovery of the balance due, the agreement to take less than what was due being without consideration and void.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75-82; Dec. Dig. § 11.*]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by Theresa L. De Villiers Baccaria against George M. Landers. From a judgment for defendant, plaintiff appeals. Reversed, and judgment rendered for plaintiff.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Louis J. Gold, of New York City, for appellant.

Clarence K. McGuire, of New York City, for respondent.

SEABURY, J. This action was brought to recover \$223.40, an alleged balance of an account claimed to be due for goods sold and delivered. It appears that the goods sold and delivered were ordered by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the defendant's wife; that they were originally charged to the defendant's wife; that they were necessities according to the circumstances and station in life of the defendant; and that the defendant and his wife were living together during the period the goods were sold and delivered. The goods were shown to be of the reasonable value of \$1,112, of which amount the defendant paid \$889.60, giving his check, with a statement thereon that the payment was "In full of all demands to date." The court below gave judgment for the defendant on the ground that there was no express agreement as to when the goods sold should be paid for, and therefore they were to be paid for at the customer's convenience.

[1] The ground upon which the court below rendered judgment for the defendant was incorrect. No time of payment being fixed in the contract for payment of the goods sold, the law presumes that payment was to be made upon delivery. *Mount v. Lyon*, 49 N. Y. 552; 35 Cyc. 264.

[2] The mere fact that the defendant's wife ordered the goods, and that the plaintiff sent a bill for the goods to the defendant's wife, did not relieve the defendant from liability. The goods sold were necessities, and, in the absence of any contract on the part of the wife that she alone should be liable for them, and in the absence of proof that the husband had already supplied his wife with articles of the same character as those purchased, or had notified the tradesman not to give credit to her, the presumption is that she contracted as agent for her husband, and that he is liable for the debt. *Speckmann v. Foote*, 138 N. Y. Supp. 380; *Wanamaker v. Weaver*, 176 N. Y. 75, 83, 68 N. E. 135, 65 L. R. A. 529, 98 Am. St. Rep. 621; *Rosenfeld v. Peck*, 149 App. Div. 663, 134 N. Y. Supp. 392.

[3] The claim of the respondent that because the last payment was made "in full of all demands to date" there was an accord and satisfaction is not tenable, in view of the fact that the amount of the debt was not the subject of dispute. While the rule that where a liquidated sum is due, the payment of part only, although accepted in satisfaction, is not, for want of consideration, a discharge of the entire indebtedness, is not looked upon with favor, and is confined strictly to cases falling within it (*Jackson v. Volkening*, 81 App. Div. 36, 80 N. Y. Supp. 1102; affirmed 178 N. Y. 562, 70 N. E. 1101), yet where the case does come strictly within the rule, that rule must be applied.

In *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986, the court said:

"It is only in cases where a dispute has arisen between the parties as to the amount due and a check is tendered on one side in full satisfaction of the matter in controversy, that the other party will be deemed to have acquiesced in the amount offered by an acceptance and a retention of the check."

[4] In the present case there was no dispute as to the amount due. When the plaintiff demanded payment the defendant, instead of disputing the claim, wrote the plaintiff as follows:

"If you are badly in need of money you will probably be willing to accept a discount of say 20% and if this will help you out and you advise me immedi-

ately on receipt of this letter to that effect, I will see that you have a check for your account in full less 20% * * * otherwise I regret that your account must take its usual course."

The present case, therefore, falls clearly within the rule declared in *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710, where it was said—

"that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount; such an agreement being nudum pactum. But if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement."

The agreement of the plaintiff to accept a part of the debt "in full of all demands to date" was without consideration and void.

The facts of the case being undisputed, and the defendant having failed to establish any defense to the plaintiff's claim, it follows that the judgment should be reversed, with costs to the appellant, and the judgment should be awarded to the plaintiff for \$222.40, with interest, together with the costs in the court below. All concur.

(83 Misc. Rep. 488)

WALSH v. FT. SCHUYLER BREWING CO. et al

(Onelda County Court. January, 1914.)

1. LANDLORD AND TENANT (§ 86*)—LEASE—CONSTRUCTION—RENEWAL.

Under a lease giving the tenant "first privilege of renewal," he was entitled to such privilege only in case the landlord gave a lease, and hence could not renew the lease by mere service of notice on the landlord, prior to the expiration of the term, stating his election to remain and demanding a new lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 270-275; Dec. Dig. § 86.*]

2. LANDLORD AND TENANT (§ 296*)—VIOLATION OF ORDER.

That the landlord had obtained an order restraining his tenant and subtenant from abandoning traffic in liquor on the premises, pursuant to the Liquor Tax Law (Consol. Laws 1909, c. 34), as amended by Laws 1910, c. 494, did not preclude him from obtaining a warrant in summary proceedings directing the removal of the tenant and subtenant from the premises; it appearing that such warrant would not be in contravention of the restraining order in that the landlord's object in obtaining such order was merely to prevent the tenants from depriving the property of its liquor tax license.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1272-1275, 1283; Dec. Dig. § 296.*]

Summary proceeding by Matthew Walsh against the Fort Schuyler Brewing Company and its subtenants. Ordered that warrant issue directing removal of defendants.

On January 9, 1909, Walsh gave the Ft. Schuyler Brewing Company a lease of a hotel property in the city of Utica, which lease was to run for a term

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of five years, and which term expired, therefore, on the 9th of January, 1914. The lease contained the provision: "With the first privilege of a renewal of this lease at the end of said term."

Prior to the 9th of January, 1914, Walsh gave notice to the brewing company and its subtenants that their lease would expire on that date, and that he would not renew the same, and that they must vacate at the end of the present term. Prior to the expiration of the term, the brewing company served upon Walsh a notice to the effect that it "does hereby exercise the privilege of renewing a certain lease" (referring to the lease in question), and requires "that a lease of said premises be given by you to the Ft. Schuyler Brewing Company under and pursuant to the privilege of renewal of said lease given and contained in said lease." And on or about the same time the Ft. Schuyler Brewing Company tendered to Walsh a lease duly executed by it, of the same premises, at the same rent and for the same term as the prior lease, but not containing the covenant of renewal. This lease Walsh refused to execute, and after the expiration of the term of the lease brought these proceedings upon the ground that the defendants were holding over after the expiration of their term without the consent of the landlord. On the 16th day of December, 1913, and prior to the expiration of the lease, the landlord, Walsh, brought an action in the Supreme Court against Thomas J. Walsh, the undertenant of the brewing company, occupying said hotel, and against the local special deputy commissioner of excise, and against William W. Farley, as state commissioner of excise, in which action, on said day, he obtained an injunction order, in and by which the said Walsh, the subtenant, "is enjoined and restrained from transferring said liquor tax certificate to any other premises or to any other person, and from abandoning the traffic in liquors at the said premises, Nos. 1 and 3 Oneida St., Utica, N. Y., and from filing a notice of abandonment in the traffic of liquors against the said premises until a further order of this court."

The premises at 1 and 3 Oneida street are the same premises mentioned in the lease, and for the recovery of which this proceeding is brought.

Upon the trial the facts were stipulated. All of the above documents were marked in evidence and the case submitted to the county judge for decision.

James Coupe, of Utica, for plaintiff.

Arthur J. Foley, of Utica, for defendants.

HAZARD, J. [1] There can be no question but that the original term of this lease ended on the 9th day of January, 1914, at noon. The lease by its terms specifically so provides. The entire question litigated here is as to the effect of the provision in the lease which says: "With the first privilege of a renewal of this lease at the end of said term." There is nothing further than the language just quoted upon that subject in the lease. It does not state for what period, or at what rate, or in what manner the renewal is to be effected, and the petitioner claims the paragraph quoted is void for uncertainty. It seems to have been held in a number of cases that such language is to be interpreted as referring to a new lease for the same term and at the same rent. *Rutgers v. Hunter*, 6 Johns. Ch. 218; *Tracy v. Albany Exchange Co.*, 7 N. Y. 474, 57 Am. Dec. 538.

It is doubtless true that the clause in question was put into the lease for a purpose, and that we must endeavor to ascertain what that purpose was, and to give it effect if possible. Defendants contend that the paragraph in effect makes the lease one for ten years, or at least that it gives them the unqualified option to renew the lease for five years, and they contend that the service of their notice of election to

remain or renew the lease is sufficient, ipso facto, to effect that result. This theory involves several propositions, the first of which is that the legal purport of the words in question is to give to the tenant an unqualified right of renewal, and that proposition involves the other one, that the landlord has nothing to say about it, and nothing to do about it; in other words, that no new lease or agreement need be made, and that nothing whatever need be done except to serve notice on the part of the tenant, upon the landlord. There doubtless are cases in which it is provided by the terms of the lease that, upon doing some specific thing, usually serving a notice in writing within a specified time, the lease shall thereby and thereupon be deemed renewed or extended; and it is doubtless true that in such cases nothing further is required than to serve a notice. Cases of that sort are: *Kolasky v. Michels*, 120 N. Y. 635, 24 N. E. 278, *Hausauer v. Dahlman*, 72 Hun, 607, 25 N. Y. Supp. 277, and *Hoff v. Royal Metal Furniture Co.*, 117 App. Div. 884, 103 N. Y. Supp. 371. In those, and many other cases which might be cited, it is held that no new lease is necessary, and that nothing is necessary beyond the service of a notice on the part of the tenant; but the opinion shows clearly enough that it is so held because of the fact that the lease itself so provides, viz., that the service of such notice shall ipso facto renew the lease. The lease in the case at bar is absolutely silent upon the subject of how it may be renewed.

The distinction between leases granting the lessee the privilege of renewal and vesting in him alone the right to renew, and one not containing such a provision, is pointed out in *Simon v. Schmitt*, 137 App. Div. 625, 122 N. Y. Supp. 421. However, there is in the lease we are considering a "privilege of renewal," and it is, I think, to be construed as a privilege running to the lessee. The lease is silent as to how he may avail himself of the privilege, and it is contended that, by the service of their notice expressing a desire or intention to renew, they have thereby renewed the lease. They also contend that by the mere fact of holding over they have exercised their option, and that the lease is thereby renewed, and cite the case of *Voegel v. Ronalds*, 83 Hun, 114, 31 N. Y. Supp. 353, in support of their contention. That was an action brought to recover rent. It appears that the lease gave to the tenant an absolute right of renewal for a term of two years "if party of the second part so desires." It was held in that case that the fact of holding over after the expiration of the original term was proof of the election on the part of the tenant to take the additional term, and the tenant was held liable for the rent. That is not a parallel case to the one at bar, and, furthermore, in the case at bar the holding over is without the consent of the landlord; he having prior to the expiration of the term notified the tenant that he must vacate, and that he would not renew. The case is also to be differentiated from that of *Chretien v. Doney*, 1 N. Y. 419, cited by defendants, which was a case where the lease provided that the tenant has "the privilege to have the premises for one year, one month and 20 days longer; but if he leaves he is to give four months' notice before the expiration of this lease." It was held in that case that no new writing was contemplated between the parties, and that by simply neglecting to serve the four

months' notice the tenants had the right to continue in possession for the full or extended term. The mere statement of the facts, as outlined above, shows that it has no application here.

The case of *Tracy v. Albany Exchange Co.*, 7 N. Y. 472, 57 Am. Dec. 538, is cited by defendants. In that case the lease contained this clause:

"The said party of the second part to have the refusal of the premises at the expiration of this lease for three years longer."

This was held to be a covenant to renew for the same term and at the same rent. In that case the landlord refused to renew except at an increased rent. The tenant took a new lease at the advanced rent, under protest, however, and brought that action to recover for damages for breach of covenant to rent, and was permitted to recover in the action. That case, however, while it might be important in an action between these parties for breach of contract to renew, is not of assistance in these summary proceedings.

My attention is not called to any case, when, under circumstances exactly similar to these, the tenant has been held to have effected a renewal of a lease merely upon the service of a notice. This brings us to a consideration of the petitioner's rights, if any, viz., as to whether he has anything to say on the subject of a renewal. It will be noticed that somebody, doubtless the party of the second part, is given the "first privilege of renewal." Defendants contend that the word "first" is mere surplusage, and point out that nobody can have a renewal of the lease but themselves. This is strictly true, as a new lease, at least one to anybody else, would not be a "renewal" of the present or former lease. However, I think that the word "renewal," as contained in the paragraph in question, is meant to refer to a new or additional lease. Substantially similar language has been construed in the case of *Holloway v. Schmidt*, 33 Misc. Rep. 747, 67 N. Y. Supp. 169, as follows:

"The words 'first privilege of a renewal,' as used in the lease, meant the prior right to a lease of five years upon terms the same as those in the lease of 1895, provided the landlord should give a lease."

It seems to me that that decision is a satisfactory and sound one, and should be followed here, which would mean that the interpretation of the clause we are considering in the lease in the case at bar means that the tenants shall have the first privilege of renewal of this lease at the end of their original term, provided the landlord leased the premises to any one. If this decision is correct, it would follow that something more was necessary than the mere service of a demand or notice of their decision to renew upon the landlord. I think there must have been, under the circumstances in this case, some new agreement, acquiesced in by both parties. I do not intend to decide that an entirely new lease must have been made. It would have been sufficient had the old lease been indorsed with a memorandum that it was renewed for a specified term at a specified rent, or even indorsed "renewed," providing that memorandum had been signed by both parties; but I think that something of that nature was required by the circumstances

of this case. I do not think that the service of the notice by the tenant, notifying the landlord that he desired to remain and demanding a new lease, ipso facto renewed the lease. The landlord had previously, or at least before the expiration of the old term, unequivocally notified the tenant that he must vacate. It is not necessary here and now to decide whether that was a breach of contract between the petitioner and the defendants. That question is not here. Specific performance is not asked in this proceeding, and could not be given. *Simon v. Schmitt*, 137 App. Div. 625, 122 N. Y. Supp. 421. Whatever may have been the rights of these defendants, or any of them, under the lease in question, I think the fact remains that the lease was not renewed, and it follows that the relation of landlord and tenant terminated at noon on the 8th day of January of this year, and, as that is the contention of the petitioner herein, it would seem to follow that the petition must prevail.

[2] It is claimed, however, by the defendants that because of the restraining order, outlined above, the defendant is enjoined from leaving the premises, and that if this court should grant an order requiring him to vacate it will be in contravention of the terms of the restraining order granted by the Supreme Court. There is no merit in that contention. Obviously, it is intended on the part of the landlord to prevent the tenant from abandoning the traffic in liquors on the premises in question, which it is apprehended he is about to do or contemplates doing, pursuant to chapter 494, Laws of 1910. The object of the plaintiff in that action is doubtless to prevent the tenants from depriving the property of its liquor tax license, and that action does not in any way interfere with these proceedings.

The petitioner is therefore entitled to a warrant directing the removal of the defendants from the premises in question.

Ordered accordingly.

GOLD et al. v. GROSS et al.

(City Court of New York, Trial Term. February 26, 1914.)

1. FRAUDS, STATUTE OF (§ 90*)—SALE OF GOODS—ACCEPTANCE OF PART.

To satisfy the statute of frauds, there must be, subsequent to the sale, a delivery by the seller with intent to surrender his control and lien, and to vest the right of possession in the buyer, and an acceptance by the buyer with intent to take possession as owner, but mere words are not sufficient.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 162, 170, 171, 174-179; Dec. Dig. § 90.*]

2. FRAUDS, STATUTE OF (§ 90*)—SALE OF GOODS—ACCEPTANCE OF PART—INCOMPLETE CONTRACT OF SALE.

Where parties on August 15th made an executory contract for the sale and purchase of goods dependent upon whether the seller's principal would authorize a sale at the price quoted, there was no completed contract of sale, so that the delivery to the buyer at that time of a piece of the goods, so that he might see that the remainder was of like quality, and for which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

he was to be charged, was not such delivery and acceptance as to take the case out of the statute.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 162, 170, 171, 174-179; Dec. Dig. § 90.*]

3. FRAUDS, STATUTE OF (§ 90*)—PART PERFORMANCE—SALE OF GOODS—DELIVERY OF SAMPLE.

Delivery of a sample, forming no part of the bulk sold and to be paid for, is not such a delivery and acceptance of part of the goods sold as to constitute a symbolical delivery which will satisfy the statute.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 162, 170, 171, 174-179; Dec. Dig. § 90.*]

Action by Israel Gold and Morris Block, doing business as Gold & Block, against Francis Gross, Jr., and others doing business as Gross, Harrison & Co. The complainant was dismissed at the trial and plaintiffs move for a new trial. Motion denied.

Max Monfried, of New York City, for plaintiffs.

Robert H. Hahn, of New York City (O. B. Thomas, of New York City, of counsel), for defendants.

FINELITE, J. The plaintiffs contend by their complaint that heretofore, and about the 15th day of September, 1912, they agreed to purchase from the defendants, and the defendants agreed to sell to the plaintiffs, 4,184 $\frac{3}{8}$ yards of voile at 40 cents a yard, and the defendants agreed to deliver the same to the plaintiffs on demand, and upon delivery thereof the plaintiffs agreed to pay the defendants the sum of \$1,673.75. Said voile was not delivered to the plaintiffs herein, and for the failure of the defendants to deliver said goods the plaintiffs therefore claim that they have suffered damages in the sum of \$1,000. The defendants, by their answer, deny these facts, and allege as a further, separate, and distinct defense to the plaintiffs' cause of action that the said alleged agreement set forth in the plaintiffs' complaint was for the sale of goods at an agreed price of more than \$50, and that neither the alleged agreement, nor any note or memorandum thereof, was ever made or exists in writing, and signed or subscribed by the said defendants, who are sought to be charged thereby or by their legal agent; nor did the said purchasers accept or receive any part of such goods pursuant to such alleged agreement; nor did the buyer pay any part of the purchase money; and that any such alleged agreement is therefore, as defendants are informed and believe, void as against these defendants, pursuant to the statute in such cases made and provided. On the trial of the action the plaintiffs offered proof to the effect that a conversation was had with one of the defendants, wherein the defendants sold to the plaintiffs the merchandise in question at the price of 40 cents per yard, and that at said time a piece of said merchandise was delivered to the plaintiffs, which was taken to the plaintiffs' place of business. The court at the end of the plaintiffs' case dismissed the complaint upon the ground that the contract was void, under the statute of frauds (section 31,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

subd. 6, of article 3 of chapter 45 of Consol. Laws of 1909): (1) That the alleged contract was oral; (2) No memorandum thereof was in writing signed by the party to be charged; (3) no part of the purchase price had been paid by the vendee or even tendered; (4) that the amount involved was upwards of \$50; (5) that there was no delivery or acceptance of the merchandise, or a part thereof, under a contract, and if there was any such acceptance under a contract, the same was void under the statute. It will therefore be necessary to refer to the testimony given by one of the plaintiffs as a witness on their behalf as to a delivery of part of the merchandise to take it out of the statute; also as to a contract made for purchase of said goods upon an agreed price, and the failure of the defendants to deliver the same in accordance with the alleged sample accepted by the plaintiffs. Said witness testified that the piece of merchandise was delivered to him about August 15, 1912, and was in the plaintiffs' possession at the time that the alleged contract was made on September 15, 1912, and the question arises here whether the piece of merchandise delivered was a sample of the goods as accepted by the plaintiffs, which were to be delivered should a contract be made. Referring to the conversation that the plaintiff alleged that he had with one of the defendants, he testified as follows:

"Q. Were there any goods delivered at that time? A. Yes. Q. How much? A. One piece. Q. Under what conditions? A. Subject that these goods will be the same as that when the offer is accepted (stenographer's minutes, page 16). Q. Did you receive the one piece of goods delivered to you? A. Yes. Q. Did you accept it? A. I only took this piece of goods to see that the other goods I got at 40 cents would be the same quality (stenographer's minutes, page 17)."

It further appeared from the evidence that one of the defendants informed the witness that he would have to cable on to the manufacturers in Europe to first obtain from them the acceptance of the offer made by the plaintiffs for said merchandise at 40 cents per yard. Up to this time, although the sample, as we may call it, was in the possession of the plaintiffs, the plaintiffs contend that this was a sample of the merchandise alleged to have been purchased, and that, upon acceptance of the said offer by the manufacturers, whom the defendants represented, that was a part delivery of the contract, so as to take it out of the statute of frauds; that the time of the delivery of the goods was to be made as soon as the offer was accepted by the manufacturers in Europe, and therefore the contract, as made between the plaintiffs and the defendants, was an executed one; that the failure of the defendants to deliver the goods on the acceptance of plaintiffs' offer was a breach of said contract for which the defendants would be liable in damages, and that the sample accepted by the plaintiffs was a manual delivery of the goods purchased. Before this can be accepted as the symbolic delivery of the one piece to the plaintiffs arises the question of whether the contract had been consummated between the plaintiffs and the defendants when said sample was taken by the plaintiffs. It is therefore necessary to further refer to the testimony of the witness in reference to the question here in-

volved. It appears that the defendants had received a cablegram from the manufacturers of said merchandise, and thereupon telephoned to the plaintiffs on the 15th day of September, 1913, when the following conversation took place:

"Q. Now, state what that conversation was? A. He told me that the manufacturers had agreed to accept the 40 cents, and that I should come and take these goods, and I told him I would be there in an hour and take the goods (stenographer's minutes, pp. 3, 4). Q. Do you remember any other thing said at that time over the phone? A. Nothing, except that he wants me to take these goods, and I told him I would go down an hour later. When I came down I asked Mr. Lovel, 'Where is the goods?' 'Why, the goods have been sold' (stenographer's minutes, p. 4). Q. What did you say about the piece you had? A. That will be charged up. The balance will follow this piece here, and the balance we have in stock here will follow (stenographer's minutes, p. 12)."

[1] As appears from this testimony, on the 15th day of September, 1912, no contract in law to take the case out of the statute has yet been proven. To satisfy the statute there must be a delivery by the vendor, with intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner. It can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties. Mere words are not sufficient. The acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer. This is elementary law as to the doctrine that it has carried the principle of constructive delivery to the utmost limit. So long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute. *Nichols v. Clark*, 40 Misc. Rep. 107-109, 81 N. Y. Supp. 262. It further appears in said minutes, in reference to the 15th day of September, 1912, when the telephonic communication was had between the plaintiffs and the defendants, as follows:

"Q. Now, state the balance of the conversation you had with Mr. Lovel on or about the 15th of September. A. Simply that he called me up on the telephone and said the goods were mine, that is, the balance I should take of the lot there. I says, '*I will be down at 11 o'clock and make the arrangements*' (stenographer's minutes, p. 27). Q. What was your agreement in this telephonic communication? A. That I take the goods out. Q. Was there anything said about paying for them? A. Nothing was told to me about paying for them. Q. No agreement made as to when payment should be made or on what terms the goods were to be taken, or anything of the kind? A. *Not until we went down to the credit man* (stenographer's minutes, p. 28). Q. Then it was after he told you the goods were sold that you went down to the credit man, is that right? A. Yes (stenographer's minutes, p. 29). Q. Well, what conversation was then had? A. I spoke to the credit man and asked him, when Mr. Lovel went downstairs with me, and we talked over the amount of credit; what credit they would give the firm of Gold & Block. Mr. Stermeyer opens up his books, and he says that the highest he can go is \$1,000 credit, and the balance will have to be in cash (stenographer's minutes, pp. 10 and 11). Q. Now, tell me again what you went down there for? A. To see that everything went through all right; that is, that there should not be any hitch in the credit. Q. Hitch in the credit? A.

Yes. Q. Anything else? A. No, just the hitch in the credit. Q. Did you go down to agree on terms? A. *We went down to agree on terms* (stenographer's minutes, p. 30)."

[2] From this conversation it is evident that the terms for the purchase of the property and the credit that the plaintiffs desired to receive on said purchase had not as yet been agreed upon; so therefore the symbolic delivery of the one piece of merchandise in the possession of the plaintiff was not a sample of the whole purchase, to take the case out of the statute of frauds. The act subsequent to the alleged sale does not show the change of ownership, but quite to the contrary. Mere words are not enough, and there were no words even sufficient to satisfy the statute. From the evidence adduced, no change of possession had taken place, no actual change by fact or word. The minds of the parties had not agreed upon a contract. It was executory in reference to the sale of the merchandise. From August 15th to September 15th, when the last conversation was had between the plaintiff and the defendants, no contract had been consummated, so therefore, to take the case out of the statute, there must be an entire contract of sale by sample, and sample of goods delivered after the entire contract had been consummated, which would take the case out of the statute. Even at this last date, to wit, September 15th, the sale was not complete. The question as to credit was not agreed upon, and it goes without saying that the defendants would not have the right to deliver the manufacturers' merchandise without an agreement as to payment had first been concluded. The sale was only conditional on ascertaining the fact of the manufacturers' acceptance of the price. There could have been no delivery at that time, because a contract of sale was not perfected. The plaintiffs knew from the conversation had with the defendants that when one of the plaintiffs called at the place of business of the defendants he was informed that the goods were sold, and after this information was conveyed to him, then for the first time did they go before the credit man and see what credit the plaintiffs would be allowed. This in itself was empty ceremony. There was no necessity to ascertain from the credit man what credit he would allow the plaintiffs on the purchase of merchandise if the plaintiffs and the defendants had already agreed upon and consummated a contract for the purchase of the merchandise. The taking of the piece of goods which the plaintiffs retained, and which was to be charged for by the defendants on August 15, 1912, was not and could not be construed as a delivery of the purchase, as the contract, as to its conditions and agreements, was still open on the 15th of September, 1912. The defendants never intended, nor could it be in reason anticipated, that they would part with the merchandise without payment therefor, and the first reference to payment was had on the 15th day of September, 1912, before the credit man of the defendants. The property was still under the control of the defendants, and no delivery was made to the plaintiffs, actual or symbolical. The bargain was not binding until the acceptance by the manufacturers as to the price offered, and if this one piece of goods was taken to be construed into a sample, it was taken not as a delivery or the acceptance of the merchandise. Un-

til a contract is consummated the defendants would have the right to withdraw any offer made by them.

[3] There must be an actual delivery by sample or by the total amount of the merchandise before it can be said that a contract had been consummated for which a party would have been liable for non-delivery. It is not the mere taking of a sample that would amount to a delivery. If a symbolical delivery is relied on, it must appear to be a delivery by the vendor and an acceptance by the vendee with a view to change the possession. *Carver v. Lane et al.*, 4 E. D. Smith, 168.

In *Johnson v. Smith* (N. Y. N. P. Cases [2d Ed.] p. 81), where it was held, upon a contract for the sale of sugar, delivery of the export entry is not a delivery of the article sold, but in the meaning of the statute. Neither is delivery of samples, forming no part of the bulk sold. Where there is an agreement on a sale that the vendee shall give notes with an indorser of four and five months, upon a demand of such notes and a total disaffirmance of the contract by the vendee, general indebitatus assumpsit lies. This was an action in assumpsit for goods sold and delivered, and the plea was nonassumpsit. It appeared from the facts that a conversation took place on the 23d day of June, 1906, between the plaintiff and defendant concerning the sale of sugars, in which conversation it was ultimately agreed that the plaintiff would sell them to the defendant at \$11.50 per hundredweight, and the defendant was to give in payment his own notes at four and five months, with his uncle's indorsement; that the export entry was then delivered to him, which merely specified the price and marks of the hogsheads, and the defendant took the samples which had been accepted (which were no part of the weight), rolled them in a paper and laid them aside in the plaintiff's counting room, and promised to call and take them away the next day, which he did not do, and inquired whether the sugars might remain in the plaintiff's store a few days, which was assented to by the plaintiff. On the night of the 27th of June the store and sugar were consumed by fire. A few days afterwards a letter was written by the plaintiff to the defendant on the subject of the sale, to which the defendant replied, disavowing the contract. The defendant's counsel moved for a nonsuit on the ground that the plaintiff ought to have declared on the special contract to give notes with an indorser at four and five months, and could not declare generally for goods sold and delivered as he had done here. It was answered by the plaintiff that whenever such an agreement was made and the vendee refused to give the notes when demanded, he disaffirmed the contract as to the notes, and entitled the plaintiff to declare generally that the letters which passed between the plaintiff and the defendant subsequent to the loss of the sugar was sufficient evidence of such demand and refusal. The judge being of this opinion, the nonsuit was refused, but the point was reserved at the defendant's request. As the facts in the case had been proved by a single witness, the defendant, in order to impeach the accuracy of his recollection, offered to go into testimony to show that, from the suggestion of the defendant with reference to his uncle, it was improbable that he could

have offered him an indorser; but this was overruled by the court as being too remote an inference. The defendant then rested his defense, chiefly on two grounds: (1) That even the parol contract between the parties had not been perfected; the sale being by weight, and that weight not having been ascertained. (2) That even if the parol contract had been complete, there was nothing to take it out of the statute of frauds; that there was no sufficient evidence of delivery; that it constituted a symbolic delivery; something must be delivered and accepted with the express intention of constituting a delivery and saving the statute of frauds; that the delivery of a sample is not a delivery of part of the goods, but in the meaning of the statute unless the sample is considered as part of the bulk. 7 T. R. 114.

The plaintiff's counsel contended that the delivery of the export entry to the defendant was a sufficient delivery to satisfy the statute, inasmuch as it contained the marks and numbers of the hogsheds, and was therefore a designation of the goods by the vendor to the use of the vendee, and was even equivalent to the marking them by the vendee, both of which acts constituted a sufficient delivery. *Ludlow v. Bowne & Eddy*, 1 Johns. 17, 3 Am. Dec. 277. They also contended that the defendant's laying aside the samples was equivalent to a delivery, because he thereby withdrew the articles from the market. Thompson, J., writing for the court, said that he was of the opinion that the facts relative to storage and delivery of the export entry were put out of the question in this case by the decision of the court in the case of *Bailey & Bogert v. Ostend & Ostend*, 3 Johns. 421, 3 Am. Dec. 509; that the only question was whether the defendant's acts relative to the samples would constitute a delivery in law. It must appear in all cases of symbolic delivery that it was the express intention of the party to make a delivery; that here, as samples form no part of the bulk to be paid for, delivery and acceptance of them would not be a delivery and acceptance of part of the goods sold within the meaning of the statute. The courts have gone far enough with regard to symbolical delivery, and that class of cases ought not to be extended, and affirmed the verdict for the defendant. I have examined the authorities cited by the plaintiff, but in all those cases the facts therein stated do not apply here. It appears from a reading of those cases that an entire contract of sale by sample was made, and thereafter a piece of goods delivered. In those cases it rightfully held that the piece of goods, delivered after "the entire contract was consummated" took the case out of the statute.

Motion for a new trial must therefore be denied. Settle order on one day's notice.

In re MITTNACHT'S WILL.

(Surrogate's Court, New York County. February 20, 1914.)

1. WILLS (§ 303*)—PROBATE—EVIDENCE—EXECUTION.

Evidence of attesting witnesses to a paper purporting to be a will held sufficient to establish its execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 711-723; Dec. Dig. § 303.*]

2. WILLS (§ 72*)—ANIMUS TESTANDI.

The act of a testator in calling a paper signed and executed by him a will and an invitation to witness a will, establish animus testandi.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 189; Dec. Dig. § 72.*]

In the matter of the contested probate of the will of Blanche Mittnacht. Probate allowed.

John B. Quintin, of New York City, for proponent.

Alfred L. Marilley, of New York City, for contestant.

FOWLER, S. The paper writing propounded as and for the last will of Blanche Mittnacht was prepared at a hospital where Mrs. Mittnacht died on June 19, 1912. The paper writing is in the following words:

"New York, May 31st, 1912.

"I, Blanche Mittnacht, being of sound mind, do hereby will to my sister, Louise C. De Freest, fifteen hundred and forty-nine dollars (\$1,549.00). I do hereby will my brother, Albert H. Vallte, five dollars (\$5.00), now on deposit in the Bowery Savings Bank on book No. 955,117.

"[Signed] Blanche Mittnacht.

"Witnesses: Joseph Schweitzer.

"Henry W. Ferris.

"Sworn to before me this 31st day of May, 1912.

"Hugh A. O'Hare, Com. of Deeds, N. Y. C., No. 1."

This very inartificial paper was prepared by an undertaker.

[1] The attesting witnesses have been produced in court and deposed to all the acts and things required by the statute of wills for the execution of a will. Standing alone, their testimony entitles the paper propounded to probate as the last will and testament of Blanche Mittnacht, deceased. The contestants have attempted to impeach the attesting witnesses by giving in evidence signed statements of such witnesses to the contrary of their depositions before me. These statements are in effect that testatrix never published the paper as her last will and that she simply requested the witnesses to sign the "paper," not characterizing it any other way. These statements were prepared by one hostile to the will. Both of the attesting witnesses depose under oath that they did not understand the effect of the several written statements so signed by them, and I am inclined to believe them. I am satisfied that the attesting witnesses are truthful witnesses and that by signing the hostile papers presented to them they did not intend to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

destroy the will. The testimony before me was given under the sanction of an oath and is full and complete. The testimonial evidence should not be nullified by a mere statement not under oath and made and prepared under circumstances not calculated to elicit the truth. Ignorant or unlettered men might easily be ensnared or misled by processes such as those indicated on the hearing. The statements draughted for the very purpose of impeaching the witnesses were not sworn to, nor was any protection given the attesting witnesses by the hostile hand who procured their signature to the declarations. The undertaker who prepared the paper propounded was also called to the stand by contestants. He was a bystander during the act of execution, and his testimony on the whole is not favorable to the will. He is not willing to characterize the paper so prepared by him as a will. But it is not his intention in preparing the will, but that of testatrix, which is at issue.

[2] Now, if testatrix called it a will, as it is sworn by the attesting witnesses she did, *animus testandi* on her part is established. An invitation to witness a will implies *animus testandi*. But even if this were a debatable point, the paper on its face purports to be a will, and this is conclusive in this matter. I am satisfied that great injustice might be done if this informal paper were refused probate, and so probate will be allowed.

Settle decree accordingly.

In re STONEMAN et al.

(Surrogate's Court, Albany County. February 20, 1914.)

1. CONTRACTS (§ 159*)—CONSTRUCTION—"FACE"—"FACE OR PAR VALUE."

Testator, on December 23, 1905, contracted with his partner to his interest in the firm for a certain sum, providing that the new firm might, at its option, apply in part payment thereon, "at the face or par value," a mortgage for \$1,300, made to the firm on July 17, 1893, carrying interest at 6 per cent. per annum, and might also apply a note to the old firm for \$150 executed October 2, 1893, payable in three months. *Held*, that the "face" of an instrument is that which is shown by the language employed without any explanation, modification, or addition from extrinsic facts or evidence, and that the term "face or par value" was intended to include the amount due on the mortgage note, with interest, at the time of election, to apply as part payment, and that as to the \$150 note no interest could be computed; none being provided for on the face of the instrument.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 159.*

For other definitions, see Words and Phrases, vol. 3, pp. 2636, 2637.]

2. WILLS (§ 821*)—CONSTRUCTION OF LEGACY—"AMOUNT."

Testator dying subsequent to 1906, by codicil directed that there be charged against the interest of a daughter, "the amount" of a mortgage for \$1,300, made by her and her husband on July 17, 1893, payable with interest at 6 per cent. per annum, and also a note of \$150 made by her husband, not purporting to bear interest upon its face, and made other provisions evidencing his intention to treat his children equally. No interest was ever paid on the mortgage, and none was ever demanded. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

memorandum given by another daughter upon a loan to her, "to be paid to his estate without interest," had been delivered to her, and receipted for as cash to that amount. *Held*, that testator, by the use of the word "amount," did not intend to charge the interest, but only the principal, against the daughter's share in the distribution of his estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114-2119; Dec. Dig. § 821.*]

For other definitions, see Words and Phrases, vol. 1, pp. 375, 376.]

In the matter of the final judicial settlement of the account of proceedings of William J. Stoneman and Alexander S. Rowland, as executors of the last will and testament of Matthew G. Stoneman, deceased. Will and partnership contract made by testator construed.

Frost, Daring & Warner, of Albany, for William J. Stoneman.

Reeves & Todd, of New York City, for Rowland.

Stedman & Stedman, of Albany, for Breitenstein.

VAN DERZEE, S. In this proceeding on final accounting, there have been submitted for determination two questions of intent to be derived from the will and from a written contract made by the testator in reference to certain assets due decedent from his daughter Carrie E. Breitenstein and her husband, George P. Breitenstein.

The facts are not in dispute, and are set forth in Schedule G of the account. Consideration will first be given to the partnership contracts, the facts concerning which may be summarily stated. On July 17, 1893, the testator and his son William J. Stoneman were engaged in business as copartners, under the name of M. G. Stoneman & Son. On that date, George P. Breitenstein and Carrie E. Breitenstein executed and delivered to said Matthew G. Stoneman and William J. Stoneman a note, wherein it is recited that:

"For value received, I promise to pay Matthew G. Stoneman and William J. Stoneman, or order, the sum of thirteen hundred dollars, with interest thereon at the rate of six per cent per annum from date hereof until fully paid, said interest payable annually according to the tenor of 3 interest coupons hereto annexed, viz.: Each for the sum of seventy-eight dollars, bearing even date herewith," etc.

The note was made payable at a bank in Wisconsin and is secured by a "first mortgage" on certain real estate in Wisconsin. The mortgage is signed, as are also the coupon notes attached, by George P. Breitenstein and Carrie E. Breitenstein.

None of the interest coupons upon this note was paid when due, nor has any interest ever been paid upon this mortgage.

On October 2, 1893, George P. Breitenstein made and delivered to the same firm of M. G. Stoneman & Son his individual promissory note, as follows:

"\$150.

Albany, N. Y., Oct. 2, 1893.

"Three months after date I promise to pay to the order of M. G. Stoneman & Son one hundred & fifty dollars, at the Albany County Bank.

"Value received.

Geo. P. Breitenstein."

No interest has ever been paid on this note.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On December 23, 1905, the testator entered into an agreement in writing with his copartner for a sale of his interest in the firm of M. G. Stoneman & Son, of all the property and assets, of every nature and kind, all the merchandise of the business, as well as all promissory notes, mortgages, claims, and demands due the firm at the time of the transfer. The price agreed upon to be paid the testator "or his executors, administrators or assigns" by the other members of the firm was—

"the sum of \$20,000, upon demand, without interest, except that said new copartnership [which was composed of the remaining members of the firm] may at its option apply in part payment of said Matthew G. Stoneman or his executors, administrators or assigns, at the face or par value thereof, a certain mortgage note of \$1,300 made by George P. Breitenstein and Carrie E. Breitenstein, his wife, to the order of said Matthew G. Stoneman and said William J. Stoneman, bearing date July 17th, 1898 and a certain promissory note of \$150 made by George P. Breitenstein to the order of M. G. Stoneman & Son, dated Oct. 2nd, 1893."

A further expressed consideration for the transfer of the business was the payment to the testator of the sum of \$1,500 annually during his natural life, in consideration for his services and the use of the \$20,000, or so much thereof as remained unpaid.

On March 5, 1912, the executors made demand upon the firm of M. G. Stoneman & Son for payment of the \$20,000 set forth in the agreement above detailed. Said firm then exercised the option stated above to apply the said mortgage note and the promissory note for \$150 in part payment thereof, and in accordance with the option, as they construed it, paid to the executors the sum of \$16,876.47. This amount represents the sum of \$20,000, less the principal of said notes, with interest thereon computed to the date of payment. The executors gave a receipt therefor, which recites—

"without prejudice to the rights of either party as may be determined by the Surrogate's Court in final accounting."

[1] The question now presented is whether the said firm of M. G. Stoneman & Son was justified in applying, in part payment of the sum of \$20,000, the interest on the said notes. To express it more concisely, do the words "face or par value" used in the agreement mean, as to the parties thereto, the principal of the mortgage note and interest as contended by Executor Stoneman, or principal without interest, as claimed by Executor Rowland?

The discussion of counsel for Executor Rowland is, to a considerable extent, upon rules of testamentary interpretation and intent. In the brief several things are assumed as facts which are not before me as proof. For instance, it is assumed that the decedent was the controlling influence in the firm of M. G. Stoneman & Son; that the \$1,300 loaned to Mrs. Breitenstein, evidenced by the mortgage note, was the money of the testator; that the mortgage note, when executed, was delivered to and held by the testator, and not to the mortgagees therein named; that the \$1,300 was the money of the decedent at the

time the mortgage was given. No oral testimony was offered in this proceeding. There is no proof to support these assumed facts, nor any indication thereof in the written instruments before me.

The contract now under consideration was made by the testator and his son, William J. Stoneman, and grandson, William H. Stoneman; the latter not a party to this proceeding. And while construction of a contract when all parties interested are not in court may seem an anomalous request, I have concluded to express an opinion, because it is a family affair, and all the parties before me appear to be willing I should make a determination. The construction of the partnership agreement must be based upon the ordinary rules applicable to contracts, and not upon rules of testamentary instruments.

The words used in the instrument of which construction is asked are "face or par value." The face of an instrument is that which is shown by the language employed, without any explanation, modification, or addition from extrinsic facts or evidence. Black's Dictionary.

In *People v. Miller*, 84 App. Div. 168, 82 N. Y. Supp. 621, it is said:

"The term 'par value' has such a well-known meaning, not only in commercial and financial circles, but as applied to ordinary and everyday business affairs, that resort to the authorities for a definition would appear to be needless. It is sufficient for the purposes of this case to mention the following authorities which hold that in determining 'par value' the interest accrued up to the time of fixing the value must be included with the principal."

My attention has not been called, nor have I been able to find any authority in this state for giving to the words "face or par value" a different meaning than that applied in the *Miller Case* by Judge Chester.

My conclusion then must be that "face or par value," as used in the contract, means and was intended to include the amount which is due and collectible on the mortgage note at the time of the election by the members of the firm, to use it in part payment of their indebtedness to the testator under the terms of the contract.

As to the \$150 note, I think no interest can be computed thereon, because the note does not purport interest upon its face.

[2] In the codicil, the testator directs that there be charged against the interest of his daughter Mrs. Breitenstein the—

"amount of a certain mortgage note of \$1,300 made by my said daughter . . . and her husband, . . . and also the amount of a certain promissory note of \$150 made by George P. Breitenstein to the order of the firm of M. G. Stoneman & Son."

In the determination of the quantum of this legacy we may now apply the rules of testamentary interpretation, which could not be applied to the contract. These notes bear date of 1893; the will was executed seven years later, in 1900. In the will the decedent mentions the mortgage note by giving it to his daughter Caroline E. Breitenstein. In the codicil of 1906 that legacy of the note was revoked, and the language quoted employed.

The fact that the testator intended to treat all his children equally is evidenced by the eighth paragraph of the will, wherein he bequeaths certain legacies of different amounts to his children after having made devises of specific real property to them. He explains these legacies by saying that the same are, in his judgment, an equalization of the value of the devises already provided for. It appears by the account that the testator loaned his daughter Mary \$3,400, "to be paid to his estate without interest," and received from her a written memorandum detailing the transaction. This instrument has been delivered by the executors to her, and receipted for as cash to the amount of \$3,400.

In view of these circumstances, I do not believe the testator intended, by the use of the word "amount," to have interest accumulate until it should amount to more than the principal, and this amount taken from the share of his daughter in the distribution of his estate. The fact that interest was, for 18 years, neither asked nor received seems to strengthen the inference that payment thereof was never purposed by the testator from his daughter.

I am of the opinion that the testator intended to give to his daughter as a legacy the notes which she and her husband had given to the firm.

WERTHEIMER v. ROSENBAUM

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. LANDLORD AND TENANT (§ 129*)—POSSESSION—FAILURE TO DELIVER—DAMAGES.

The measure of damages for a lessor's failure to deliver possession of a furnished apartment to a lessee thereof was the difference between the rental value of the apartment and the rent reserved in the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 450-457; Dec. Dig. § 129.*]

2. EVIDENCE (§§ 474, 568*)—OPINION EVIDENCE—COMPETENCY OF EXPERTS—TESTIMONY AS TO VALUE.

In an action for failure to deliver possession of a leased apartment to the lessee, the rental value of the apartment could be shown only by the testimony of one familiar therewith, and the testimony of plaintiff, who was not shown to be familiar with the rental value of apartments of substantially the same character in the same neighborhood, would not support a judgment in his favor, though defendant introduced no evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219, 2392-2394; Dec. Dig. §§ 474, 568.*]

3. LANDLORD AND TENANT (§ 129*)—FAILURE TO DELIVER POSSESSION—ACTIONS—EVIDENCE.

In an action against the lessor of a furnished apartment for failure to deliver possession, plaintiff's testimony as to the comparative advantages of the leased apartment over another which he leased after defendant's failure to deliver was incompetent, as it did not tend to show the rental value of the leased apartment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 450-457; Dec. Dig. § 129.*]

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Louis Wertheimer against Edith Rosenbaum. From a judgment for plaintiff after a trial by the court without a jury, defendant appeals. Reversed, and new trial ordered.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Sharon Graham, of New York City, for appellant.

Boudin & Liebman, of New York City, for respondent.

SEABURY, J. The plaintiff sued to recover damages alleged to have been sustained by reason of the defendant's failure to deliver possession of a certain furnished apartment which the plaintiff claimed the defendant had leased to him for a term, commencing October 13, 1913, and ending May 1, 1914, at the monthly rental of \$130. After the alleged refusal of the defendant to deliver possession, the plaintiff leased another apartment in a different section of the city at the rate of \$160 per month.

[1,2] The only evidence offered to show the damages which the plaintiff claimed he sustained was given by the plaintiff himself, who was not shown in any satisfactory manner to have been familiar with the rental value of apartments of substantially the same character in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 146 N.Y.S.—12

the same neighborhood. If the plaintiff was entitled to recover at all, he was entitled to recover only the difference between the rental value of the premises demised and the rent reserved in the lease. An award of damages under this rule could only be made upon testimony of one who was shown to be familiar with the rental value of the premises demised. The estimate by the plaintiff, who had no expert knowledge on the subject, does not satisfy us that the premises demised were worth more than the rent reserved.

[3] The evidence of the plaintiff as to the comparative advantages of the apartment demised over the other apartment which he subsequently leased was incompetent and should not have been received. Such evidence did not in any way tend to show the rental value of the apartment which the plaintiff leased from the defendant.

The court below has awarded the plaintiff a judgment for the difference between the rent reserved and the plaintiff's estimate of what the apartment demised was worth to him. Nor is the position of the plaintiff strengthened by reason of the failure of the defendant to give evidence. If the plaintiff had offered proof as to the market value of the premises, the defendant might have been able to contradict such proof; but the defendant was in no position to dispute plaintiff's estimate of what the apartment would have been worth to him.

Judgment reversed, and new trial ordered, with costs to the appellant to abide the event. All concur.

SELLITTO v. LAMBERTI CONST. CO.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

BILLS AND NOTES (§ 335*)—ACTIONS—DEFENSES.

A note was executed by defendant, payable to the order of plaintiff's partner upon the latter's representation that there was a certain amount of masonry to be done in a wall which he was to erect. The note was indorsed to plaintiff, who knew that it was given on the understanding that if defendant was found to be indebted to plaintiff's partner in a smaller amount than that named in the note, defendant should be liable only for the reduced amount. *Held*, that it appearing that the wall contained less masonry than was claimed, plaintiff could not recover the full amount of the note, but must consent to a reduction.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 817; Dec. Dig. § 335.*]

Appeal from Municipal Court, Borough of The Bronx, First District.

Action by John Sellitto against the Lamberti Construction Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered, unless plaintiff consents to a remittitur.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Otto H. Droege, of New York City, for appellant.

Albert H. Vitale, of New York City, for respondent.

PER CURIAM. This is an action upon a promissory note for \$517, made by the defendant and payable to the order of one Scognamiglio.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The evidence shows that the note was given to Scognamiglio upon the representation that 25,501 cubic feet of masonwork in a certain wall was to be done, and that the note was indorsed and delivered to the plaintiff, who is shown by the evidence to have been a partner of Scognamiglio, and had knowledge of all the circumstances under which the note was made. It was clearly shown upon the trial that there were only 20,446 cubic feet of masonwork to be performed, and that the defendant had paid certain sums on account. The evidence shows that the note was given upon the understanding, of which the plaintiff was fully aware, that if the defendant was found to be indebted to Scognamiglio in a smaller sum than that named in the note, the defendant should only be liable for the reduced amount. We have examined the evidence carefully, and it shows that the defendant is indebted for the work done in the sum of \$92.68.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event, unless the plaintiff consents within 10 days to reduce the judgment to \$92.68, in which event the judgment is affirmed, without costs to either party.

HIRSCH et al. v. JACOBY.

(Supreme Court, Appellate Term, First Department. December 23, 1913.)

BROKERS (§ 24*)—ORDERS TO SELL—LOSS FROM DISOBEDIENCE.

Statement of a customer to brokers carrying stocks for him on margin, that he was going away, and did not want to lose any more than they had to his credit, otherwise he would not be responsible, amounts to an order to sell, so that they, not selling till the loss exceeded his margin with them, cannot recover of him the difference.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 19; Dec. Dig. § 24.*]

Appeal from City Court of New York, Trial Term.

Action by Charles S. Hirsch and others, partners as Hirsch, Lilienthal & Company, against Joseph Jacoby. From a judgment on a verdict directed for plaintiffs, defendant appeals. Reversed and dismissed.

Argued November term, 1913, before LEHMAN, PAGE, and WHITAKER, JJ.

Maurice Meyer, of New York City (Arthur C. Kahn, of New York City, of counsel), for appellant.

Mark G. Holstein, of New York City, for respondents.

PAGE, J. This is an action brought by the plaintiffs, a firm of stockbrokers, to recover an alleged balance of \$620.29 on an account which they were carrying for the defendant for speculation in stocks on margin. It is not disputed that on August 29, 1912, the plaintiffs held for the defendant's account 100 shares of Brooklyn Rapid Transit stock and 100 shares of Seaboard Air Line stock with a margin of between \$200 and \$300 credit. The defendant's account was placed with the plaintiff through one Benjamin L. Sinsheimer, who was a personal friend of the defendant and was employed by the plaintiffs as a clerk for the purpose of receiving and handling accounts in their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

name for customers. Sinsheimer took charge of the defendant's account for the plaintiffs with their knowledge and consent. It is not disputed, furthermore, that on August 29th, when the defendant still had several hundred dollars to his credit in the account, he said to Sinsheimer, the plaintiff's agent:

"I am going on a trip, and I will be gone possibly from six to eight weeks. You have a few hundred dollars to my credit there. I do not want to lose any more than you have to my credit, otherwise I will not be responsible."

To which Sinsheimer replied:

"All right, I will do it."

The defendant then went South, and on September 3d he telegraphed the plaintiffs from Louisville, Ky.:

"Inform Sinsheimer not lose more than have to my credit."

The obvious meaning of these instructions is shown by the plaintiffs' reply to this telegram, which states:

"We received your telegram to-day from Louisville. * * * Upon receipt of same we immediately put in an order to sell 100 Seaboard Air Line Pfd. at 53 as your debit balance is about \$5,283."

The stock was sold subsequently at a loss of \$620.29, which the plaintiffs seek to recover from the defendant. The defense is that the plaintiffs failed to follow the instructions given to Sinsheimer on August 29th as above shown.

The plaintiffs moved for a direction of a verdict on the ground that no defense was shown, which is equivalent to a demurrer to the evidence produced by the defendant. The court granted the motion and directed a verdict holding that the facts proved did not constitute a defense. This was clearly error. It is well settled that, when stocks are carried upon margin, not alone does there exist the relation of pledgor and pledgee, between the broker and customer, but also the relation of principal and agent, and when the customer gives instructions tending to limit his loss the broker is precluded from recovering from the customer losses which would have been obviated had the instructions been reasonably followed. In *Zimmerman v. Heil*, 86 Hun, 114, 33 N. Y. Supp. 391, affirmed on opinion below 156 N. Y. 703, 51 N. E. 1094, which is very similar to the case at bar, it is held that a statement by the client "that he could not afford to deposit more margin, and that he would not lose more than he had lost, amounted in effect to an order to sell" and was sufficient to support a finding by the jury that the brokers were instructed to sell. In the case at bar the defendant's admitted instructions not to lose more than he had to his credit, imposed a duty upon the plaintiffs to sell the stock which they were holding for him at a price which would prevent further loss. They so construed and followed the instructions sent in the same language on September 3d after it was too late, and offer no excuse for their failure to do so on August 29th when the order was first given. This, in my opinion, constituted a complete defense to the action.

The judgment appealed from must therefore be reversed, with costs to the appellant, and the complaint dismissed, with costs. All concur.

(84 Misc. Rep. 445)

STANDARD STEAM SPECIALTY CO. v. CORN EXCHANGE BANK.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. BANKS AND BANKING (§ 174*)—COLLECTION OF FORGED PAPER—LIABILITY.

Under Negotiable Instruments Law (Consol. Laws 1909, c. 38) § 42, providing that where a signature is forged or made without authority it is inoperative and that no right to retain the instrument, to give a discharge therefor or to enforce payment thereof, can be acquired through such signature unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority, a bank which collected checks upon which the payee's indorsement was forged was liable to make good the amount it had received, as its indorsement was a warranty of the genuineness of prior indorsements.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 629-633; Dec. Dig. § 174.*]

2. BANKS AND BANKING (§ 174*)—COLLECTION OF FORGED PAPER—LIABILITY.

Where an employé of a corporation authorized only to indorse checks payable to its order to the order of the bank in which they were customarily deposited, by means of a rubber stamp, followed by the name of the treasurer in her handwriting indorsed them in blank wholly in her own handwriting in the name of the corporation and the treasurer, the indorsement was a forgery and conveyed no title either to the persons to whom she transferred them or to the bank which collected them for such persons, and such bank was liable for the amount so collected thereon.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 629-633; Dec. Dig. § 174.*]

3. CORPORATIONS (§ 425*)—AUTHORITY OF AGENT—ESTOPPEL TO DENY.

Under Negotiable Instruments Law (Consol. Laws 1909, c. 38) § 42, providing that a forged signature or one made without authority is wholly inoperative, a corporation, which authorized an employé to indorse checks payable to it to the order of the bank in which they were customarily deposited by means of a rubber stamp followed by the name of the treasurer in her handwriting, was not estopped to deny her authority to indorse them in blank as against a bank who collected them for persons to whom she transferred them, since it could not have been misled if she had performed the act authorized in the manner prescribed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701, 1705; Dec. Dig. § 425.*]

4. BILLS AND NOTES (§ 340*)—BONA FIDE PURCHASER—NOTICE.

The bank receiving a check of a corporation indorsed by an officer or agent thereof in blank or to his own order is thereby put upon inquiry.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 825-828, 842-848; Dec. Dig. § 340.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Standard Steam Specialty Company against the Corn Exchange Bank. From a judgment for defendant, plaintiff appeals. Reversed, and judgment directed for plaintiff.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Henry M. Stevenson, of New York City, for appellant.

Bowers & Sands, of New York City (John J. Halpin, of New York City, of counsel), for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GUY, J. This action is brought to recover the amount of 11 checks aggregating \$329.79, drawn to plaintiff's order by various customers, the indorsement of plaintiff's name on each of which is alleged to have been forged. These checks were, after such indorsement, deposited with the defendant bank and collected by it for its depositors.

The answer denies that the indorsements were forgeries, and alleges that plaintiff's employé who indorsed said checks in plaintiff's name was authorized so to do, and that defendant acted in good faith and in due course of business.

It was stipulated that the plaintiff owned the checks in question; that its only officers were Norman C. Brizse, president, and Percy H. Pinder, secretary and treasurer; that it employed as a stenographer one Harriet Cohen, who was accustomed to make its deposits in the Greenwich Bank, and who was authorized to indorse its checks with a rubber stamp as follows: "Pay to the order of the Greenwich Bank. The Standard Steam Specialty Company"—and to affix at the end of the stamp indorsement, in her handwriting, the words "Percy H. Pinder, Treasurer"; and that "Harriet Cohen was not verbally or in writing instructed or authorized by the officers of the Standard Steam Specialty Company to indorse checks, except in the manner above set forth"; also, that Harriet Cohen either took the 11 checks in question from the mail, or they were delivered to her for indorsement for deposit in the Greenwich Bank, and instead of indorsing the checks in question with the rubber stamp, "Pay to the order of the Greenwich Bank. The Standard Steam Specialty Company," and adding in her own writing, "Percy H. Pinder, Treasurer," as she was alone authorized to do, she indorsed them with the blank indorsement, wholly in her handwriting, "Standard Steam Specialty Company, Percy H. Pinder, Treasurer," "Harriet Cohen," or "H. Cohen"; that she then delivered the 11 checks, 9 to one reputable business man and 2 to another reputable business man, who in good faith paid her the full amount thereof in cash, without knowledge of any wrongdoing.

[1] Where a bank has collected a check upon which the payee's indorsement "is forged or made without authority of the person whose signature it purports to be" (Negotiable Instrument Law, § 42), it cannot retain the money, since it had no title to the instrument upon which the money was paid, "unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority." Its indorsement is a warranty of the genuineness of prior indorsements, and, upon the discovery that any indorsement is a forgery, it becomes immediately liable to make good the amount it has received. *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, 30, 31, 85 N. E. 829, 22 L. R. A. (N. S.) 499; *Oriental Bank v. Gallo*, 112 App. Div. 360, 362, 98 N. Y. Supp. 561, affirmed 188 N. Y. 610, 81 N. E. 1170; *Stein v. Empire Trust Co.*, 148 App. Div. 850, 853, 133 N. Y. Supp. 517.

[2, 3] Authority to an agent to indorse checks in a specifically restricted manner, in order that they may be deposited to the account of the principal, does not confer upon the agent authority to indorse in any other manner or for any other purpose.

In *Schmidt v. Garfield Nat. Bank*, 64 Hun, 298, 19 N. Y. Supp. 252, affirmed without opinion in 138 N. Y. 631, 33 N. E. 1084, upon a state of facts practically identical with the case at bar, the learned court said:

"Lingard had authority to use the stamp and to sign the plaintiff's name under the stamping upon the checks and drafts, adding his own initials thereto, and thereupon to cause the checks and drafts bearing such restricted indorsement to be deposited in the Chemical National Bank, to the credit of the plaintiff. But such authority gave Lingard no right to indorse the plaintiff's name, except in connection with a restricted indorsement made by stamping the checks and drafts with the stamp provided for that purpose by the plaintiff. * * * Assuming that he had authority to use the stamp and sign the plaintiff's name in connection with the use thereof, and then cause the checks and drafts to be deposited to the plaintiff's account in the Chemical Bank, his action in indorsing the checks with the plaintiff's name without using the stamp, and depositing such checks and drafts to his own account in the Garfield National Bank, was absolutely without any authority or justification whatever. There was therefore not only no testimony which would justify the court in holding that Lingard had authority to indorse the checks and drafts in the manner in which he did, but there was no conflict in the testimony which required the court to submit, or would have justified it in submitting, the question to the jury, as to whether Lingard had authority to indorse the checks in the manner in which he did."

See, also, *Cluett v. Couture*, 140 App. Div. 830, 125 N. Y. Supp. 813, citing this case with approval.

The case of *Salen v. Bank of State of New York*, 110 App. Div. 636, 97 N. Y. Supp. 361, relied upon by respondent as authority for the proposition that plaintiff is precluded herein from denying the authority of its agent, Harriet Cohen, is not on all fours with the case at bar. In the case cited the agent had general authority to indorse checks for the purpose of depositing them to the credit of his principal; but the exact method of indorsement was not prescribed and restricted as in the case at bar. In this case the sole authority reposed in Harriet Cohen, as to indorsement, was to perform the physical act of affixing the stamp indorsement on the backs of checks, "Pay to the order of the Greenwich Bank. The Standard Steam Specialty Company," and adding thereto in her own handwriting the words "Percy H. Pinder, Treasurer." Had she performed this sole act she was authorized to perform in the restricted manner prescribed, defendant bank could not have been misled thereby. The indorsement of the plaintiff's name by her in any other form whatever was an act of forgery and could convey no title either to the persons to whom she transferred the checks or through them to the defendant bank.

It is also to be noted that in the *Salen Case* the agent had general authority to draw checks against deposits which he was authorized to make and to use the proceeds thereof, thus indicating that there was no intent to limit his authority to the performing of a mere carefully restricted physical act.

No act of the plaintiff herein would work as an estoppel under section 42 of the Negotiable Instruments Law.

[4] The fact that a check of a corporation is indorsed by an officer or agent thereof in blank, or to his own order, puts a bank, upon receiving such checks, on inquiry (*Niagara Woolen Co. v. Pacific Bank*,

141 App. Div. 265, 267-269, 126 N. Y. Supp. 890; Ward v. City Trust Co., 192 N. Y. 61, 69, 84 N. E. 585; Squire v. Ordemann, 194 N. Y. 394, 396, 397, 87 N. E. 435.

It is urged by the respondent that the defendant bank is in a different position because it did not deal directly with the wrongdoer. We are unable to see that its position is altered in any respect by reason of this fact. The indorsement being a forgery, it could convey no title to the transferee thereof, and the invalidity of the indorsements could not be cured by subsequent transfer to others. Defendant's depositor, having no title, could convey none to the defendant, and defendant, having no title and having wrongfully collected the moneys represented by the checks, is liable for the amounts thus wrongfully received.

For this reason the judgment must be reversed, with costs and judgment directed in favor of the plaintiff for the full amount claimed, with costs.

DELANY, J., concurs. SEABURY, J., taking no part.

(84 Misc. Rep. 400)

SCANTLEBURY v. TALLCOTT.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

BILLS AND NOTES (§ 46*)—REQUISITES—FORM AND CONTENTS—RECITALS AFFECTING CHARACTER OF INSTRUMENT.

That a writing promising to pay a certain sum on a certain date, with interest, also contained a receipt for the money loaned did not affect its legal character as a promissory note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 64; Dec. Dig. § 46.*]

2. PRINCIPAL AND AGENT (§ 136*)—CONSTRUCTION AND OPERATION—PARTIES.

An alleged agent, who signed a promissory note personally, the name of his principal not appearing on the note, was liable thereon, even though the payee knew that he was merely an agent; it being competent for him to make himself personally liable.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 447-450, 476-491; Dec. Dig. § 136.*]

3. BILLS AND NOTES (§ 92*)—REQUISITES AND VALIDITY—CONSIDERATION—SUFFICIENCY.

The advance by the payee of a note to the party signing it of the amount thereof, for the benefit of a company of which the party signing was treasurer, was a sufficient consideration to support the obligation of such party, no matter whether he retained the money personally or delivered it to the company; the loan being on the strength of his credit.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-205, 208-212; Dec. Dig. § 92.*]

Appeal from City Court of New York, Special Term.

Action by Francis H. Scantlebury against Chester W. Tallcott. From an order setting aside a directed verdict for the plaintiff, and from a judgment dismissing his complaint, plaintiff appeals. Reversed, and verdict reinstated.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Emil Breitenfeld, of New York City, for appellant.

Benjamin, Shepard, Houghton & Taylor, of New York City (Woolsey A. Shepard, of New York City, of counsel), for respondent.

SEABURY, J. [1] The plaintiff, as assignee of the Oeking Company, sues for a balance of \$1,500 remaining unpaid upon the following note, signed by the defendant.

"New York, 7/8/13

"Received from the Oeking Company two thousand five hundred 00/100 dollars, which I promise to pay July 10th, 1913, with 6% interest per annum.

"Chester W. Tallcott."

The proof shows that the Oeking Company loaned \$2,500 to the defendant, who was the treasurer of the Ernst Wiener Company, which was in need of money. The loan was made by giving its check to the order of the defendant for this amount. The check was indorsed by the defendant.

[2] The court below held that the defendant was not liable upon the note because the loan was in fact made to the Ernst Wiener Company, although the check for the money was made payable to the defendant personally. This circumstance furnished no ground for relieving the defendant from liability. The Ernst Wiener Company was in need of money, and the plaintiff's assignor loaned this money to the defendant, and took back the personal note of the defendant. The defendant was none the less liable upon this note because he obtained the money for the benefit of the corporation of which he was treasurer, instead of for his own personal benefit. The legal character of the instrument sued upon as a promissory note is in no respect changed because it was also a receipt for the money which the plaintiff's assignor paid to the defendant. Nor is there anything in the case which indicates that the defendant was to be secondarily liable for the debt rather than he should become the principal debtor.

[3] The name of the Ernst Wiener Company did not appear on the note, and the defendant was liable upon it even though the plaintiff's assignor knew that the defendant was merely the agent of the Ernst Wiener Company. 7 Cyc. 549. Even if the defendant was the agent of the Ernst Wiener Company, it was nevertheless competent for him to make himself personally liable for the money which the plaintiff's assignor loaned. Phelps v. Borland, 30 Hun, 362. The advance by the plaintiff's assignor of the money to the defendant for the benefit of the Ernst Wiener Company was a sufficient consideration to support the obligation of the defendant, and it was entirely immaterial whether the money advanced was retained by the defendant personally, or was delivered by him to the Ernst Wiener Company. Washington Bank v. Ferguson, 43 App. Div. 74, 79, 59 N. Y. Supp. 295; Isaacson v. Etkin, 148 App. Div. 219, 132 N. Y. Supp. 1044; First National Bank of Whitehall v. Tisdale, 18 Hun, 151, affirmed 84 N. Y. 655.

In discussing this case, we have adopted the view most favorable to the respondent, and have assumed that the money was advanced to

the defendant for the benefit of the Ernst Wiener Company, although an examination of the record shows that this is by no means conceded, and there is evidence in support of the plaintiff's contention that the money was advanced personally to the defendant. The money having been advanced on the strength of the defendant's credit, it makes no difference whether he personally benefited by it, or whether he turned it over to a corporation of which he was a stockholder and treasurer. In either view the note sued upon is a valid obligation of the defendant; and, no defense having been proved, it follows that the order of the court below, setting aside the verdict directed in favor of the plaintiff, should be reversed with costs, and the verdict of the jury reinstated with costs to the appellant. All concur.

(84 Misc. Rep. 457)

SACHS v. GASDORF.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. NEW TRIAL (§ 99*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

Where newly discovered evidence was merely cumulative of that given on the trial, and the expectation of a different result on a new trial would only hang on the presumption that another jury might give credence to eight witnesses instead of four, the motion should have been overruled.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. § 99.*]

2. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE.

Where, on the trial of an action by a broker for commissions, the issue was as to the terms of the contract of employment, testimony of witnesses who were present and heard the contract could not be considered newly discovered evidence on motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

Appeal from Municipal Court, Borough of the Bronx, First District.

Action by George Sachs against Hans Gasdorf. From an order setting aside a judgment in his favor, plaintiff appeals. Reversed, and judgment reinstated.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

N. J. O'Connell, of New York City, for appellant.

Sol Simmons, of New York City, for respondent.

DELANY, J. [1, 2] The plaintiff brought this action to recover commissions alleged to have been earned by him in bringing about the sale of defendant's business to one Phelps, and a verdict in his favor resulted. Subsequently the defendant moved to set aside the judgment, and an order was granted setting aside the same. The ground of the motion was newly discovered evidence and was supported by the affidavits of four persons, which in effect recite the same state of facts as that given on the trial by the defendant and three other witnesses. Such testimony is purely cumulative, and the expectation of a different

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

result on a new trial would only hang on the presumption that another jury might give credence to eight which the former jury evidently refused to give to four witnesses. Such a presumption is without any logical support and is insufficient to justify a new trial. The plaintiff had but his own and Phelps' testimony to sustain his case, so that the difference in the number of witnesses could not have affected the defendant prejudicially. Nor is the evidence proposed newly discovered in the proper sense. The accidental finding of a card in his pocket after the trial he claims furnished him with the name of a witness whose discovery led to others. The question to which this evidence applies is whether the plaintiff was to look to the buyer for his commissions; defendant claiming that he reduced the price from \$7,500 to \$7,000 on such an understanding between the three. But this was denied by the plaintiff and Phelps. The persons who were present at the time of these negotiations and might have been expected to have heard the conversation could hardly be supposed to furnish newly discovered evidence. While the fact that the evidence was cumulative would not in every case be a ground for denying a motion for a new trial, yet, where evidence is cumulative and already given by a goodly number of witnesses, some impelling facts must be shown to make it probable that the interest of justice requires a new trial. Defendant had his day in court as well as the plaintiff and had witnesses on the point in question double the number of the plaintiff. The jury determined the fact on the evidence, and no such situation in our opinion is shown to justify the disturbance of its finding.

Order reversed, with costs, and judgment reinstated. All concur.

FUNK & WAGNALLS CO. v. MILLER.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

COURTS (§ 189*)—MUNICIPAL COURTS—PLEADING—NECESSITY FOR ANSWER OR DEMURRER.

Under Municipal Court Act (Laws 1902, c. 580) § 145, there being a verified complaint in an action for more than \$50, a written answer or demurrer is necessary to raise an issue, so that there being such complaint and no answer or demurrer, plaintiff making a prima facie case, there can be no judgment on the merits for defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 458; Dec. Dig. § 189,*]

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by the Funk & Wagnalls Company against Henry Miller. From a judgment for defendant after a trial by the court, plaintiff appeals. Reversed and rendered.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Loeb, Bernstein & Ash, of New York City, for appellant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GUY, J. This action was brought to foreclose a lien on chattels sold under a contract of conditional sale. There was a verified complaint, but no answer or demurrer was filed.

Plaintiff proved a prima facie case, and asked for judgment for the foreclosure of its lien of \$72.08, including interest; the court then undertook to settle the matter by advising the gradual payment by defendant of the amount called for by the contract of conditional sale; thereafter a dispute arose as to which the details are lacking. The court terminated the dispute by rendering judgment for defendant on the merits, thereby in legal effect vesting the legal title to the chattels in defendant. *Clark v. Scovill*, 198 N. Y. 279, 284-286, 91 N. E. 800. On the proceedings and evidence as returned, no defense was either pleaded or proven.

Under the present Municipal Court Act (Laws 1902, c. 580, § 145), where there is a verified complaint in an action for more than \$50, a written answer or demurrer is required to raise an issue.

Judgment reversed, with costs, and judgment of foreclosure granted, with costs. All concur.

(84 Misc. Rep. 459)

FEINBLATT v. UNTERBERG et al.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

NEW TRIAL (§ 52*)—GROUNDS—COMPROMISE VERDICT.

Defendant contracted to furnish plaintiff shirts to be laundered for a year, and agreed that, if the work furnished was not sufficient to pay plaintiff an average profit of \$40 a week, defendant would at the end of the year make up the difference. Defendant breached the contract 13 weeks after it was made, and thereafter plaintiff was unable to earn anything in reduction of damages, and, for the 13 weeks before the breach, plaintiff only made \$5 a week, or \$65 in all. The jury found for plaintiff, but only awarded him \$455 damages. *Held*, that since plaintiff was entitled to recover \$40 a week for 52 weeks, or \$2,080 less the \$65, the verdict will be set aside as having resulted from compromise and not being supported by the facts.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 101; Dec. Dig. § 52.*]

Appeal from City Court of New York, Trial Term.

Action by Abraham Feinblatt against Israel Unterberg and others. From a judgment for plaintiff and an order denying a motion for a new trial, defendants appeal. Reversed, and new trial ordered.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Louis B. Williams, of New York City (Simon S. Hamburger, of New York City, of counsel), for appellants.

Henry Kuntz, of New York City (Abraham P. Wilkes, of New York City, of counsel), for respondent.

DELANY, J. The action herein was brought by the plaintiff upon a contract, which he alleges he entered into with the defendants, whereby they agreed to furnish him with a certain number of shirts to be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

laundered by him for a period of one year from the making of the contract at prices agreed upon by the parties, and whereby they further agreed that, in the event the plaintiff's profits for the year were less than \$40 weekly, they would pay him the difference between that sum and the amount actually earned by him.

The answer denies the making of the contract, and there is evidence on the part of the defendants supporting the denial. The jury therefore on the conflicting testimony found on this point for the plaintiff. The testimony of the plaintiff was that the defendants assured him in the event of the amount of work not being sufficient to pay him an average of \$40 a week that they would at the end of the year make up the difference, and the amount sued for was for such a sum. The breach of the contract occurred in August, 1911, and thereafter plaintiff was unable to earn anything in reduction of damages. For the 13 weeks before the breach plaintiff made but \$5 per week, or a total of \$65, so that his damages, the jury having found in his favor, should have been \$40 a week for 52 weeks, a total of \$2,080, less \$65, or a sum equal to \$2,015. The jury awarded him \$455, which was less than a quarter of the amount claimed. It was not disputed that the plaintiff had not been able to earn any money during the term of the contract subsequent to its breach. It is obvious that this verdict was not reached with proper regard for the facts and the law, but was the result of a compromise. Respondent's brief urges that this verdict is the result of allowing \$40 a week for 13 weeks before the breach, or a total of \$520, less the \$65 received during that time, or \$455; but this seemingly-true conclusion only demonstrates the supposition of the compromise. Such a verdict therefore cannot be permitted to stand.

In *Myers v. Myers*, 86 App. Div. 73, 83 N. Y. Supp. 236, the court said:

"Parties to a litigation, the defendant as well as the plaintiff, are entitled to have the issues submitted to the jury decided solely upon the evidence, and either party has just cause for complaint if that is not done. * * * The verdict rendered was clearly a compromise, and whether or not it unfavorably affected the defendant it is impossible to say. It is sufficient that it was not justified by the evidence, and therefore the judgment entered thereon should be reversed."

Judgment and order reversed, and a new trial ordered, with costs to appellants to abide the event. All concur.

(84 Misc. Rep. 393)

GOLDOWITZ et al. v. HENRY KUPFER & CO.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. PLEADING (§ 248*)—AMENDMENT OF COMPLAINT—SURPRISE.

The opinion on a former appeal indicated that plaintiffs' cause of action was based on a contract to manufacture and deliver goods, and defendant knew that plaintiffs claimed that to be their cause of action, and defendant's acceptance of the contract stated in terms that the goods were to be "manufactured and delivered," and the contract expressly provided for delivery at the times stated. *Held*, that plaintiffs could not claim to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

have been surprised by an amendment of the complaint upon a second trial so as to allege a cause of damages for defendant's failure to deliver to plaintiffs goods which defendant had agreed to manufacture and deliver.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. § 248.*]

2. SALES (§ 152*)—PERFORMANCE BY BUYER—SUFFICIENCY.

When the buyer of goods which were to be manufactured and sold to it called upon the seller and requested to be permitted to select the colors in which the goods were to be furnished, as he was required to do by the contract, and the seller refused to permit the buyer to make the selection, and stated thereafter that the goods had advanced and he would not comply with his contract, the buyer had sufficiently performed the condition requiring him to select the color of the goods, and was not required to again offer to make the selection.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 357; Dec. Dig. § 152.*]

Appeal from City Court of New York, Special Term.

Action by Isaac Goldowitz and another against Henry Kupfer & Co. From an order setting aside a verdict for plaintiffs, they appeal. Reversed, and verdict reinstated.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Henry I. Kowalsky, of New York City (Robert L. Turk and Benj. Frindel, both of New York City, of counsel), for appellants.

Leo G. Rosenblatt, of New York City, for respondent.

SEABURY, J. Upon the first trial of this action the complaint was dismissed, and the judgment of dismissal was reversed, and a new trial ordered. 80 Misc. Rep. 487, 141 N. Y. Supp. 531. The opinion of the court upon the first appeal determined that the contract upon which the action was based was not within the statute of frauds. Upon the second trial the complaint was amended. As amended, it stated a cause of action for damages for the failure of the defendant to deliver goods to the plaintiffs which the defendant had agreed to manufacture and deliver. The respondent contends that the court erred in allowing the amendment to the complaint, and pleaded surprise when the plaintiff asked to amend.

[1] We do not think that the defendant was taken by surprise on account of this amendment. The opinion of the court on the first appeal indicated that the plaintiffs' cause of action was based upon a contract to manufacture and deliver, and the defendant knew that such was in fact the contention of the plaintiffs. Not only did the plaintiffs contend that such in fact was the nature of the cause of action upon which they sued, but the defendant's acceptance of the plaintiff's offer in terms stated that goods were "to be manufactured and delivered." The contract provided that the defendant was to deliver to the plaintiffs certain velveteens, and contained the following clause:

"The colorings and delivery specifications for at least one-half of this contract are to be given by June 15, 1911. The balance of the goods may be drawn against as wanted during the season, but all must be taken by Decem-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ber 1, 1911, and Henry Kupfer & Co. may ship in any unspecified balance in black on that date."

It appeared in evidence that the words "coloring and delivery specifications" meant that the buyer should indicate to the seller the color in which the goods were to be furnished. The plaintiffs proved that in the latter part of May, 1911, one of the members of the plaintiffs' firm called at the place of business of the defendant and had an interview with a salesman named Cooper, and told him that he had "come to give him an assortment of the goods," and that Cooper told him to return in a few days. In the early part of June, the witness testified that he called again and made the same offer and that Cooper then told him it would be necessary for him to see the manager. He then saw Howlett, who is conceded to have been the defendant's manager, and asked that a delivery of the goods be made, and he was told that the goods had advanced in price and that he must see the president of the defendant corporation. Shortly thereafter the witness saw Kupfer, the president of the defendant corporation, and was told that the goods had advanced in price and that the defendant refused to deliver them. There was much other testimony to substantially this effect.

The complaint alleged, in the fourth paragraph:

"That on or about the 22d day of May, 1911, and the 17th of June, 1911, the plaintiffs were ready and willing and duly demanded and offered to receive and pay for said velveteen pursuant to said agreement, and requested the defendant to deliver the same, and otherwise duly performed all the conditions on their part to be performed."

[2] The learned court below set the verdict aside on the ground that the plaintiffs had pleaded performance of the conditions of the contract "requiring them to make selections of color," and that instead of so doing they had excused their failure to make such selections. We think that this view involved too strict an interpretation of the plaintiffs' pleading. The complaint alleged that the plaintiffs duly performed and demanded and offered to receive the goods, and that the defendant refused to deliver the same. When the plaintiffs called on the defendant and asked to make the selection or "assortment," and the defendant refused to permit them to do so, the plaintiffs had, as alleged in their complaint, "duly performed all the conditions on their part to be performed." The refusal of the defendant at that time to permit the plaintiffs to make the selection and the statement by the defendant shortly thereafter that the goods had advanced in price, and that the defendant would not comply with its contract, relieved the plaintiffs of any further obligation under their contract. After such a refusal, they certainly were not bound to again ask leave to make the selection.

As the learned court below set aside the verdict of the jury solely upon this ground, it follows that the order appealed from should be reversed, with costs, and the verdict of the jury reinstated. All concur.

(84 Misc. Rep. 450)

SUGARMAN et al. v. KEARNS.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

BROKERS (§ 49*)—COMPENSATION—SUFFICIENCY OF SERVICES OF BROKER.

Where a broker employed to procure the acceptance of an assignment of a mortgage merely secured an acceptance "subject to the requirements and regulations" of the company with whom the negotiations were had, and the deal fell through because an estoppel certificate against another mortgage was demanded and could not be furnished, the broker could not recover his commissions for procuring such conditional acceptance, as it only amounted to an agreement to accept the assignment, subject to any requirement that might be imposed or at pleasure.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. § 49.*]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Harry Sugarman and another against Wilhelmina Kearns. From a judgment for plaintiffs, defendant appeals. Reversed, and complaint dismissed.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

John T. Mulhall, of New York City, for appellant.

John H. Jones, of New York City, for respondents.

GUY, J. This action was brought to recover \$200 broker's commissions alleged to be due plaintiffs for procuring an acceptance of an assignment of a first mortgage loan of \$4,000, with an extension thereof for five years, on premises No. 241 East 123d street, New York City, at 5½ per cent. per annum, within two days from September 15, 1913. The answer sets up a general denial.

The contract, which was in writing, provided for any necessary subordination agreement (in relation to the second mortgage), but was silent as to any estoppel certificates on junior mortgages. Plaintiffs, claiming to act as defendant's agent, signed an application to the title company for a loan, but no mention was made therein as to defendant procuring such estoppel certificates from subsequent mortgagees as might be requested by the title company. On September 15, 1913, plaintiffs procured from the title company, whose client mortgage company held the first mortgage, a written conditional agreement to make said loan, to be a first lien on the premises 241 East 123d street, the mortgage to run for five years at 5½ per cent. interest "subject to the requirements and regulations of this company." What these requirements and regulations were the conditional acceptance did not disclose.

The parties met for the purpose of closing the transaction, when the attorney representing the mortgage company demanded an estoppel certificate from the holder of an alleged unpaid third mortgage on which no interest had been paid for over twenty years, and, because defendant could not produce the desired estoppel certificate, the closing fell through.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The legal effect of the conditional acceptance the title company signed was simply an agreement to make a loan and to accept an assignment of the mortgage held by defendant, as security therefor, subject to any requirement it might see fit to impose, or at its pleasure. The procuring of such a conditional acceptance by plaintiffs was not such a performance of the brokers' duty as would entitle them to commissions. *Holliday v. Roxbury Distilling Co.*, 130 App. Div. 645, 656, 657, 115 N. Y. Supp. 383; *Duckworth v. Rogers*, 109 App. Div. 168-170, 95 N. Y. Supp. 1089; *Ashfield v. Case*, 93 App. Div. 452, 453, 87 N. Y. Supp. 649; *Crasto v. White*, 52 Hun, 473, 476, 477, 5 N. Y. Supp. 718; *Steele v. Lippman* (Sup.) 115 N. Y. Supp. 1099, 1100.

The plaintiffs having failed to perform their contract to obtain a loan for defendant, based on the acceptance by the lender of an assignment of defendant's mortgage as security, have established no cause of action against the defendant.

The judgment must therefore be reversed, with costs, and the complaint dismissed, with costs. All concur.

POWERS v. NEW YORK HEADQUARTERS KNIGHTS OF COLUMBUS.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. PRINCIPAL AND AGENT (§ 22*)—CREATION AND EXISTENCE OF RELATION—EVIDENCE OF AGENCY.

The testimony of an alleged agent that he had authority to act for the defendant in employing plaintiff was a mere conclusion and not competent proof of such authorization.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 40; Dec. Dig. § 22.*]

2. TRIAL (§ 29*)—CONDUCT OF TRIAL—MISCONDUCT OF JUDGE.

The issue being the authority of K. to act for defendant, the conduct of the judge in stating, after one of defendant's witnesses had testified, and while three other witnesses, who were subsequently called, were waiting to testify, that he would believe K. against defendant's five witnesses denied defendant its day in court, and the judgment for plaintiff must be reversed.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 80-83, 508; Dec. Dig. § 29.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Lawrence J. Powers against the New York Headquarters Knights of Columbus. From a judgment for plaintiff, the defendant appeals. Reversed, and new trial ordered.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Walter J. Egan, of New York City, for appellant.

David C. Broderick, of New York City, for respondent.

GUY, J. [1] Defendant appeals from a judgment by the court, acting without a jury, in favor of plaintiff for services of plaintiff and six

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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assistant musicians, who, plaintiff alleges, were employed by defendant's alleged agent, one Kelly, to furnish music at an entertainment given by defendant. Plaintiff proved the making of a contract with Kelly, and that on the evening in question he appeared with his assistants, tendered service, which was refused, and that he and his assistants were ejected from the premises. Kelly, called by plaintiff as a witness, merely testified to his conclusion that he had been authorized to act for defendant, but no competent proof was introduced of such authorization by the general committee of defendant or by any committee having power to act in the matter. Plaintiff then rested.

[2] Defendant called as a witness one of defendant's general committee, who testified that no resolution had been adopted authorizing Kelly to act for defendant in the matter. At this juncture, the defendant's case being still unfinished, the defendant having three more witnesses in court, who were subsequently called, the court interrupted the proceedings by stating, "I want to tell you I will believe Mr. Kelly's testimony against your five witnesses," to which statement defendant duly excepted. Three additional witnesses were then called by defendant, the case was closed, and subsequently the court rendered a judgment in favor of the plaintiff. It is clear that defendant was denied its day in court, and that the judgment cannot be permitted to stand.

The judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

READ PRINTING CO. v. J. J. LITTLE & IVES CO.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

ACCORD AND SATISFACTION (§ 9*)—COMPROMISE AND SETTLEMENT (§ 5*)—RETENTION OF CHECK.

Where, a dispute having arisen as to the state of the parties' account, defendant prepared a statement in accordance with his understanding, and forwarded it with his check, stated to be in settlement of his account, to plaintiff, the retention and conversion into cash of the check, after defendant again, and on plaintiff demanding more, stated it was sent in full settlement, was an accord and satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 88-91; Dec. Dig. § 9;* Compromise and Settlement, Cent. Dig. §§ 10-16; Dec. Dig. § 5.*]

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by the Read Printing Company against the J. J. Little & Ives Company. From a judgment for plaintiff, defendant appeals. Reversed and dismissed.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Bridges, Bacon & Jones, of New York City (Henry W. Bridges, of New York City, of counsel), for appellant.

Samuel Wasserman, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GUY, J. Defendant appeals from a judgment in favor of plaintiff after trial before the court, without a jury, in an action brought to recover a balance due for goods sold and delivered. A dispute arose as to certain items, first, whether the last bill rendered by plaintiff should be \$136 or \$130, next as to a discount of \$10 claimed by defendant. (See S. M. page 4.) A representative of plaintiff called at defendant's office, and, as a result of a conversation held by him with defendant, a statement of account was prepared by defendant in accordance with defendant's understanding and forwarded by defendant to plaintiff with a check stated by defendant to be in settlement of account, and that plaintiff fully understood the purpose for which the check was sent is shown by the fact that, on the same day, plaintiff sent, in reply to defendant, a letter beginning with the words:

"Relative to your statement of even date and your check for \$470.56, which you tender in settlement of our account, stating that plaintiff claimed a larger amount due and requesting an additional check from defendant."

To this defendant replied repeating the statement that the check was sent in full settlement of the account and explaining in detail the arrangement made with plaintiff's representative. Notwithstanding this correspondence, plaintiff retained the check and converted it into cash. The retention of the check under these circumstances constituted an accord and satisfaction.

The judgment must therefore be reversed, with costs, and the complaint dismissed, with costs. All concur.

(84 Misc. Rep. 429)

COHEN v. HIRSKOWITZ et al.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. LANDLORD AND TENANT (§ 298*)—RECOVERY OF POSSESSION BY LANDLORD—SUMMARY PROCEEDINGS—ANSWER.

Under Code Civ. Proc. § 2244, providing that an answer may be filed in summary proceedings, setting up any legal or equitable defense, in like manner as though the claim for rent was the subject of the action, an answer averring a settlement of the claim for rent and an agreement to dismiss the proceedings was a valid defense.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1276-1280; Dec. Dig. § 298.*]

2. LANDLORD AND TENANT (§ 298*)—RECOVERY OF POSSESSION BY LANDLORD—SUMMARY PROCEEDINGS—ANSWER.

In summary proceedings for nonpayment of rent, the tenant may plead payment, or a general release, or that the landlord has accepted a note which is not yet due.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1276-1280; Dec. Dig. § 298.*]

3. LANDLORD AND TENANT (§ 305*)—RECOVERY OF POSSESSION BY LANDLORD—SUMMARY PROCEEDINGS—ANSWER.

Under Code Civ. Proc. § 2244, providing that an answer may be filed in summary proceedings, setting up any legal or equitable defense, or counterclaim, as though the claim for rent was the subject of the action, an answer alleging a settlement of the claim for rent, and an agreement to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dismiss the proceedings, was not ineffectual because such matter was alleged by way of defense rather than by way of counterclaim.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1310, 1311; Dec. Dig. § 305.*]

4. LANDLORD AND TENANT (§ 305*)—RECOVERY OF POSSESSION BY LANDLORD—SUMMARY PROCEEDINGS—ANSWER.

Where an answer in summary proceedings alleged a compromise and settlement of the claim for rent, and an agreement to dismiss the proceedings, and that the tenants had performed their part of such agreement, the court could not assume that the tenants had violated the agreement, and it was improper to hold the answer insufficient.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1310, 1311; Dec. Dig. § 305.*]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Summary proceedings by Cassel Cohen against Lazar Hirskowitz and another, based on nonpayment of rent. From a final order in favor of the landlord, the tenants appeal. Reversed, and new trial ordered.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Samuel S. Kogan, of New York City, for appellants.

Max D. Steuer, of New York City, for respondent.

SEABURY, J. [1] This is a summary proceeding based upon the claim of nonpayment of rent by the tenants. The answer set up that the landlord and the tenants had entered into a settlement and compromise of the rent claimed in the petition to be overdue, and that the landlord agreed, among other things, to discontinue the present summary proceeding. The answer also set up that the tenants had tendered the possession of the premises to the landlord pursuant to the terms of the agreement of settlement and compromise, which the tenants claimed the landlord had entered into with them, and alleged that the tenants had performed and that the landlord had not performed the conditions which he was obligated to perform.

The only part of said agreement which it is now relevant for us to consider is that part of the agreement whereby the landlord compromised and settled the claim for rent upon which this proceeding is based, and agreed to discontinue the present proceeding. The learned court below held the answer insufficient and granted a final order on the pleadings in favor of the landlord.

The tenants had the right to plead that the claim upon which the summary proceeding was brought had been settled, and that an agreement had been entered into between the landlord and the tenants to discontinue the present proceeding. Code of Civil Procedure, § 2244. If the tenants proved the facts pleaded in their answer, those facts would have constituted a valid defense to the present proceeding. If the claim for rent had been settled, the landlord could not succeed in the summary proceeding; and, if it were proved that the landlord had entered into a legal contract to discontinue this proceeding, he could not, in the face of such agreement, be entitled to a final order. In

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

legal effect the defense pleaded was equivalent to a plea that the landlord had released the tenants from the claim upon which he sued. A party proceeded against in an action or a special proceeding may always defend himself by the interposition of such a plea.

[2] In principle there is no reason why the tenants should not be permitted to plead that the claim upon which the proceeding is brought has been compromised and settled and that the landlord agreed to discontinue the pending summary proceeding. Thus, where the proceeding is instituted because of the nonpayment of rent, the tenant may plead payment (*Cochran v. Reich*, 91 Hun, 440, 36 N. Y. Supp. 233), or a general release of the claim, or that the landlord has accepted the negotiable note of the tenant which is not yet due (*Spiro v. Barkin*, 30 Misc. Rep. 87, 61 N. Y. Supp. 870).

[3, 4] The claim of the landlord that, although the tenants may have a claim for damages against him for breach of the agreement alleged, they cannot plead this agreement as a defense seems to overlook the fact that one of the terms of the agreement alleged compromised and settled the very claim upon which the landlord bases his right to maintain the present proceeding. Nor is the plea alleged in the answer rendered ineffective because it is urged as a defense and not by way of counterclaim. Code Civil Procedure, § 2244. If the defense is established, it follows that the petition should be dismissed. Nor does the suggestion made by the respondent that the tenants have themselves violated the terms of the alleged agreement of settlement make the defense insufficient. As pleaded, the defense alleged that the tenants duly performed the terms and conditions of the agreement on their part to be performed. If, upon the trial, it can be shown that the tenants themselves violated the terms of the agreement of settlement and compromise, that fact might be held to relieve the landlord from his agreement to discontinue the present proceeding, but the court could not assume that this was the true situation from an inspection of the pleadings, which included a defense alleging full performance on the part of the tenants.

It follows that it was error to award the landlord a final order upon the pleadings, and that the final order must be reversed, and a new trial ordered, with costs to the appellants to abide the event. All concur.

RACE v. KRUM.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

Appeal from Trial Term, Albany County.

Action by C. Bertrand Race against Charles B. Krum. From a judgment for plaintiff, and an order denying his motion for a new trial, defendant appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Joseph A. Lawson, of Albany, and Walter Jeffreys Carlin, of New York City, for appellants.

Edgar T. Brackett and Harold H. Corbin, both of Saratoga Springs, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. All concur, except WOODWARD, J., dissenting in opinion, in which HOWARD, J., concurs.

WOODWARD, J. (dissenting). Originally two causes of action were alleged in the complaint, one based upon negligence, the other upon a breach of warranty; the latter being the one which was sent to the jury and upon which the verdict in favor of the plaintiff was found. The cause of action surviving is based upon a complaint which alleges upon information and belief:

That at "all the times hereinafter mentioned the defendant was the proprietor, engaged in the business of carrying on a drug store," and that the defendant, "as a part of his said business, had in his said drug store a counter at which he drew and sold soda waters and sold ice cream to be and which was largely consumed at said counter in said store, and which were sold by the defendant as fit and proper for human consumption; that on the 22d day of June, 1911, the plaintiff went to said store and, at said counter therein, ordered, from an employé of the defendant in charge of said counter, ice cream which the defendant and said defendant's employé well knew was to be eaten by the plaintiff at once and upon said premises; that said ice cream was taken from a receptacle within, or near, said counter, and by said employé of the defendant, and was handed to and served to the plaintiff, who thereupon at once, at said counter, in said store, in the presence of the employé of the defendant serving the same, ate said cream; that said ice cream thus served and delivered by said employé of the defendant was not wholesome or fit for human consumption, but on the contrary was poisonous, filled with poisonous ptomaines, and was highly injurious and poisonous to any one eating the same, which fact was known to the defendant, or should have been known by him, in the conduct of his said business."

The complaint then alleges in detail the sufferings of the plaintiff, due, as he alleges, to the eating of the ice cream, the expense to which he has been put in dealing with his illness, and continues:

"That when the defendant sold said cream hereinbefore mentioned to the plaintiff, he warranted and represented that the same was wholesome and fit and proper for human consumption, and the plaintiff relied upon such warranty and accepted and ate it as aforesaid in reliance on such warranty, and the plaintiff had no knowledge that said cream was not wholesome and suitable for him to eat; that said warranty of the defendant was broken as hereinbefore set out and the plaintiff has suffered great damage thereby."

The answer to this cause of action admits the allegations in relation to the defendant's doing business; denies knowledge or information as to the alleged purchase by the plaintiff, and the results thereof; denies the allegations in reference to the alleged unwholesomeness of the ice cream, and of its being poisonous; denies the illness of the plaintiff and the expenses incurred by him; and admits the warranty alleged as to the wholesomeness of the ice cream; but denies that the warranty was broken. The only issues presented by the pleadings, therefore, are such as relate to the alleged unwholesomeness of the ice cream, and whether the plaintiff actually purchased the same, and the results to him of partaking thereof, with his expense growing out of the illness which he claims resulted therefrom. The very interesting question of how far the purveyor of ice cream impliedly warrants the product to be free from poisons which can be detected only by bacteriological and chemical analysis, if at all, is not presented by this record,

for the answer admits a general warranty as broad as that alleged in the complaint, and rests upon a denial of the breach of such warranty. Whether, under a proper pleading, this court would be willing to hold that a person selling ice cream impliedly warranted the same to be free from poisonous ptomaines which could not be detected in the practical conduct of the business, and which no reasonable care could exclude, is purely academic here, for the defendant has consented by his pleadings to stand upon the broad proposition that he did warrant the quality in the same degree that the plaintiff has alleged, and that he has been guilty of no breach of that warranty, and the case must be determined upon the pleadings as they are now before this court.

It is entirely evident from the remarks of the learned court in denying a motion for a new trial that the court was not satisfied with the justice of the determination, that it was not convinced that the evidence warranted the conclusion reached by the jury, and we will examine the case with a view to determining whether the verdict is supported by the evidence, for this is the one question which appears to demand consideration at this time. The plaintiff, who is an attorney at law, 32 years old, testified to the effect that on the 22d day of June, 1911, he ate supper at a restaurant at about 5 o'clock in the evening; that his supper consisted of a small steak, fried potatoes, bread and butter, and tea without milk or sugar; that subsequently he walked about the city, and at about 8 o'clock in the evening met some young ladies by appointment; that at about half past 10 or 11 o'clock in the evening of that same day he, with the young ladies, went into the defendant's store; that he there ordered ice cream with fresh strawberries, as distinguished from canned strawberries, poured over the same; that he ate about half a dish of the ice cream and put it aside, afterward walking home with the ladies; that after traversing a few blocks he was taken with pains in his abdominal region; and that it became necessary for the ladies to help him to walk, though both of the ladies deny this when called in his behalf, though one of them says that he complained of nausea when he had reached her home. Plaintiff further testified that on reaching home he was taken with fits of vomiting and purging, and that the matter thrown up was of a creamy appearance, streaked with red, and that the vomiting and purging continued until both were of a watery nature. The plaintiff gave his experiences in detail, and testified that the day was the hottest ever known in Albany, or words to that effect, while the report of the weather bureau showed that the temperature did not get above 73 degrees at any time during the 22d day of June, 1911, and that it was below 70 during the evening, so that his testimony is to be taken with some degree of allowance.

With the testimony of the plaintiff as a foundation, we will examine the evidence of his doctors, and see how much of substantial fact was before the jury in support of the theory that the plaintiff was poisoned by something in the ice cream. The general contention of the plaintiff was that he was a victim of ptomaine poisoning; that this poison was in the ice cream, rather than in the meat which he had eaten at an earlier hour in the evening, and it appearing that ptomaine

poison is to be found in meats and fish, equally with milk and its products, there was an effort to further classify the poison as tyrotoxinon, which is claimed to belong to the general class of ptomaines, but to be found exclusively in milk and its products. It was conceded by all of the physicians, both for and against the plaintiff, that this tyrotoxinon is a rare and difficult poison to discover, that it is impossible to discover without a bacteriological and chemical analysis, and one of the witnesses testified that, following the exact formula of the discoverer of this elusive poison, he had been unable to isolate the poison, and the plaintiff in this action is called upon to establish, by a fair preponderance of evidence, that he was injured by reason of a poison contained in the ice cream which he purchased of the defendant under the warranty alleged.

Eddy S. Haswell, a practicing physician, was called to prescribe for the plaintiff at the time of his illness, and this witness testified that he first saw the plaintiff on the morning of June 23, 1911, at about 7:30, which was long after the plaintiff had undergone his vomiting and purging of the night. The witness says that he found plaintiff in bed with "his face somewhat flushed, his temperature 103 $\frac{4}{5}$, a pulse of 120; his pulse was weak and barely perceptible to the finger at the wrist." This witness testified that the normal temperature was 98 $\frac{2}{5}$, and that the normal pulse was from 70 to 80, showing a dangerous degree of increase in both, and he then describes the treatment, which is not shown to be different from that which would have been used in treating ptomaine poisoning generally. He says that the plaintiff stooped while he was present, and that the stool resembled oat straw cut into short bits and water soaked, but he made no chemical or bacteriological examination of the matter to determine whether it contained poison, and he says that he diagnosed the case from its history, from the facts stated to him by Mr. Race, the plaintiff, as being "probably some form of food poisoning and, in the common sense used in the form, that is the popular use of the word ptomaine, not technical; so I diagnosed it as a case of ptomaine poisoning." The witness then follows the case for two weeks, during which time the plaintiff gradually recovered under the treatment, and then describes a rash which developed upon one side of plaintiff's face, which spread to the eye, and which is claimed to have resulted in a permanent injury to the eye. This rash appears to have been of the nature of the disease popularly known as shingles, and its relation to the alleged poisoning seems very remote, although there is an effort to trace this to the poison. There is also some evidence on the part of this witness that he discovered a hernia, which is supposed to have been developed through the strain of vomiting and purging incident to the poisoning, and the witness then testifies that his final diagnosis of the case, as he viewed it upon the stand, was that it was "a form of food poisoning commonly expressed, the common use of the word ptomaine, not its scientific use."

Up to this time there is not a particle of evidence of anything more than a diagnosis of an ordinary case of ptomaine poisoning, such as might have resulted as well from the meat eaten at 5 o'clock as from

the ice cream eaten at 10:30 or 11 o'clock in the evening, and the witness is called upon to introduce James F. Rooney, a practicing physician of Albany, who was called and consulted by telephone. Upon cross-examination Dr. Haswell admitted that the symptoms detailed by himself might have been caused by what is popularly known as an overloaded stomach—by indigestion—and that the principal symptoms at least were identical with various diseases. He stated, in answer to a further question, that ptomaines exhibited their symptoms in the patient in from 30 minutes up to 8 or 9 hours, but admitted that he knew of no case, and that he had read no authority holding that the symptoms would develop in any case in 30 minutes, and finally said that it was conceded that the usual length of time was from 2 to 6 hours; that this was the average case. He also said the ptomaines were found in a large variety of foods, and practically admitted that they were found in meats, and, while reluctantly admitting that their presence could not be determined without an analysis, he insisted that the duty of a doctor was to at once address himself to relieving the symptoms without waiting to inquire too minutely into the cause of the symptoms, and then, conceding that he could not make an absolutely accurate diagnosis of a case of ptomaine poisoning without a laboratory examination, he said that he had made none in the case of the plaintiff, and that the only opportunity he had of getting materials for such an examination was on the occasion of his first visit, when the stool was already contaminated by the water in the closet. This is the substance of the testimony of the plaintiff's doctor, in so far as it related to the question of the presence of ptomaine poison, and it is clear that it is just as likely that the poisoning resulted from the eating of meat at 5 o'clock as from the eating of ice cream at 11 o'clock, for not a single fact is clearly stated which is not just as consistent with the one theory as the other. Concededly the poison is to be found in meat as well as in milk and its products, and the time within which it develops symptoms is as clearly within the facts in reference to the eating of the meat as in the eating of the ice cream. No one has pretended that he has found any ptomaine poison either in the matter exuded from the plaintiff or in the can from which the ice cream was served, and the symptoms which are described are concededly those which would be common to any case of ptomaine poisoning whether arising from the eating of meat or the consuming of a milk product.

We come then to the testimony of James F. Rooney, a practicing physician of Albany, who says that he did not see the plaintiff at the time of his alleged poisoning; that he merely talked with Dr. Haswell over the telephone, and advised as to the treatment. This witness was asked a hypothetical question, based on the testimony of the plaintiff and his physician, as to what plaintiff suffered from, and answered:

"I will say that the individual in question suffered from a form of food poisoning, probably tyrotoxon; and that his herpes (rash) was the result of a nervous lesion of one of the facial nerves that has not infrequently supervened upon this form of poisoning, and that his cornea also was a direct sequence of his facial herpes."

The witness was then asked for his judgment, "on the facts assumed, as the question was finally corrected and settled, did he take such tyro-

toxicon into his system?" He answered: "I should say within an hour or two hours of the time of the first appearance of symptoms." He also declared that he would not say that so long a time as five or six hours elapsed prior to the time; that is, that he took it into his system with the supper which was stated, and then the question was reformed, and it, together with the answer, is given as follows:

"In your judgment was the tyrotoxicon taken into his system when he ate of the cream and strawberries a few moments before the sickness supervened, or the steak, potatoes, bread and butter, and tea that he ate five or six hours before? A. I should say certainly with the cream which he is said to have taken, inasmuch as tyrotoxicon is only found in milk and its products."

That is, the witness testifies first that the patient "suffered from a form of food poisoning, probably tyrotoxicon," and then reaches the conclusion that he must have taken this into his system from eating the cream, and not because of any facts appearing in the hypothetical question, but because "tyrotoxicon is only found in milk and its products." There is absolutely no evidence in the case that the plaintiff suffered from tyrotoxicon poisoning, except the symptoms related by the plaintiff and his physician, and which are not shown to belong exclusively to any particular form of food poisoning, and the witness in answer to the hypothetical question does not state that he was suffering from this exclusive form of poison, but that it was "probably tyrotoxicon," and then reasons from this premise that the poisoning must have resulted from the eating of the cream, because it is only in milk products that this peculiar poison is found, which is clearly a very unsubstantial foundation for that burden of proof which the plaintiff assumed in entering upon the trial of this action. Not a single fact is pointed out to differentiate tyrotoxicon poisoning from the poisoning which results from decomposing beef, and the weakness of the evidence is clearly revealed in the question and answer immediately following. The witness was asked, "What is tyrotoxicon?" and the answer made was that it is "a poison of uncertain chemical constitution that was first isolated by Vaughan, of Ann Arbor, Mich." All the doctors, as heretofore pointed out, agree that it is a very rare and difficult poison to locate; but this witness, upon a mere statement of general symptoms, jumps to the conclusion that here is probably a case of tyrotoxicon, and upon this bridge of probabilities walks to the conclusion that the plaintiff must have taken on the poison with the cream because this peculiar brand of poison could not come from meat. But even here he does not come up to the requirements, for, while he tells us that the poison must have been taken in with the cream "inasmuch as tyrotoxicon is only found in milk and its products," he answers a further question, "It comes exclusively, do I understand you to say, from milk products?" by declaring simply that, "Milk and its products are the only things in which it has thus far been found."

That is a long way from evidence that it is not to be found in meats, in potatoes fried in lard, in bread and butter, or in tea; it is simply a statement that a rare and difficult poison to isolate has not yet been found in any other than in milk products, and, for all that we know, it may be found in any of the things which the plaintiff ate at 5 o'clock

in the afternoon. But the witness is not willing to stand squarely upon his probability, for, after giving his theory of the manner in which tyrotoxinon works in the system, he is asked this question:

"Upon the cross-examination of a medical witness here the questions were put to him as to whether some of the symptoms exhibited by the patient were not those of gastric ulcer, acute appendicitis, typhoid fever, shingles. Now sufficient time having elapsed to demonstrate by the recovery of the patient that he did not have any of these diseases which I have named as being mentioned on the cross-examination, does not that accentuate and confirm your diagnosis of tyrotoxinon poisoning?"

And the witness answered:

"Why, it confirms the diagnosis of food poisoning absolutely."

The examination was continued farther, but the witness did not go beyond the point of claiming that the diagnosis of food poisoning was confirmed by the later developments in the plaintiff's case, so that with the exception of the intrusion of the probability of tyrotoxinon there is absolutely no evidence in the case which tends to show anything more than that the plaintiff was poisoned by some kind of a food poison, commonly known as ptomaine poison, and the conclusion of the witness that this poison must have been taken in with the ice cream is the merest guesswork, and has no foundation better than exists for the conclusion that the poison was taken into the system with the beef-steak eaten at 5 o'clock, and this is the gist of all of the evidence produced on the part of the plaintiff to show that he was poisoned by eating ice cream at the defendant's store on the 22d day of June, 1911.

Assuming, without deciding, that there was in this testimony enough of evidence to take the case to the jury, the whole of the force of the evidence was negated by the defendant's witnesses, all of whom appear to be far better qualified to testify upon the question at issue, for they are men who have specially qualified along these lines. Harry Saul Bernstein, who qualified as an expert in bacteriological matters, and who is the secretary of the milk commission of the county of Albany, and has had a wide experience in dealing with the examination of milk, testified in behalf of the defendant, and after describing the process of discovering food poisons in individuals, and telling us that the diagnosis of ptomaine poisoning can only be done with certainty by an examination of the vomitus and the stool of the patient, he explains about tyrotoxinon and says that it "is an exceedingly rare poison produced in milk and milk products and produced only under unhealthy conditions." A few excerpts from his direct testimony, in no manner weakened by cross-examination, will be of interest at this point. We give the matter as it appears in the record:

"In the case of poisoning arising from the presence of tyrotoxinon in the human system, what would you say with regard to the temperature as to being high or low, normal or subnormal? A. The temperature, according to the cases reported, has been subnormal with one exception. Q. What do you mean by subnormal? A. Below the normal. The normal is 98.6, and a temperature anything below that is subnormal. Q. And one of the symptoms of tyrotoxinon poisoning is the subnormal temperature? A. That is so regarded. Q. When do the symptoms of tyrotoxinon poisoning first begin to show themselves after the food in which the tyrotoxinon exists has been taken into the system, how long after? A. From one to ten hours. * * * Q. Will you kindly

tell the jury whether nausea, vomiting, purging, and tenderness of the abdomen are symptoms of any kind of food poisoning? A. Those symptoms occur in poisoning with meat, in poisoning with fish. They may also occur in any number of diseases. * * * Q. Assuming that a man of about 30 years of age, of a good physique, born and reared in the country, on the 22d of June, 1911, with a temperature ranging from 58 to 73 in the 24 hours, at 5 o'clock in the afternoon partook of a meal consisting of a small beefsteak, potatoes fried in lard, bread and butter, tea without either milk or sugar, and from five to six hours afterwards ate half a dish of ice cream with fresh strawberries and the juice thereof poured over it, and immediately after eating the ice cream, or so immediately after as to be but a few minutes, was taken with nausea, and within 45 minutes with violent vomiting and severe pains in the abdomen, and diarrhoea, would in your opinion those symptoms be caused by food poisoning in a meal partaken at 5 o'clock, or in the ice cream consumed five or six hours later? A. Those symptoms would arise from the meal partaken at 5 o'clock, or prior to that. Q. And what would you say would be the character of the poison that produced those symptoms, the ptomaine, the tyrotoxin—I use ptomaine in the popular sense, I know you have given tyrotoxin as a subdivision of ptomaine—but would it in your opinion be a result of tyrotoxin poisoning? A. No, it would not be the result of tyrotoxin poisoning. Q. But would be the result of what kind of poison in your opinion, some kind of food poison? A. It would be the result of some kind of food poison; it is difficult to state what kind. Q. Could it be determined without analysis, bacteriological and chemical, in your opinion? A. It could not be."

This witness testified that ice cream manufactured and served in the manner testified to by the defendant and his witnesses would not probably take on tyrotoxin poison; that it would be almost impossible. An elaborate cross-examination did not weaken this testimony in any degree, and being asked the question, "Are the symptoms that attach to poison from eating a steak the same as those that attach to taking tyrotoxin," the witness answered: "The symptoms are almost identical. The only difference comes on in the intensity of the symptoms."

Ralph E. Myers, who qualified as a physiological chemist, testified that "we can say, generally speaking, that ptomaine poisons from meat, from ice cream, from cheese, and perhaps some other things, would give about the same train of symptoms," and that meats were more likely to contain ptomaines than milk, and generally his testimony was in harmony with that of the preceding witness, and it stood the test of cross-examination equally well. He was followed by Andrew MacFarlane, M. D., whose qualifications were conceded by the plaintiff, and who, in addition to his general practice, had specialized upon bacteriology and chemistry. Dr. MacFarlane testified that meat containing poisonous ptomaines when taken into the stomach began to show effects in from 5 to 6 hours and for indefinite times up to 24 or 36 hours, so that it appears, from undisputed testimony of a competent authority, that the poison which the plaintiff took into his system might have been there not only from the time of taking the meal at 5 o'clock, but for a day or more previous to the time that the symptoms developed, and the same witness, answering a question based on the symptoms narrated by the witnesses, says that:

"All of those symptoms could not be produced by tyrotoxin poisoning of the ice cream which he took directly before the symptoms appeared."

And later he declared positively that they could not be produced by the ice cream.

It would be tedious and unprofitable to follow these witnesses in detail, but enough has been pointed out to show that opposed to the testimony of one physician, who bases his conclusion upon his assumption that the plaintiff was poisoned by tyrotoxin, is the testimony of three men fully qualified to speak, and they concur in the essential matters involved in the case, and they are entirely uncontradicted in the most essential points. Giving the plaintiff the benefit of the assumption that there was evidence entitling him to go to the jury at the close of his case, we are fully persuaded that the verdict is not supported by the weight of evidence, and that it ought not to stand. The evidence is far stronger that the plaintiff took the poison into his system at his evening meal than that he was wronged by the defendant in selling him a dish of ice cream, and the burden was upon the plaintiff to establish that he received the poison from the defendant, and not from any other source. This he has clearly failed to do. The only affirmative evidence is that furnished by the plaintiff that he ate the ice cream, and by his physician that certain symptoms developed. But the plaintiff also testified that he ate beefsteak at 5 o'clock in the afternoon, and the overwhelming weight of evidence is that meat is equally liable to produce the exact symptoms detailed by the plaintiff and his witnesses, and within the time which had elapsed between the taking of the food and the occurrence of the symptoms. Besides this, the evidence is undisputed that the symptoms from ptomaine poisoning might develop at any time within 36 hours of the taking in of food, and that the question of what kind of poisoning resulted could not be determined without an analysis, based upon actual examination of the excretions. In other words, we are asked to hold that a mere diagnosis of a comparatively unknown physician is to take the place of evidence, and that the defendant is to be charged with responsibility for the plaintiff's misfortunes without a particle of evidence to show that he was in any manner liable for the presence of poison in the plaintiff's stomach and bowels. We might, with the jury, guess that he took in the poison with the ice cream; but it would be merely a guess, unsupported by any tangible evidence, and contrary to the weight of evidence appearing in the record.

The judgment and order appealed from should be reversed, and a new trial granted, with costs to the appellant to abide the event.

(161 App. Div. 78)

KEANE v. SEA BEACH RY. CO.

(Supreme Court, Appellate Division, Second Department. March 6, 1914.)

1. MASTER AND SERVANT (§ 278*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE.

Evidence, in a motorman's action for injuries from collision with a train of work cars, *held* not to sustain a finding of negligence, in that the brakes on plaintiff's car were defective.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. **MASTER AND SERVANT (§ 182*)—VICE PRINCIPAL.**

The direction and control contemplated by Railroad Law (Consol. Laws, c. 49) § 64 (42a), providing that railroad employes intrusted with the authority of superintendence, control, or command of other employes, or with authority to direct or control any other employe in the performance of such employe's duty, are vice principals, must emanate from superior authority.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 371, 372; Dec. Dig. § 182.*]

Appeal from Trial Term, Kings County.

Action by Dennis Keane against the Sea Beach Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and STAPLETON, JJ.

D. A. Marsh, of Brooklyn, for appellant.

Don R. Almy, of New York City, for respondent.

JENKS, P. J. This is a common-law action for negligence brought by servant against master. The servant was injured when a car of which he was the motorman came into collision with a train of the defendant's work cars. A moment before collision the car had been driven by Walden, a novice then under instruction by the plaintiff. But when collision seemed imminent, the plaintiff thrust Walden aside and took control. The learned court submitted "two specific claims" of negligence to the jury. The first was as to the alleged defective brakes of the car, and the second as to the negligence of the defendant in management of the train.

[1] As the verdict for the plaintiff was general, we cannot determine the ground of liability found by the jury. I think that the judgment cannot be affirmed because a casting of liability upon the "first specific claim" of negligence would be against the weight of the evidence.

The accident occurred about 3:45 p. m. of September 1, 1911. The plaintiff testifies that the brakes were defective so that both a longer time and a greater distance were required to stop the car. He does not specify any particular defect. He testifies that on the day of the accident he told the defendant's starter, Leckie, of this defect. But that testimony is without corroboration save that Walden testifies that he heard some conversation, which he could not recall save that the starter asked the plaintiff to make up lost time, and the plaintiff answered that he could not do so with that car, but Walden could not remember what reason was given by the plaintiff for his inability. For the defendant, Leckie, the starter, testifies that there was a conversation relating exclusively to the fact that the plaintiff was behind time, that plaintiff attributed the fault to the heavy travel, and that no mention was made of any defect. The plaintiff testifies on his direct examination that in this same conversation complaint had been made as to his delay. Thus plaintiff, his witness Walden, and Leckie, all agree that a subject of the conversation was the delay; but the plain-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

tiff alone says that during that conversation he complained of the defective brakes, for Leckie denies this feature and Walden cannot recall it. The defendant's mileage computer, who made his report from the cards of the conductor, testified that run No. 2 had the car on the morning of September 1, 1911, also on the afternoon, and that no one else had it on that day. The defendant's dispatcher, testifying from his records, shows that the plaintiff had run No. 2 on September 1, 1911, from 6:38 to 7:40, and from 12:50 to 4:10 morning and afternoon. The said mileage computer testified that this motorman made nine trips in the morning and six trips in the afternoon and was "pulled in" by a wrecking crew. These two witnesses were not cross-examined, nor was their testimony attacked. Moreover, the plaintiff testifies that the brakes he had on the car in the morning worked properly, but whether it was this car or not he could not state, although he afterwards says that he changed cars on account of a defective spring in the trolley pole. It was also testified that examination after the accident revealed that the brakes were in good condition, except that incident to the collision the brake rod was broken. The plaintiff in describing the accident says that he was 75 feet away when the colliding train started to back; that he was running at the rate of 10 or 12 miles an hour; that he pushed the novice aside from working the car, seized the handles, and did all he could to stop his car, but before he could get into position to do anything his car had gone 40 feet at least, and when he hit the other train he was almost stopped. Thus, even with these brakes, he almost stopped this car traveling at the rate of 10 or 12 miles an hour in a distance of less than 40 feet.

[2] I shall not discuss the evidence as to the "second specific claim" of negligence, save one feature. It is clear that the train was backed down after its motorman or engineer received a signal from the defendant's employé Rooney. The plaintiff contends that Rooney was a vice principal within the purview of section (42a) 64 of the Railroad Law (Consol. Laws, c. 49) and the defendant insists that Rooney was a fellow servant. The contention arises upon the indefinite proof as to the status of Rooney and as to what capacity he was acting in at the time of his signal. Rooney was on the train, left it after it had been stopped, and went ahead to view the way. He testifies that he was a switchman and went to protect the switches, and again that he was the acting conductor, the flagman, the brakeman, and the switchman; but that there was another switchman, and two flagmen, on the train. As the engineer or motorman was backing his train, he could not see for himself whether he should continue his way. The question, then, is whether the engineer or motorman, when he acted upon the signal from Rooney, was obedient to a superior or merely relied, on account of his inability to see for himself, upon the aid of an inferior. For the direction and control expressed in the statute refers to emanation from superior authority. *Hallock v. New York, O. & W. R. Co.*, 197 N. Y. 450, 90 N. E. 1124.

The judgment and order must be reversed, and a new trial must be granted; costs to abide the event. All concur.

WILLSON v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Special Term, New York County. April 17, 1913.)

1. RAILROADS (§ 222*)—NUISANCE—COMPLAINT—DAMAGES RECOVERABLE.

Where, in an action for damages to plaintiff's property from nuisances arising from the operation of a railroad, there was no allegation in the complaint that the nuisances were the result of negligent, unskillful, or improper operation, plaintiff could only recover damages resulting from unlawful operation of the railroad.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 720-724; Dec. Dig. § 222.*]

2. RAILROADS (§ 222*)—OPERATION OF ROAD—ACTION FOR DAMAGES—LOCATION OF RAILROAD—SUFFICIENCY OF EVIDENCE.

Evidence, in a property owner's action for damages from nuisances arising from the operation of a railroad, *held* to show that the railroad was not laid out and operated on park land, as alleged by plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 720-724; Dec. Dig. § 222.*]

3. RAILROADS (§ 222*)—LOCATION OF TRACK—PRESUMPTION.

Where, in a property owner's action for injunction and damages from nuisances arising from the operation of a railroad on nearby premises, it is shown that authority to place tracks on a particular location in a city was granted, and that tracks have been located for over 60 years under such grant without any question being raised by the municipality as to the correctness of the location, it will be presumed, in the absence of proof to the contrary, that the tracks are located on the place of the authorized location.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 720-724; Dec. Dig. § 222.*]

4. RAILROADS (§ 222*)—INJURY FROM OPERATION—ABUTTING OWNER.

Where, in an action for injunction and damages to property from nuisances arising from the operation of a railroad on nearby premises, it appeared that plaintiff's land was about 400 feet from defendant's track and separated therefrom by a driveway and park land, he was not entitled to the rights of an abutting owner.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 720-724; Dec. Dig. § 222.*]

5. RAILROADS (§ 222*)—INJURY FROM OPERATION—BURDEN OF PROOF.

Where, in a property owner's action for injunction and damages from nuisances arising from the operation of a railroad, it is shown that, though plaintiff is not an abutting owner, his premises are injured by noises, smoke, soot, and odors arising as claimed, the burden is on defendant to prove its authority to commit the nuisances complained of and to show that its authority was not exceeded.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 720-724; Dec. Dig. § 222.*]

6. RAILROADS (§ 18*)—FRANCHISE—RIGHT TO ATTACK—ACTION FOR NUISANCE.

The validity of the franchise under which a railroad company is operating can be attacked only in a proper proceeding by the state and not in a property owner's action for injunction and damages from nuisances arising from the operation of the railroad.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 39-44; Dec. Dig. § 18.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. RAILROADS (§ 222*)—OPERATION UNDER FRANCHISE—LIABILITY TO LAND-OWNER.

Where a railroad company has been authorized by its franchise to run a road through a given locality and has acquired private property over which it is authorized to run, it is not responsible to the owners of neighboring property for merely consequential damages necessarily incident to the operation of its trains.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 720-724; Dec. Dig. § 222.*]

8. RAILROADS (§ 222*)—OPERATION UNDER FRANCHISE—LIABILITY TO LAND-OWNER.

That a railroad company is operating on its own property under a franchise does not relieve it from liability to the owner of neighboring property for nuisances arising from the burning of soft coal and the storing of offensive live stock in the vicinity of a select residential portion of a city, where the burning of such coal is not necessary, and the company has not been authorized by the Legislature to construct a siding at that particular place upon payment of compensation to the owners of neighboring property.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 720-724; Dec. Dig. § 222.*]

9. RAILROADS (§ 222*)—INJURIES FROM OPERATION OF RAILROAD—LIABILITY TO LANDOWNER—DEFENSE.

In a property owner's action for injunction and damages from nuisances arising from the operation of a railroad on nearby premises, the fact that plaintiff's property was owned by the grantor of defendant's right of way at the time of the grant was no defense for acts which could not have been reasonably within the contemplation of the parties at such time.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 720-724; Dec. Dig. § 222.*]

10. LIMITATION OF ACTIONS (§ 55*)—CONTINUING NUISANCE—OPERATION OF RAILROAD.

A continuing nuisance arising from the operation of a railroad in an improper manner, so as to cause injury to neighboring property, is not barred by the statute of limitations until the statutory period has run from the date of its last repetition.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

11. RAILROADS (§ 222*)—INJURIES FROM OPERATION—DAMAGES.

Where, in a property owner's action for injunction and damages to vacant property from nuisances arising from the operation of a railroad on nearby premises, it appeared that no permanent injury was done to his freehold, and there was no evidence from which any actual damage for which recovery could be had could be estimated, he was entitled to merely nominal damages in connection with an allowance of the injunction.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 720-724; Dec. Dig. § 222.*]

Action by George L. Willson against the New York Central & Hudson River Railroad Company for injunction and damages. Ordered that injunction be allowed and that plaintiff recover nominal damages.

Clarence J. Shearn and J. Bleecker Miller, both of New York City, for plaintiff.

Alex. S. Lyman, of New York City (Robert A. Kutschback and George H. Walker, both of New York City, of counsel), for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 146 N.Y.S.—14

PAGE, J. This action is brought by the owner of a parcel of vacant unimproved land situated at the corner of Riverside Drive and 105th street in the city of New York, to enjoin the New York Central & Hudson River Railroad Company from maintaining and operating its railroad in front of plaintiff's premises, and in Riverside Park, and compelling it to remove its tracks, and for past damages. The grounds of action set forth in the complaint are briefly: That immediately opposite said premises is a public park known as Riverside Park, extending from the westerly side of Riverside Drive to the Hudson river, and which is held in trust by the city of New York for the benefit of the public for the ordinary uses of a public park and for no other purpose whatever; that the defendant without any authority or right has entered into and upon said public park and taken possession thereof, and constructed thereon in front of the plaintiff's premises and for a long distance to the north and south thereof a railroad, and has been and still is operating the said railroad in the said park by cars and trains drawn by steam engines on such railroad day and night without the consent or authority of the plaintiff or his grantors and against plaintiff's right to the use and enjoyment of the aforesaid premises; that the railroad operated by the defendant in said public park consists of four tracks from Seventy-Second street to Ninety-Sixth street, three tracks to Ninety-Eighth street, four tracks to 107th street, three tracks to 108th street, and four tracks to 123d street; that not only does the defendant operate trains on said tracks, but uses a portion of same for storage of cars and allows long trains of cars loaded with live stock to stand upon said tracks, as a consequence of which the atmosphere along said Riverside Drive is polluted with a foul stench from said cars and annoying and disturbing noises are made by the animals; that the operation of both passenger, freight, and switching trains is accompanied by annoying and disturbing noises, consisting of the constant blowing of steam whistles, ringing of bells, and other noises incident to the operation of steam railroad trains, which noises penetrate to the neighborhood of plaintiff's premises and make repose and rest impossible; that the steam engines operating said trains emit ashes, cinders, oil, water, and other substances upon said park in front of plaintiff's premises, and obnoxious gases, smoke, and cinders have been and constantly are emitted by said steam engines into said park and have and constantly do penetrate into plaintiff's premises; that by reason of the foregoing the plaintiff has been deprived of the enjoyment of the use and occupation of his premises, and plaintiff's passage along and through and his enjoyment of the said park has been and is interrupted; that access to the Hudson river forming the westerly boundary of said park was been and is greatly impeded; that the value of plaintiff's property and the rental value thereof has been greatly depreciated; that no proceedings were ever taken by the defendant to condemn the interest of this plaintiff or his grantors in said premises and park, or to compensate the plaintiff or his grantors for the property taken and injured by the construction of such railroad, or to acquire any interest or right in said park; that these injuries are continuous and of a permanent nature.

The answer is a denial of most of the allegations of the complaint admitting that the defendant operates a railroad, part of which extends from Seventy-Second street to 123d street, but denies that the railroad is laid and constructed upon or through park lands, but that it is laid on lands of which the defendant is and at all times mentioned in the complaint was the owner. That said railroad consists of two main tracks, and a siding extending from Seventy-Second to 123d street, with other sidings extending, respectively, from Seventy-Second to Ninety-Fifth, from Ninety-Seventh to 107th street, and from 108th to 123d street. For separate defenses the defendant alleges: (1) Its incorporation and grant or license from the state to operate said railroad as a common carrier, and that the track and sidings are necessary for the proper maintenance, operation, and use of the railroads of the said defendant, and that all land, tracks, locomotives, and cars used thereon are maintained, used, and operated pursuant to lawful authority and that the operation of the said railroad is necessarily attended with noise and with the emission of smoke, steam, vapor, and dust which are unavoidable from the proper management, maintenance, and operation of the railroad. (2) A grant of a right to the right of way of that portion thereof in front of plaintiff's premises from William B. Moffatt, who at the time of the said grant was the owner in fee of a tract of land, including with that portion granted to defendant, the plaintiff's premises. (3) Possession and use of the property for a railroad and the operation thereof with the attendant noise, smoke, steam, vapor, and dust for more than 20 years last past, and the continuance for that period has given a right by prescription to the continuance thereof. (4) Statute of limitations. (5) That such use and occupation of the said lands by the defendant had been open and notorious and was well known to the plaintiff at the time he purchased the premises described in the complaint and has been acquiesced in by the plaintiff without objection until he brought this action. (6) That the plaintiff has an adequate remedy at law.

[1] It will be noticed that there is no allegation in the complaint that the nuisances complained of were the result of negligent, unskillful, or improper operation of the railroad by the defendant. I therefore ruled upon the trial that the plaintiff by his complaint had limited himself to the recovery of damages resulting from the unlawful operation of the railroad. Although the plaintiff does not acquiesce in the correctness of this ruling, on mature reflection I believe the same to have been sound and shall adhere to it.

[2] The plaintiff's allegation that the road of the defendant was laid out and operated upon park land was not borne out by the proof. The Hudson River Railroad Company was incorporated under chapter 216 of the Laws of 1846, and was authorized to construct a single, double, or treble track railroad between the cities of Albany and New York. The directors of such corporation were authorized to locate their railroad on any of the streets or avenues of the city of New York westerly of and including Eighth avenue and on or westerly of Hudson street, provided the assent of the corporation of the city be first obtained to such location, and they were also authorized to make sur-

veys and maps, which were to be certified to and filed by them in the office of the register of the county of New York, designating the location of the tracks that they deemed most advantageous. Such location maps were filed, as required by statute. By ordinance of the city, approved by the mayor on May 6, 1847, permission was granted to the Hudson River Railroad Company to construct a double track with suitable turnouts along the line of the Hudson river from Spuyten Duyvil creek to near Sixty-Eighth street, occupying so much of the Twelfth avenue as lies along the shore, and thence on streets and avenues not involved in this action. The railroad was built and has occupied the lands upon which it is now constructed for more than 50 years.

[3] The plaintiff claims that the defendant has not shown that the present location of the tracks coincides with those located on the map filed with the register in 1847. Where, however, authority to place tracks on a particular location was granted and tracks have been located for over 50 years under authority of such grant, without question being raised by the municipality of the correctness of the location, the court will presume, in the absence of proof to the contrary, that the tracks as now existing are upon the place of the authorized location. The first legislation providing for the creation and maintenance of Riverside Park is chapter 697 of the Laws of 1867. Under this act a map was filed in the office of the then street commissioner, since transferred to and remaining on file in the office of the president of the borough of Manhattan which shows, as to the portion material to this case, the easterly line of Riverside Drive as parallel to and 400 feet westerly of the westerly line of Eleventh avenue. Riverside Drive is 100 feet wide. Immediately west of that is the "public square," now Riverside Park, of the width, opposite 105th street, of 300 feet. Westerly of the park is shown Twelfth avenue, 100 feet in width, and the bulkhead line, 100 feet westerly of the westerly line of Twelfth avenue. Condemnation proceedings were had and the land acquired for Riverside Park, the westerly line of which was the easterly line of Twelfth avenue. Concededly the tracks of the company were not at this time east of Twelfth avenue, as shown on said map, nor were the defendant's rights condemned and taken for park purposes in this proceeding. The next legislation affecting the park was chapter 496 of the Laws of 1885, entitled an act to define, lay out and establish the boundaries and lines of Riverside Park and Twelfth avenue, between Seventy-Ninth and 129th streets, in the city of New York, wherein it is provided that:

"The permanent westerly boundary of Riverside Park [between the points above designated] shall be the line designated upon the map or plan of the route or roadway of the Hudson River Railroad Company filed on or about the 7th day of September, 1847, in the office of the register of the city and county of New York as the easterly line or side of said route or roadway. * * * The permanent westerly boundary of Twelfth avenue * * * shall hereafter be a line drawn parallel with but distant seventy-five feet westerly from the westerly line of said railway, route or roadway laid out as aforesaid, and all other lands between the westerly line of the said railway, route or roadway and the line hereby established as the westerly boundary of said avenue is hereby declared to be a public street or avenue (and to be known as Twelfth avenue)."

The corporation counsel is authorized to bring condemnation proceedings to carry out the provisions of this act, but it is expressly provided that:

"Nothing herein contained shall affect the rights and franchises of the New York Central & Hudson River Railroad Company."

The next legislation was chapter 152 of the Laws of 1894, entitled an act providing for the improvement of the lands and waterfront adjacent to Riverside Park, in the city of New York, by extending and improving said park and regulating the use of said lands and waterfronts, in which it is provided:

"All those pieces or parcels of land, including land under water and upland fronting upon Riverside Park, in the city of New York, bounded southerly by the southerly side of Seventy-Second street if extended westerly; northerly by the southerly side of One Hundred and Twenty-Ninth street if extended westerly; easterly by the westerly line of the route or roadway of the Hudson River Railroad Company as laid down upon the map of said route or roadway filed in the office of the register of the city and county of New York on or about the 2d day of September, 1847; and westerly by the bulkhead line of the Hudson river * * * are hereby laid out, appropriated and set apart for the public uses following."

The effect of this legislation was to enlarge Riverside Park by establishing a new portion thereof westerly of the railroad and extending to the bulkhead line. This act did not embrace within the territory affected thereby the route or roadway of the defendant. The proof thus demonstrates that the defendant's route or roadway was not and is not located upon the land of Riverside Park, and plaintiff's allegations to that effect are disproved.

[4] The plaintiff's counsel in his brief argues that he has the rights of an abutting owner, and cites freely from the elevated railroad cases. A mere statement of fact as to the location of plaintiff's premises with respect to the defendant's roadway disposes of his contention. His premises are about 400 feet east of the defendant's roadway and abut upon the easterly side of Riverside Drive. The land between Riverside Drive and defendant's roadway comprises Riverside Park, which is terraced down to the defendant's roadway, which is from 90 to 100 feet below the level of plaintiff's premises. To seek to apply to these facts the rules of law which were developed to meet a condition where railroad tracks were elevated upon a permanent structure upon the street immediately in front of or closely adjacent to premises abutting upon that street is more ingenious than sound. See *Fobes v. R., W. & O. R. R.*, 121 N. Y. 505, 517, 24 N. E. 919, 8 L. R. A. 453. Nor is it necessary to consider the interesting question raised by plaintiff's counsel as to the title to land under water, which was attempted to be granted to the defendant by William B. Moffatt. It may be that Moffatt had not acquired title thereto; then the title would be in the city of New York and would be covered by the permission granted to construct the railroad tracks on such lands. In either event plaintiff cannot question the title in this proceeding.

If any title remained in Moffatt, his heirs by appropriate proceedings can assert it. If the title to the property is not good as against

the city, it can protect its rights. The grant by Moffatt and the license of the city are a sufficient answer to this plaintiff's case.

[5] In spite of the distance separating plaintiff's premises from the defendant's railroad, it is not seriously disputed that the noises, smoke, soot, and odors arising from the operation of the defendant's railroad penetrate to the plaintiff's premises and damages ensue therefrom to the plaintiff. These acts constitute a nuisance from which the plaintiff is entitled to relief unless the defendant can show that it is justified and protected by law or license. If the defendant operates its railroad on Twelfth avenue, the burden is upon it to plead and prove a legal right to commit the nuisances complained of, and the justification must be as broad in its scope as the acts perpetrated. In other words, it must show its authority and also that the authority was properly exercised and not in any way exceeded. *Clifford v. Dam*, 81 N. Y. 52; *Brown v. Met. St. Ry.*, 60 App. Div. 184, 70 N. Y. Supp. 40. The principal question to be determined, therefore, is to what extent the defendant has sustained this burden.

[6] It has been shown that the defendant is a duly incorporated railroad company and has a franchise from the state of New York to operate and maintain its tracks and road in the location in which it now is, and that it is occupying the roadbed and right of way along the shores of the Hudson river openly under a claim of title. The plaintiff has attempted to question both the validity of the franchise and the defendant's title to the land. As to both of these he must fail, as the franchise of a corporation should only be tested in a proper proceeding brought by the state from which it sprang, and courts will not try the title to real property until it is disputed by some one claiming a paramount title, which this plaintiff does not. *City of N. Y. v. Bryan*, 196 N. Y. 158, page 168, 89 N. E. 467. Furthermore, the Court of Appeals has passed upon the question of the validity of this defendant's franchise in *New York Central & Hudson River R. R. v. City of N. Y.*, 202 N. Y. 212, 95 N. E. 638, in which the franchises both to exist as a corporation and to operate its road were specifically upheld. Until it has been specifically proved to be otherwise in proper actions or proceedings for that purpose, it must therefore be assumed that the New York Central & Hudson River Railroad Company is operating its trains upon the tracks below Riverside Park pursuant to a valid franchise from the Legislature of the state of New York, and that its occupation of the roadbed is a lawful one.

[7] To what extent does this license legalize the nuisances of which the plaintiff complains? The plaintiff does not claim any title in the defendant's roadbed or that any of his property has been actually taken by the defendant. He claims merely as the owner of neighboring land affected by the operation of the road. The Court of Appeals of this state has repeatedly held that, when a railroad company has been authorized by its franchise to run a road through a given locality and has duly and legally acquired the private property over which it is authorized to run, it is not responsible to the owners of abutting and neighboring property for merely consequential damages necessarily incident to the operation of its trains, such as the usual smoke, noises, and odors of steam engines. *Fobes v. R., W. & O. R. R.*, 121 N. Y.

505, 24 N. E. 919, 8 L. R. A. 453; *Conabeer v. N. Y. C. & H. R. R.*, 156 N. Y. 474, 51 N. E. 402; *Uline v. N. Y. C. & H. R. R.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661. It is presumed that the Legislature intended to grant to the railroad company the right to operate its trains in the usual manner and to legalize the usual and necessary nuisances which result to the surrounding country.

[8] While its franchise protects the defendant from the necessary consequences of running its trains, I am of the opinion that it is not a defense to all of the acts proved by the plaintiff. The burning of soft coal and the storing of offensive live stock cars in the vicinity of a select residential portion of the city may not be deemed to be acts within either the express or implied terms of the franchise to run a railroad.

"The public character of the defendant's business does not entitle it to maintain a nuisance." *Bly v. Edison El. Ill. Co.*, 172 N. Y. 1-8, 64 N. E. 745, 746 (58 L. R. A. 500).

The principle and rule applicable to these acts are fully set forth in the cases of *Garvey v. L. I. R. R.*, 159 N. Y. 323, 54 N. E. 57, 70 Am. St. Rep. 550, *Bohan v. Port Jervis G. L. Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711, *Cogswell v. N. Y., N. H. & H. R. R.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701, and the authorities are collated and discussed. In the *Cogswell Case* the Court of Appeals said:

"The statutory sanction which will justify an injury to private property must be expressed or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the Legislature contemplated the doing of the very act which occasioned the injury."

As a common carrier the defendant must transport live stock. As an incident to such transportation and delivery it is probably necessary that these cars should stand upon sidings at the destination. We have seen that the defendant company was authorized by the Legislature to construct its tracks with necessary sidings, but this does not justify the use of the sidings in a residential section of the city for the storage of foul and offensive cars. To justify such use it would be necessary to show that the Legislature had expressly authorized the construction of the siding at that particular place and for that particular use, and the Legislature would not have power to grant the authority without provision for compensation to the owners of neighboring property. None of the other defenses pleaded by the defendant is in my opinion sufficient to justify the aforesaid acts.

[9] The fact that the plaintiff's property was owned by the grantor of the defendant's right of way at the time of the grant might be held to be a sufficient justification of any of the usual and necessary results of operating the road (*Bennett v. L. I. R. R.*, 181 N. Y. 431, 74 N. E. 418), but would be no defense for acts which could not have been reasonably within the contemplation of the parties at the time of the grant to the defendant.

[10] No prescriptive right to commit these acts has been proved. It is well settled law that a continuing nuisance of this kind is not barred by the statute of limitations until the statutory period has run from

the date of its last repetition. The defense has therefore failed in these respects and an injunction will issue restraining the defendant from storing or keeping cattle cars or other cars which bear an offensive odor in the vicinity of plaintiff's premises and restraining and enjoining the defendant from operating engines burning soft coal upon that portion of the road which passes the vicinity of plaintiff's premises.

[11] Had the plaintiff proved substantial damages to his property arising from these nuisances, he would be entitled to recover them in this action, but in this regard he has failed. His property is vacant land situated in the heart of a high-class residential section and unavailable for any other purpose than that to which the neighborhood is devoted. No permanent injury to his freehold has been done, and there is no evidence from which the court can judge that he has suffered any actual loss by reason of injury to the rental value of the premises or what proportion of injury may have resulted from soft coal and cattle cars. The plaintiff will therefore receive merely nominal damages of six cents.

Settle findings and decree on notice.

In re NEWKIRK AVE. IN CITY OF NEW YORK.

(Supreme Court, Special Term, Kings County. March, 1914.)

1. MUNICIPAL CORPORATIONS (§ 407*)—STREET OPENING ASSESSMENTS—CONSTITUTIONALITY OF STATUTES—INEQUALITY.

Greater New York Charter (Laws 1901, c. 466) § 992, as amended by Laws 1910, c. 548, provides that any owner of land within a street extending to or beyond its center may, without compensation and before the appointment of commissioners, convey his interest therein to the city providing the same is free from incumbrances, etc., and, if the title conveyed be not rejected for good cause by the corporation counsel, the conveyance shall be recorded and filed, and thereupon the city shall become vested with the title to the same extent as if acquired by a proceeding to open that part of the street, and thereafter the land fronting on the part of the street conveyed and extending to the center of the block on either side shall not be chargeable with the expense of the opening of the remainder of any part of the street except the fair proportion of the awards that may be made for buildings. *Held*, that the section is not unconstitutional on the ground that it increases the burden of assessment to be borne by those who do not make such cessions to the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1003, 1004; Dec. Dig. § 407.*]

2. MUNICIPAL CORPORATIONS (§ 492*)—OPENING OF STREETS—ASSESSMENT OF BENEFITS.

Where an assessment of a benefit parcel in street opening proceedings exceeds one-half of the value of the parcel assessed, as appraised by the commissioners of estimate and is claimed for that reason to be contrary to Greater New York Charter (Laws 1901, c. 466) § 980, the proper practice is to refer the report back to the commissioner of assessment with directions to report the date as of which he fixed the value of the parcels, for the purpose of determining whether he took into account the enhancement of value from the improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1156-1158; Dec. Dig. § 492.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MUNICIPAL CORPORATIONS (§ 467*)—OPENING OF STREETS—ASSESSMENT.

The commissioner of assessment in street opening proceedings should take into account the enhancement of value resulting from the improvement in assessing benefits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1110, 1111; Dec. Dig. § 467.*]

Proceedings by the City of New York to acquire lands for the opening of Newkirk Avenue. On motion to confirm report of the commissioners of estimate and the commissioner of assessment. Report of commissioners of estimate confirmed, and report of commissioner of assessment returned, with directions.

Archibald R. Watson, Corp. Counsel, of New York City (Edward Riegelmann, of Brooklyn, and Howard L. Campion, of New York City, of counsel), for City of New York.

Robert H. Haskell and James R. Gormly, both of Brooklyn (John H. Easterday, of counsel), for objectors.

BENEDICT, J. This is a motion to confirm the report of the commissioners of estimate and the report of the commissioner of assessment in a street opening proceeding. Objections were made before the commissioners to the awards for certain parcels of property taken; but no brief has been presented to me in support of any such objections, and the report of the commissioners of estimate is accordingly confirmed.

[1] Certain property owners within the area of assessment object to the assessments made because certain other property owners, who ceded their lands to the city in pursuance of section 992 of the Greater New York Charter, have been relieved of assessment in accordance with the provisions of that section. It is claimed that the section is unconstitutional, for the reason, I suppose, that it increases the burden of assessment to be borne by those who do not make such cessions. I do not think this claim can be supported.

Section 992 of the Charter as amended by Laws of 1910, c. 548, reads as follows:

"Any owner or owners of land and of all the estate therein embraced within the lines of any street laid down and shown on the map or plan of the city of New York, and extending from a side of said street to or beyond its center line, may, without compensation and before the appointment of the commissioners, convey all their right, title, and interest therein, providing the same shall be free from incumbrances inconsistent with the title to be acquired by the city, to the city of New York, and upon the delivery of such conveyances to the corporation counsel of said city with affidavits made by all such owners to the effect that the persons making them, are the owners of the estates in such lands so conveyed by them, respectively, and stating their interests, and that such estates in such lands are free of all incumbrances, except as aforesaid, it shall be the duty of such corporation counsel to examine such conveyances and papers, and if such title shall not be rejected for good cause, by such corporation counsel, he shall cause the said conveyances to be recorded in the office in which conveyances of real estate are recorded in the county in which such lands are located within sixty days after their delivery to him, and file them with the comptroller of such city, and thereupon the city of New York shall become vested with the title to said lands to the same effect and extent as if they had been acquired by a proceeding taken for the opening of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that portion of said street; after the making and acceptance of such conveyances, no proceeding to open the lands so conveyed shall be taken or maintained, nor shall the lands fronting on that portion of the streets so conveyed, and extending to the center of the block on either side of such portion of said street so conveyed, be chargeable with any portion of the expense of opening the residue or any portion of the residue of such street, except the due and fair proportion of the awards that may be made for buildings as aforesaid."

The foregoing amendment of the charter made in 1910, under the provisions of which property owners are given the right of cession of the property required by the city for the improvement, was designed to save unnecessary cost to the property owner, and in furtherance of that policy the law should not be strained to prevent or impede the voluntary cession of such property.

The cession under this provision of portions of the property sought to be acquired serves to reduce not only the aggregate amount of the awards, but also the total of the expenses. This reduction in the amount of the awards may not, it is true, reduce the assessments in blocks in which no property is ceded, if the block by block method of assessment be followed; but it is apparent that the individual assessments to raise the aggregate amount awarded would not be increased by the exemption of ceded property, whatever method of assessment is adopted. The reduction in the expenses, however, will benefit all property owners within the area of assessment. While it cannot be said, perhaps, that the assessments for expenses in case of cessions of part of the lands will be exactly the same as they would have been had no such cessions been made, I think the powers of taxation residing in the Legislature are ample to cover the provision here under consideration, and I therefore hold that section 992 is not violative of any constitutional right of the objectants.

[2] Objection is also made that the assessments on benefit parcels 81, 85, and 99 exceed one-half of the value of the respective parcels assessed in violation of section 980 of the charter, and the court is asked, among other things, to refer the report back to the commissioner of assessment with directions to report the date as of which he fixed the value of these parcels for the purpose of assessment.

Under the cases of *Matter of City of New York, Avenue D*, 192 N. Y. 575, 84 N. Y. Supp. 956, and *Matter of City of New York, Thayer Street*, 138 App. Div. 252, 122 N. Y. Supp. 952, I think this should be done. The former case suggested that such was the proper practice in cases involving the question whether an assessment exceeds one-half the value of the property assessed, and in the latter case the rule was actually applied, with the result that the assessment was eventually confirmed. 142 App. Div. 721, 127 N. Y. Supp. 396.

[3] It is the province of the commissioner of assessment to take into account the enhancement of value resulting from the improvement (*Matter of the City of New York, Avenue D*, 122 App. Div. 416, 106 N. Y. Supp. 889, affirmed 192 N. Y. 575, 84 N. E. 956); but, where it appears that the assessment exceeds one-half the value of the premises as valued by the commissioners of estimate, it is proper to ascertain whether he has done so.

None of the other objections seems to require special consideration.

Report of commissioners of estimate confirmed. Report of commissioner of assessment returned to him, with directions to report the date as of which he determined the value of benefit parcels 81, 85, and 99, and whether in estimating such value he took into consideration the enhancement in value thereof by reason of the improvement in question.

Settle order on notice.

HORGAN v. RAPID TRANSIT SUBWAY CONST. CO.

(Supreme Court, Appellate Term, First Department. February 24, 1914.)

1. MASTER AND SERVANT (§ 179*)—NEGLIGENCE OF FELLOW SERVANT—EMPLOYERS' LIABILITY ACT.

A master's exemption from liability for the act of a fellow servant has not been abolished by the Employers' Liability Act (Consol. Laws 1909, c. 31, §§ 200-204).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 354-358; Dec. Dig. § 179.*]

2. MASTER AND SERVANT (§ 295*)—ASSUMPTION OF RISK—QUESTION OF FACT.

In view of Labor Law (Consol. Laws 1909, c. 31) § 202, distinguishing between the employé's assumption of necessary risks as a principle of law, and his possible assumption of obvious risks as a defense, and making the question whether the employé understood and assumed the risk one of fact, it was error to instruct that the defense of assumption of risk was neither a question of law or of fact.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

3. TRIAL (§ 251*)—ACTION FOR INJURIES—INSTRUCTION—APPLICATION TO ISSUES.

In an action under the Employers' Liability Act (Consol. Laws 1909, c. 31, §§ 200-204) for personal injuries, where there was nothing in the record upon which the jury might base a conclusion in response thereto, a charge upon defendant's negligence, given after completion of the main charge and after passing on requests of counsel, injected a new issue and was reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

4. MASTER AND SERVANT (§ 289*)—ACTION FOR INJURIES—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

On evidence in an action under the Employers' Liability Act (Consol. Laws 1909, c. 31, §§ 200-204) for personal injuries, held that, notwithstanding plaintiff's testimony that he thought he was in a position of safety, the question of his contributory negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

Appeal from City Court of New York, Trial Term.

Action by William Horgan against the Rapid Transit Subway Construction Company. From a judgment entered upon the verdict of a jury, and from an order denying defendant's motion for a new trial, defendant appeals. Reversed, and new trial granted.

Argued January term, 1914, before LEHMAN, BIJUR, and PAGE, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Lyman A. Spalding, of New York City (Theodore H. Lord, of New York City, of counsel), for appellant.

Francis X. McCollum, of New York City (Raphael Link, of New York City, of counsel), for respondent.

BIJUR, J. This action was brought under the Employers' Liability Act to recover damages for personal injuries sustained by plaintiff through the alleged negligence of defendant.

Plaintiff was engaged in plumbing a column in the subway close to the north-bound track about 150 feet north of the 110th Street Station. A north-bound train injured his foot, which in the course of his work he had placed so near the westerly rail of the north-bound track as to have come in contact with some part of the train.

From the evidence adduced at the trial, it became quite clear that the only pertinent allegation of negligence in the complaint was the following:

"That the defendant's superintendent or foreman failed to furnish the plaintiff with any signalman whose duty it was or should be to issue warnings of the approach of trains and to notify all employes in time to avoid accident or injury."

The proof offered by plaintiff was to the effect that on previous days a watchman had been walking up and down the north-bound track, and had stopped approaching trains by the use of his lantern when he thought that necessary, or whistled to notify the employes to assume positions of safety when he thought it advisable that the trains should pass by. There was not the slightest suggestion that this method of warning was not ample.

Plaintiff's further proof showed that on the morning of the accident, at about 9 o'clock, he had gone to the foreman to ask for a helper on the work and to notify him that no watchman was on duty, and that the foreman had promised to send one forthwith. The accident happened about 10 o'clock. A number of plaintiff's witnesses testified "that there was no watchman on the north-bound track," and that no whistle was blown or other warning given on that morning. Defendant's witnesses testified that two watchmen were on duty and had been paid that day, one controlling south-bound traffic and the other at or near the northern end of the station platform controlling the north-bound trains. Defendant evidently conceded that a watchman was necessary, and neither plaintiff nor his witnesses gave any indication that a watchman stationed and operating as he had been on previous days was not a sufficient protection.

[1, 2] The learned court below instructed the jury at length in regard to the common-law liabilities of master and servant, and undertook to point out changes made by the Employers' Liability Law. In the course of his charge he said, in substance, that the fellow-servant rule had been abolished and that the defense of assumption of risk was neither a question of law nor of fact. To both these statements the counsel for defendant excepted, and asked the court particularly to charge as provided in the first sentence of section 202 of the Labor Law (L. 1910, c. 352) that an employé, as matter of law, assumed the

necessary risks of his employment, namely, those inherent in the nature of the business after the employer had exercised due care, and excepted to the refusal of the court to so charge. Both these exceptions present errors. The master's exemption from liability for the act of a fellow servant has not been abolished by the Employers' Liability Act, and the distinction between the employé's assumption of "necessary risks" as a principle of law, and his possible assumption of "obvious risks" as a defense, has been carefully preserved in section 202 of the Labor Law. See, also, *Hurley v. Olcott*, 134 App. Div. 631, 637, 119 N. Y. Supp. 430.

[3] It may be that these two errors would not require reversal of the judgment, because as the case was tried it is not clear how either the fellow-servant rule or the doctrine of assumption of risk became material to the jury's deliberations. The chief criticism which defendant presents in respect of this part of the charge is that it tended to confuse the minds of the jury. Unfortunately, however, after the main charge was completed, and all of the respective counsels' requests had been passed on, and, at least part of the error above referred to had been technically corrected, counsel for the plaintiff insisted on asking the court to charge "that if they believed that in the exercise of reasonable care on the part of the defendant a watchman was needed at the place where the plaintiff was working, 150 feet north of the platform, and no watchman was there," etc., the jury would be justified in finding the defendant negligent. To this, defendant's counsel excepted, "among other grounds, upon the fact that this is not an issue presented by the pleadings," and he might well have added "nor by the proofs."

It is quite plain that, by this last charge and the colloquy and requests to charge which immediately preceded it, an issue which had not previously been hinted at was injected into the controversy. The record is absolutely bare of any testimony upon which the jury might base a conclusion in response to this charge.

I am reluctant to reverse a judgment after there have been repeated trials; but the defendant is entitled to have the decision of a jury upon the actual issue presented by the pleadings and the proofs and to a correct statement of the law applicable to this issue.

[4] Appellant also makes the point that plaintiff, having testified that he thought that he was in a position of safety, must be taken, as matter of law, to have been guilty of contributory negligence. In this contention I cannot agree—as a general proposition, and particularly not as applied to the circumstances of this case.

Judgment reversed, and a new trial granted, with costs to appellant to abide the event.

PAGE, J., concurs. LEHMAN, J., concurs in result.

(84 Misc. Rep. 561)

E. F. KEATING CO. v. CITY OF NEW YORK et al.

(Supreme Court, Special Term, New York County. December, 1913.)

1. MUNICIPAL CORPORATIONS (§ 366*)—PUBLIC IMPROVEMENTS—CONTRACTS—COMPLETION OF WORK BY CITY.

Where a city, in accordance with the contract, notified the contractor to discontinue work because of delay, and that the work would be completed at its expense, such notice operated as a termination of the employment, rather than a cancellation of the contract, and the contractor was entitled to the balance of the contract price after deducting the cost of finishing the work.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 899; Dec. Dig. § 366.*]

2. MUNICIPAL CORPORATIONS (§ 373*) — PUBLIC IMPROVEMENTS — CONTRACTS — RIGHTS OF SUBCONTRACTOR.

A subcontractor could establish his lien upon a municipal improvement to the extent of the sum due the contractor; his rights being measured by those of the contractor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 913; Dec. Dig. § 373.*]

3. MUNICIPAL CORPORATIONS (§ 373*)—PUBLIC IMPROVEMENTS—CONTRACTS—RIGHTS OF SUBCONTRACTORS—PLEADING.

In an action against a city to foreclose a subcontractor's lien upon public improvements, liquidated damages for delay, not claimed in the answer, should not be allowed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 913; Dec. Dig. § 373.*]

Action by the E. F. Keating Company against the City of New York and others. Judgment for plaintiff.

Phillips & Avery, of New York City (Frank M. Avery and Henry W. Eaton, both of New York City, of counsel), for plaintiff.

Archibald R. Watson, Corp. Counsel, of New York City (John L. O'Brien, of New York City, of counsel), for defendants.

GIEGERICH, J. [1, 2] The action is brought by a subcontractor to foreclose a lien for a public improvement. According to the stipulation of facts, the principal contractor, after doing a large part of the work contracted for, failed to complete, and on the 18th day of June, 1907, was adjudged a bankrupt, and a trustee in bankruptcy was appointed. On the 2d day of July, 1907, the city authorities notified the bankrupt contractor to discontinue all work under the contract and that the city would proceed to complete the work in the manner provided by the terms thereof. The ground of this action by the city authorities stated in the notice was that the work was unnecessarily and unreasonably delayed and that the contractor was willfully violating the conditions of the contract. The provisions of the contract on the points evidently referred to in the notice served on behalf of the city are that, if the work be unnecessarily or unreasonably delayed or the contractor willfully violates any of the conditions of the contract, then the city authorities shall have the power to notify the contractor to discontinue all work under his contract, and shall thereupon have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

power to complete or to contract for the completion of the work or such part thereof as they might deem necessary and to charge the expense thereof to the contractor, and that:

"The expense so charged shall be deducted and paid by the city out of such moneys as may be due or may at any time thereafter become due to the contractor, * * * and in case such expense shall exceed the said sum * * * then the contractor shall pay the amount of such excess to the city."

The city authorities procured the work contracted for to be completed by another contractor. The original contract price was \$22,300. The city had paid the original contractor \$12,375 and paid to have the work completed \$7,350, making a total expense of \$19,725, which, deducted from the contract price, leaves \$2,575. The chief question in the case is whether the city is entitled to retain this difference or whether it can be reached by the subcontractor under his lien, whose rights, of course, are measured by the rights of the principal contractor against the city. It will be observed that the contract under consideration does not expressly provide as to what shall be done with the excess after deducting the cost of completing the contract, in which respect it differs from most of the cases to which attention has been called in the briefs. In *Herrmann & Grace v. Hillman*, 203 N. Y. 435, 96 N. E. 741, and in *Willard Co. v. City of N. Y.*, 81 Misc. Rep. 48, 142 N. Y. Supp. 11, by the terms of the contract the contractor was not entitled to such excess. On the other hand, in *Fraenkel v. Friedmann*, 199 N. Y. 351, 92 N. E. 666, and *Steiger v. London*, 141 App. Div. 382, 126 N. Y. Supp. 256, the contract expressly provided that the contractor should have such excess. The Court of Appeals in *Fraenkel v. Friedmann*, supra, points out the distinction between the owner's terminating and canceling a contract and terminating the contractor's employment under the contract. In this case it seems plain, from the notice served by the city upon the principal contractor, that there was not a cancellation of the contract, but a termination of the contractor's employment. The contractor was notified "to discontinue all work and that the city would proceed to complete the work called for under the contract." In *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017, this same question arose under a contract which, like the present one, made no express provision as to whether the contractor should or should not be entitled to any excess after deducting the cost of completion from the balance of the contract price. In that case, although it appeared that the contractor wholly abandoned the work willfully, the court held that, while the owner was under no obligation to do so, she nevertheless did go on and complete the building according to the contract, and that, as her action was according to the contract, it would be presumed, in support of the judgment, that it was under the contract, and that, although she had threatened to cancel the contract, she had not done so, and the lien of the subcontractor attached to the difference between the sum expended in completion of the contract and the amount unpaid on the contract price. The court reached that result, although they expressly recognized that there was nothing due upon the contract when the lien was filed, and rested their conclusion upon the act of the owner in proceeding to complete the building accord-

ing to the contract, which they held thus continued operative through her action. My conclusion is that in this case the plaintiff is similarly entitled to such difference, amounting here, as above stated, to \$2,575. *Dennison Construction Co. v. Mannes Schmidt*, 204 N. Y. 404, 97 N. E. 859, differs from the present case in that there was no evidence that the owner proceeded or intended to proceed under the article of the building contract which gave him liberty to terminate the employment of the contractors and to finish the work himself; the court pointing out that neither had an architect's certificate been procured nor had the written notice provided in the article been given. In the present case there was such certificate and there was such notice.

[3] On behalf of the defendant it is also urged that the liquidated damages at the rate prescribed in the contract for delay amount to more than the excess above mentioned, but, as no claim for such liquidated damages is set up in the answer, it should not be allowed.

There should be judgment in favor of the plaintiff for the sum of \$2,575. Present, with proof of service, requests for findings within five days after the publication of this memorandum.

(84 Misc. Rep. 372)

CAHILL v. GILMAN.

(Supreme Court, Trial Term, Kings County. February, 1914.)

1. TRIAL (§ 105*)—DIRECTION OF VERDICT.

While, under the direct provisions of Code Civ. Proc. § 1187, the court may, after a special verdict, pass upon a motion for nonsuit or direct such general verdict as either party is entitled to, it would ordinarily direct a general verdict conforming to the special verdict, unless it was clearly against the weight of the evidence, or the motion for nonsuit should be granted notwithstanding such verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. CONTRACTS (§ 138*)—LEGALITY.

If the contract, at the basis of plaintiff's cause of action, is illegal, he cannot recover, though he declared upon a contract which was colorably lawful.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

3. GAMING (§ 17*)—VALIDITY OF CONTRACTS—PUBLIC POLICY.

Laws 1802, c. 44, § 1, declares all racing, etc., of horses for any bet or stakes to be a common nuisance and an offense, and that the bettors and parties thereto shall be punished, and section 5 provides that all contracts for or on account of any sums bet or depending on any such race "or concerning the same" shall be void. The same provisions were substantially embodied in the Revision of 1813, vol. 1, p. 222, in 1 Rev. St. 1829, pt. 1, c. 20, tit. 8, art. 5, § 55, and in article 3, § 8, of the same chapter, and were continued by the Percy-Gray Law (Laws 1895, c. 570), and section 1 of the original act, as modified, is now part of Penal Law (Consol. Laws 1909, c. 40) § 987, and section 5 constitutes sections 991 and 992 of the Penal Law, section 991 of which makes all wagers depending upon any race, etc., "unlawful," and section 992 of which provides that all contracts on account of any money wagered, as provided in the previous section, shall be void. *Held*, in view of the declared policy of the state, that a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contract by plaintiff with decedent for services, which largely consisted in making wagers for decedent on horse races and acting as decedent's betting commissioner, was contrary to public policy.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 29-35; Dec. Dig. § 17.*]

4. **CONTRACTS (§ 108*)—VALIDITY—CONTRARY TO PUBLIC POLICY—"PUBLIC POLICY."**

The individual opinion of the judge is not the test for determining whether a contract is contrary to public policy, since the "public policy" of the state is to be ascertained from the established law, as found in the Constitution, statutes, and judicial records, being the principle of law that no one can lawfully do that which tends to injure the public or to be against the public good.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498-503, 505, 507-511; Dec. Dig. § 108.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5813, 5814; vol. 8, p. 7773.]

5. **PRINCIPAL AND AGENT (§ 81*)—ACTIONS FOR COMPENSATION—ILLEGAL CONTRACT.**

An agent employed to carry out an unlawful transaction cannot recover compensation from his principal either upon an express or implied contract, in view of the common-law maxim, "*frustra legis auxilium quaerit qui in legem committit*."

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 194-214, 219, 223; Dec. Dig. § 81.*]

6. **CONTRACTS (§ 108*)—LEGALITY—PUBLIC POLICY.**

If an act contracted for is in violation of public policy, the contract is unenforceable, whether the act be criminal or not.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498-503, 505, 507-511; Dec. Dig. § 108.*]

7. **CONTRACTS (§ 137*)—LEGALITY—INVALIDITY IN PART.**

If a contract, which contains an element which is legal and one which is against public policy, is entire, the legal consideration cannot be separated from that which is illegal, so as to make the legal part enforceable, irrespective of the equities between the parties to the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 701-712; Dec. Dig. § 137.*]

Action by Thomas F. Cahill against Lester L. Gilman, as executor of Theophilus Gilman, deceased. On motion for dismissal of the complaint and to set aside a verdict for plaintiff. Motion for dismissal granted.

George W. Martin, of Brooklyn, for plaintiff.

Brush & Crawford, of New York City, for defendant.

BENEDICT, J. At the conclusion of the testimony, the defendant renewed the motion made and denied at the end of the plaintiff's case to dismiss the complaint on the ground that the plaintiff had failed to establish any legal contract, and that, if he had established any contract at all between himself and the decedent, whose executor he was suing, it was an illegal and void contract. The court reserved decision of the motion and submitted two questions of fact to the jury in manner following:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
146 N.Y.S.—15

Question 1: Was the plaintiff, between the 30th day of October, 1907, and the 27th day of August, 1912, employed by Theophilus Gilman as secretary and companion at the rate of \$5 per day?

Question 2: If you shall find that the plaintiff was so employed by said Theophilus Gilman, did he render services as such secretary and companion, and, if so, for what period?

The jury answered the first question in the affirmative, and to the second they answered, "One thousand and thirteen days." The effect of these findings, if the court should direct a general verdict in plaintiff's favor, as it is authorized to do by section 1187 of the Code of Civil Procedure, would be to give to the plaintiff a verdict for \$5,065.

[1] The court may, however, under this section, notwithstanding such verdict, "pass upon the motion to nonsuit or direct such general verdict as either party may be entitled to"; but it would ordinarily direct a general verdict in conformity with such special verdict, unless the special verdict were clearly against the weight of the evidence, or unless the motion to nonsuit ought, as a matter of law, to be granted non obstante veredicto. When the special verdict was rendered, the defendant moved to set it aside as contrary to law, contrary to the evidence, and against the weight of the evidence, and as excessive. Decision upon this motion was also reserved, and briefs have since been submitted by both parties.

The plaintiff sued to recover a sum in gross, \$7,500, alleged to be the reasonable value of services rendered by him to the defendant's testator, under a contract of employment resting in parol, between October 30, 1907, and August 27, 1912, as secretary and companion. By a bill of particulars, to which no objection was made, the cause of action was modified so as to allege a verbal contract, by the terms of which the decedent employed the plaintiff as companion and confidential clerk on October 30, 1907, and agreed to pay him \$5 a day for his services, and that the plaintiff rendered services up to the decease of the testator, which occurred on August 27, 1912, and it was upon this theory that the action was tried. I shall assume, as indeed I must for the purposes of the motion for a nonsuit, that there was evidence of employment of the plaintiff by the testator to render some kind of services for him, or at least that there was enough evidence of employment to go to the jury; but the more serious question which the motion presents is whether the employment was not one to perform services which were unlawful because against the public policy of this state.

[2] Unless the contract were in reality not unlawful, the plaintiff cannot recover upon it, even though he declared upon one which colorably was lawful, and the motion for a nonsuit should, in such case, be granted.

[3] Upon the trial, the plaintiff sought to establish the contract of employment by the witness Moran, whose testimony upon this point was as follows:

"When he (Theophilus Gilman) quit bookmaking at the fall meeting of Sheepshead Bay, he said that he was very sorry that he had to lay us off, but that he was going to continue with Tommy Cahill (the plaintiff) at a salary of \$5 a day. We were getting \$10, and he said that he could not afford

to pay him that amount of money, but he would retain him at \$5 a day to do his betting for him and look after his business." Mins. pp. 5, 6.

The witness was then asked this question by counsel for the plaintiff:

"Q. What else did he (Theophilus Gilman) say he was to act as, as betting commissioner and attending to his horses, and what else?"

To which the witness replied:

"To be his personal attendant and to be his confidential agent, looking after the entering of horses and doing his betting for him on the race track." Mins. p. 6.

And upon cross-examination the witness testified that, at the conversation had at the Sheepshead Bay meeting in 1907, Gilman said that he was "to use him (the plaintiff) in betting," and that "Tommy (the plaintiff) was doing his betting for him," and that Gilman said this on many occasions. Mins. pp. 27, 28.

It is apparent from the entire testimony that, during the period in which the services were rendered, the plaintiff was acting as a "betting commissioner," as he himself testified, "at all race tracks around New York that were running," and received commissions to and did make bets there and elsewhere for the testator upon horses in which the testator was interested, taking money from the testator to be used in making such bets and collecting for him moneys resulting therefrom. An examination of the testimony clearly indicates that while the plaintiff may occasionally, if the testimony be true, have rendered some slight personal services to the testator which fall within the classification of services usually rendered by secretaries or confidential clerks (such, e. g., as going to his bank to deposit or draw moneys for him), yet not only a material part, but practically all the services which the plaintiff was employed to perform and which he did perform, were in the way of a betting commissioner (that is, as has been said, acting as agent for the testator in betting or wagering moneys upon the result of horse racing). This kind of service was unquestionably, upon the evidence, what the testator employed the plaintiff to render and what the plaintiff undertook to perform. If we eliminate from the case the evidence as to service connected with wagering moneys upon horse racing, there is nothing left of the original claim for services of a legitimate nature, and it is impossible, from the evidence, to segregate the latter class of services from the former.

The question is therefore squarely presented, by the defendant's motion for a nonsuit, whether such an agreement as the evidence tends to establish in this case can be enforced, or whether it is not an illegal agreement because contrary to public policy, and for that reason void and unenforceable.

[4] The test by which the courts determine whether a given act or contract is or is not against public policy does not rest in the mere individual opinion of the judge who is called upon to decide the question, otherwise different judges might reach different conclusions upon the same state of facts, according to their complexional view of the abstract morality of the question. Public policy is the principle of law

that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. It is ascertained from the established law of the state, whether found in the Constitution, the statutes, or judicial records. A state can have no public policy except what is found in its Constitution and laws. *People v. Hawkins*, 157 N. Y. 1, 12, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736, citing *Hollis v. Drew Theological Seminary*, 95 N. Y. 166; *Cross v. U. S. Trust Co.*, 131 N. Y. 343, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597. See, also, *Girard Will Case*, 2 How. (U. S.) 127, 11 L. Ed. 205. Where the state has spoken through its Legislature, there is no room for speculation as to what the public policy on that particular subject is. Once ascertained contracts which contravene it "are not sometimes valid and sometimes invalid, but they are always invalid, and the courts will never tolerate or enforce them."

[6] It is the rule in this state, and I believe in many other states as well, that one who is employed as an agent to carry out a transaction which is unlawful cannot recover, either upon an express or implied contract, for compensation for his services against his principal, and I take it that this is an illustration of the maxim of the common law, "*Frustra legis auxilium quaerit qui in legem committit.*" (In vain does he who offends against the law seek the help of the law.) *Kent v. Judkins*, 53 Mo. 160, 163, 87 Am. Dec. 544. In *Gray v. Hook*, 4 N. Y. 449, 455, interpreted in the cases cited in 1 N. Y. Anno. Dig. 280, what had been said in 1 Comyn on Cont. 30, was approved, namely:

"All contracts or agreements which have for their object anything which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void; and, whenever a contract or agreement is entered into with a view to contravene these general principles, there is no form of words, however artfully introduced or omitted, which can prevent courts of law and equity from investigating the truth of the transaction, for *ex turpi contractu actio non oritur* is a rule both in law and equity."

In 20 Cyc. 934, it is said:

"A contract in direct promotion of illegal gambling is also illegal and cannot be enforced."

In support of this is cited *Harris v. White*, 81 N. Y. 532, where it was held that one could recover for services in driving a horse in a race for a purse or prize at any place within the state where, by statute, such races are authorized, but that the rule would be otherwise if the case had involved the making of bets, wagers, or stakes upon the result of the race. Chief Judge Folger, in speaking of the distinction between the two things, says (page 539):

"A bet or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them, on the happening in the future of an event at the present uncertain; and the stake is the money or thing thus put upon the chance. There is in them this element that does not enter into a modern purse, prize, or premium, viz.: That each party to the former gets a chance of gain from others, and takes a risk of loss of his own to them. 'Illegal gaming implies gain and loss between the parties by betting, such as would excite a spirit of cupidity.' *People v. Sergeant*, 8 Cow. 139. A purse, prize, or premium is ordinarily some valuable thing, offered by a person for the doing of something by others, into the strife for which

he does not enter. He has not a chance of gaining the thing offered; and, if he abide by his offer, that he must lose it and give it over to some of those contending for it is reasonably certain. Such is the meaning of the words now, in common understanding, in the practical use of them, and in the legislative purview, as will be seen by the citations which we make. Laws of 1868, c. 91, § 3; chapter 523, Laws of 1860, § 3; Laws of 1872, c. 609, § 2."

In *Ruckman v. Pitcher*, 1 N. Y. 392, Judge Jones, after examining the several provisions of the Revised Statutes relative to racing and gambling upon the results of racing, said:

"While, therefore, the special acts which have been referred to may exonerate the parties concerned in the race in question from the provisions and penalties of the act against the racing of animals, I see no reason to doubt that the wager upon the result of the race comes fully within the provisions of the act declaring all wagers unlawful, and all contracts relating to them void."

From an early period in the history of this state until the present time, the making of bets or wagers upon the result of horse racing has been unlawful by statute, although not under all circumstances constituting a crime.

By chapter 44, Laws of 1802, § 1, it was provided that:

"All racing and running, pacing or trotting of horses, mares or geldings, for any bet or stakes, in money, goods or chattels, or other valuable thing, shall be and hereby are declared to be common and public nuisances, and offenses against this state; and the authors, bettors, stakers, stake holders, parties, contrivers and abettors thereof, shall be proceeded against, and punished by fine and imprisonment at the discretion of any court having cognizance thereof; and all public officers concerned in the administration of justice, are hereby strictly enjoined to cause this act to be faithfully executed."

It was further provided in section 5 that all contracts "for or on account of any sum or sums of money, or other thing, bet or staked, or depending on any such race or races as aforesaid, or concerning the same, * * * shall be deemed and adjudged void in law." This act is also found in the Revision of 1813, vol. 1, p. 222.

Section 1, above recited, was, with some slight changes, embodied in the Revised Statutes of 1829 (passed December 3d) as section 55, art. 5, tit. 8, ch. 20, pt. 1. Section 5, above recited, was embodied in section 8 of article 3 of the same chapter, and has never been repealed, not even by the provisions of the Percy-Gray Law (chapter 570, Laws of 1895). See *Mendoza v. Levy*, 98 App. Div. 326, 90 N. Y. Supp. 748, per Mr. Justice Hirschberg. Section 1, as modified, is now part of section 987 of the Penal Law, and section 5 now constitutes sections 991 and 992 of the same law, which now read as follows, unchanged since 1827, except by making two sections out of one, viz.:

"Sec. 991. Illegal Wagers, Bets and Stakes. All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful."

"Sec. 992. Contracts on account of money or property wagered, bet or staked are void. All contracts for or on account of any money or property, or thing in action wagered, bet or staked, as provided in the preceding section, shall be void."

It thus appears that for more than a century it has been unlawful to engage in this state in the making or laying of bets or wagers upon

the results of horse racing; and while it is true that not every form of such gambling constitutes a crime unless it be "accompanied by record, registry or the use of some part of the paraphernalia of professional gamblers, except in the case of pool selling where probably no writing or record is necessary to constitute the crime" (People v. Langan, 196 N. Y. 260, 267, 89 N. E. 921, 923, 25 L. R. A. [N. S.] 479, 17 Ann. Cas. 1081, per Cullen, C. J.), yet it is equally true that it is the settled public policy of the state, as shown by its statutory enactments, that contracts to engage in or to promote this form of gambling are void in law and will not be sustained by the courts. The contention of the plaintiff that the act was not criminal, and that therefore the plaintiff can recover, overlooks this distinction and finds no support in the authorities cited on his brief.

[6] If it be violative of public policy, it vitiates the contract and renders it unenforceable.

One further point made by the counsel for the plaintiff should be noticed. Where a contract or transaction is held to be illegal and void, and consequently not enforceable, such contract cannot be sifted and the legal services rendered under it, or in its pursuit, separated from the illegal services and a recovery had for so much of the service as shall be adjudged to be legal.

[7] Where an entire agreement contains an element which is legal and one which is void, as being against public policy, the legal consideration cannot be separated from that which is illegal and void, so as to found an action on the legal consideration. Courts of justice are not required, in any way, to aid in the enforcement of an illegal contract, or to lend their assistance, in any respect, to an illegal transaction. Their action is controlled by a principle having no respect to the equities between the parties, or their bad faith towards each other, but rests upon the solid and broad foundation of a wise and prudential governmental policy. *Rose v. Truax*, 21 Barb. 361.

I therefore hold that the contract sued upon is void and illegal in its entirety as against the public policy of this state, as found in its statutes. The special verdict in favor of the plaintiff is set aside as contrary to law and contrary to the evidence and the weight of the evidence, and the defendant's motion for a dismissal of the complaint is granted, with costs. Thirty days' stay of execution after service of notice of entry of judgment and 30 days to make case on appeal granted to the plaintiff.

(161 App. Div. 77)

LARKIN v. REID ICE CREAM CO.

(Supreme Court, Appellate Division, Second Department. March 6, 1914.)

1. NEGLIGENCE (§ 121*)—EVIDENCE—RES IPSA LOQUITUR DOCTRINE.

Defendant was charged with liability for damage from its horse running away because of the bit falling out of its mouth so that the driver could not restrain it. The bridle, which was intended to permit feeding in harness, did not have the bit-rings held up on both sides to the jaw-straps by buckles, but on one side the strap was attached to the ring by a snap-hook so that the bit could be disconnected when feeding, and the snap-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

hook gave way and released the bit, but it was not shown whether it became disconnected because of the worn condition of the snap-hook or because the driving rein was attached to the ring in front of the snap-hook and worked it loose in crossing over it. *Held*, that the release of the bit was an occurrence which ordinarily would not happen without negligence, so that proof of the occurrence *prima facie* showed negligence, even if plaintiff could not show which of the causes released the bit.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.*]

2. NEGLIGENCE (§ 119*)—ALLEGATIONS OF COMPLAINT—ISSUES.

Where the complaint and bill of particulars in an action for damage from a horse running away alleged "defective harness" as the cause of the accident, the court properly refused to narrow the issue to the question of a defect in the snap-hook attaching the jaw-straps to the bit-rings.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

Appeal from Trial Term, Kings County.

Action by Mary Larkin, as administratrix of Thomas J. Larkin, against the Reid Ice Cream Company. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, RICH, STAPLETON, and PUTNAM, JJ.

James J. Mahoney, of New York City (George J. Stacy, of New York City, on the brief), for appellant.

Ellis L. Aldrich, of New York City, for respondent.

PER CURIAM. [1] Defendant was not held because its horse bolted and ran. Its liability comes from the bit falling out of the horse's mouth, rendering the driver powerless. The bridle, designed to allow feeding in harness, did not have the bit-rings held up on both sides to the jaw-straps by buckles. On one side the strap was attached to the ring by a clasp or snap-hook, so that the bit could be disconnected when the horse was fed from a nose-bag. It was this snap-hook which gave way, and released the bit, as the driver tried to check the horse's flight. Defendant maintained that the snap-hook was perfect, and the rein properly attached. Hence defendant could give no explanation for this occurrence or account for the snap-hook being separated from the bit. Obviously, it might happen from a weakened or worn snap-hook; and defendant's driver also admitted that, if the driving rein was attached to the ring forward of the snap-hook, such a crossing over the snap-hook might work it loose. Even if plaintiff could not specify which of these causes let out the bit, yet, as the occurrence was one that in common experience could not happen without negligence, it presented a *prima facie* case for the jury. *Robinson v. Consolidated Gas Co.*, 194 N. Y. 37, 40, 86 N. E. 805, 28 L. R. A. (N. S.) 586.

The jury therefore could find for plaintiff, upon the defendant's failure to account for this slipping out of the bit without negligence on the part of defendant (*Sweeney v. Edison Electric Illuminating Co.*, 158 App. Div. 449, 143 N. Y. Supp. 636), taken in connection with plain-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tiff's evidence of defects in the snap-hook given by three witnesses whose attention had been directed to it when the horse was finally stopped and held.

[2] The complaint, and bill of particulars, both alleged "defective harness." The court therefore rightly refused to narrow the issue to the question merely of a defect in the clasp or hook. But the court did charge that the "duty of showing the cause of the snap or bit becoming separated one from another is upon the plaintiff"—certainly as favorable as appellant could ask.

The judgment and order are therefore affirmed, with costs.

(161 App. Div. 59)

BENARD et al. v. PROTECTED HOME CIRCLE.

(Supreme Court, Appellate Division, Fourth Department. March 4, 1914.)

1. INSURANCE (§ 788*)—LIFE INSURANCE—"SUICIDE."

"Suicide," as used in a suicide clause in a benefit certificate, implies a mental appreciation of the act of self-killing, which an insane person could not have.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. § 788.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6764-6769; vol. 8, p. 7809.]

2. INSURANCE (§ 817*)—MUTUAL BENEFIT INSURANCE—BURDEN OF PROOF—SUICIDE.

The defense of self-destruction is an affirmative defense the burden of proving which rests on the association in an action on a mutual benefit certificate, and hence it must show that the poison taken by insured was not taken by mistake.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1999-2002; Dec. Dig. § 817.*]

3. INSURANCE (§ 788*)—MUTUAL BENEFIT INSURANCE—SUICIDE CLAUSE.

A clause of a mutual benefit certificate exempting from liability for death from suicide would not be applicable if insured took poison through mistake.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. § 788.*]

4. EVIDENCE (§ 63*)—PRESUMPTIONS—SANITY.

Sanity is presumed; that being the normal human condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 83; Dec. Dig. § 63.*]

5. EVIDENCE (§ 60*)—PRESUMPTIONS—SUICIDE.

Since suicide is unlawful and immoral, it is presumed that insured's death was not caused by suicide.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 81; Dec. Dig. § 60.*]

6. INSURANCE (§ 825*)—MUTUAL BENEFIT INSURANCE—ACTIONS—JURY QUESTION—CAUSE OF DEATH.

Evidence in an action on a mutual benefit certificate held to make it a jury question whether insured took poison by mistake or for suicidal purpose.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Cattaraugus County.

Action by Martha Benard and another against the Protected Home Circle. From a judgment for defendant, plaintiffs appeal. Reversed, and new trial ordered.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Henry Donnelly, of Olean, for appellants.

George A. Larkin, of Olean, for respondent.

LAMBERT, J. This is an action to recover upon a contract of life insurance issued by the respondent, upon the life of George Benard. The issuing of the certificate, the payment of all premiums due, and the death of the insured are all conceded. The defense is based upon the conceded fact that Benard died from carbolic acid administered by his own hand. In this connection, there is invoked a suicide clause in both the certificate of insurance and in the by-laws of the respondent. Both these clauses are set forth, in full, in the answer.

Plaintiffs do not attempt to combat the proof that the insured met his death from self-administered carbolic acid, and that conclusion is required from the evidence. But to escape the consequences of the provisions in avoidance of the policy plaintiffs advance two arguments.

[1] It is first urged that the defense in avoidance is affirmative in character and that its burden rests upon the respondent; that respondent, in its answer, has urged the sole defense of suicide; that the act of suicide, under our decisions, implies and requires that the suicide be a sane person, capable of appreciating the character and consequences of his acts; and that the evidence in this case presents a question of fact as to whether or not the insured was possessed of that degree of mentality. It is true that our Court of Appeals has held that an insane man cannot commit suicide. That suicide implies a mental appreciation of the act, such as an insane man could not have. *Meachem v. Association*, 120 N. Y. 242, 24 N. E. 283; *Shipman v. Home Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347. But this entire argument rests upon the narrow construction of the answer, as raising solely the defense of suicide, in its strict sense. I cannot accede to that construction of this pleading. The answer pleads the self-destruction clauses of both the by-laws and the certificate. Such clauses, as will be seen from an examination of them, are sufficiently broad to void this policy regardless of the mental condition of the insured, and it therefore seems to me that, in asserting "suicide" as a defense, the defendant should be deemed to have used that term in its colloquial sense as embracing all acts of self-destruction, regardless of the mental condition of the subject.

[2, 3] The second argument of the appellant is somewhat different and has more merit. It must be conceded that the defense of self-destruction is affirmative, and that the burden of sustaining it rests upon the defendant. In establishing that defense it was incumbent upon the defendant to negative the possibility of this acid having been taken by mistake; for, if taken through error, then clearly the clause of the policy, in avoidance, is not applicable. It is urged by appellant that

defendant has not met that burden, so conclusively as to resolve that question into one of law, rather than one of fact. The effect of the holding of the trial court, in directing a verdict for the plaintiff for the amount, only, of premiums paid, is that the evidence adduced, upon this affirmative defense, by both sides, permits but the single inference that the acid was taken intentionally. If such court was right in this conclusion, then such question was properly handled as one of law. But, if contrary inferences are permissible from such evidence, then such evidence should have been submitted to the jury.

Briefly stated, the evidence pertinent is as follows: The insured was a young man about 38 years of age. He was a barber by occupation, owning his own shop. For some years his health had been poor, requiring him at various times to seek employment taking him into the outdoor air. He suffered great pain at intervals. His eyesight was poor; the sight of one eye being almost entirely gone. He was under a physician's care and customarily carried upon his person bottles of remedies, at least one of which was a four-ounce bottle. On the day of his death and about two hours previously thereto, he purchased of a druggist a four-ounce bottle of carbolic acid. He had made similar purchases before. That particular kind of acid was in use by him for sterilizing his barber tools. Just before his death he went into a saloon and with a pencil wrote something upon a piece of paper. He then called for a glass of beer and took it to a table in the place. Soon afterwards he called for another, saying that he had broken the first. Although no broken glass was to be seen, the bartender gave him another, which he took into the water-closet. He was next seen coming out of the closet, when he stated that he had killed himself. Of several persons, he requested a physician. One was summoned, but insured soon died. His lips, mouth, throat, and stomach were found to be burned with carbolic acid. The bottle of acid was found upon him, about one-third emptied. Upon his person, a letter was found addressed to his wife (presumably the one he had just been writing). That letter is not produced, but two witnesses give its contents in general terms. They say it asked his wife to forgive him and that she take care of the children. One witness says it contained the statement that he could stand it no longer and that it expressed love for his wife. It further appears that previously the insured had had issued to him a revolver permit; that his wife, one of the plaintiffs, observed him standing in front of a looking glass with the revolver in his hand; and that she thereupon requested the cancellation of the permit and secured possession of the revolver.

By reason of his frequent use of carbolic acid, in his business, this particular purchase proves little in aid of defendant. It is as compatible with mistake as with the intentional taking thereof. The circumstances of the taking of the acid (except the writing of the letter) are also easily to be reconciled with mistake, and perhaps his requests for a physician even tend to support the theory of mistake more strongly than that of intention. The letter affords the greatest argument in favor of the defendant. But the contents of that letter are hazily given, and, from the portions recollected, it may be that a contrary

inference is drawn than would be present if the missive itself was before the jury, complete. Defendant finds further assistance in the previous occurrences with the revolver, urging a tendency to take his own life to be shown therefrom. It does not appear, however, that he ever made any actual attempt so to do, and the evidence is not of strong probative value, in and of itself.

On the other hand, the ill health and suffering of the insured, his poor eyesight, and his custom of carrying his physician's remedies in bottles of the size and character of the one containing this acid, are all circumstances that tend to weaken the theory of intention and to support that of mistake. There is no evidence of any preannouncement of intention to destroy himself, nor is there any circumstance shown which differentiates his life on that day from what it had been repeatedly and continuously theretofore.

[4, 5] Added to these circumstances is the legal presumption, first, of sanity; and, next, against suicide. Sanity being the normal condition of mankind, its existence is presumed until the contrary is shown. Suicide being unlawful and immoral, the presumption obtains in favor of mistake rather than suicide and is conclusive until the contrary is shown.

[6] I am of the opinion that the defendant did not make out its defense of intentional self-destruction with such clarity as permitted the court to dispose of the matter as a question of law. It seems to me that a jury might find from all the circumstances that this acid was taken by mistake and in the belief that it was medicine proper to take. If I am right in this, then a jury question was presented and a reversal is required.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

(84 Misc. Rep. 421)

HART v. WALSH et al.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. CONTRACTS (§ 99*)—ACTIONS—SUFFICIENCY OF EVIDENCE—FRAUD.

In an action for breach of a contract by which defendants were to pay plaintiff a royalty in consideration of plaintiff's not suing to enjoin defendants from producing a play, evidence held not to sustain a finding that defendants were induced to make the contract by plaintiff's fraudulent claim that he owned the copyright to certain plays.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 448-453, 1197-1199, 1799, 1800; Dec. Dig. § 99.*]

2. CONTRACTS (§ 95*)—DURESS—THREATENED SUIT.

If plaintiff, believing that his property rights in certain plays were being infringed by a play produced by defendants, threatened to enjoin defendants' production of their play unless they paid him a royalty, defendants' contract to pay plaintiff a royalty if he did not sue them was not invalid for duress.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 431-440; Dec. Dig. § 95.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. CONTRACTS (§ 94*)—FRAUD.

If a contract by defendants to pay plaintiff a royalty on a play produced by defendants, if plaintiff would not sue defendants for infringing plaintiff's rights in certain other plays, was valid when made, the fact that plaintiff afterwards made a statement to defendants calculated to convey the false impression that he had a copyright on the plays in which he was interested would not affect the validity of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.*]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Thomas Riego Hart against Blanche Walsh and another. From a judgment for defendants, plaintiff appeals. Reversed, and judgment rendered for plaintiff.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Appell & Taylor, of New York City (George H. Taylor, Jr., of New York City, of counsel), for appellant.

Henry L. Slobodin, of New York City, for respondents.

SEABURY, J. The complaint alleges that the plaintiff is the owner of the rights to the English translations of the plays known as "Fedora" and "La Tosca," the "situations" from which plays are alleged to be incorporated in a play called "The Countess Nadine," which has been produced by the defendants; that the plaintiff and the defendants entered into an agreement wherein and whereby it was provided that, if the plaintiff would refrain from bringing actions for damages or for an injunction against the defendants by reason of the acts of the said defendants in presenting such "situations" in "The Countess Nadine," the defendants would pay to the plaintiff a royalty of \$20 per week; and that under such agreement royalties for eight weeks have accrued and have not been paid by the defendants; wherefore plaintiff demands judgment in the sum of \$160. The learned court below found that there was no contract between the plaintiff and the defendants, and that if there was such a contract it was induced by fraud and duress on the part of the plaintiff, and rendered judgment in favor of the defendants.

That part of the opinion of the learned court below which deals with the question whether the "situations" portrayed in "The Countess Nadine" violate the right of literary property which the plaintiff claimed to own by reason of his proprietorship of the plays known as "Fedora" and "La Tosca" does not in our judgment relate to any issue of law or fact raised by the pleadings in this action.

The record presents but two questions for determination: First, was a contract entered into between the plaintiff and the defendants; and, second, if so, was such contract induced by fraud or duress on the part of the plaintiff? If the evidence requires that the first question should be answered in the affirmative and the second question in the negative, it follows that the plaintiff is entitled to judgment.

It does not seem to us that the question whether the play produced

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the defendants, "The Countess Nadine," involved "situations" similar to those presented in "Fedora" and in "La Tosca" is in any way involved upon this appeal. It appears from the record, without dispute, that Fannie Davenport McDowell made certain English translations of the last-mentioned plays, and that she exercised rights of ownership in said plays, which rights were generally recognized throughout the dramatic and theatrical world in the United States and Canada; that she died in September, 1898; and that her executors sold to the plaintiff the manuscripts of said translations and the exclusive right to produce said plays.

Whether the plaintiff's claim to the exclusive ownership of said plays is meritorious, we cannot determine in this action. That he claimed to be the exclusive owner of such plays by virtue of the sale made to him by the executors of the estate of Fannie Davenport McDowell conclusively appears, as also does the fact that he claimed that his right of literary property in said plays was violated by the play produced by the defendants known as "The Countess Nadine."

The uncontradicted evidence shows that the defendants, in consideration of the plaintiff's promise to refrain from suing upon his claim, agreed to pay him \$20 per week as a royalty during the time that "The Countess Nadine" was produced. The defendant Walsh signed a written contract to this effect on September 17, 1913, and on September 18, 1913, the defendant Golden wrote the plaintiff a letter in which he said:

"At our interview Monday evening Miss Walsh and I agreed to pay you the sum of twenty (\$20) dollars per week."

This letter and the written agreement signed by Miss Walsh leave no room for doubt that the defendants made the agreement upon which the plaintiff declares.

The respondents claim, and the learned court below found, that the contract, if made, was induced by false representations. The representation which the plaintiff is alleged falsely to have made is that he had a copyright of the plays "Fedora" and "La Tosca." The difficulty with sustaining the claim of the respondents is that there is no evidence that the plaintiff made such a claim before the contract was entered into. The defendants could not testify whether the plaintiff said that he owned the rights to these plays, or whether he said he owned the copyright to them; and the defendants testified that they were not induced, by such representation, to enter into the contract. It is true that several days after the contract was made the plaintiff did send a threatening letter to the defendant Walsh, which inclosed a copy of the section of the United States Revised Statutes which declared that the publication, without the consent of the owner, of a literary production which had been copyrighted, rendered the person publishing the same guilty of a misdemeanor and liable to a year's imprisonment. Whatever may be said as to the impropriety of sending such a letter, the statement contained in that letter cannot by any process of reasoning be held to have induced the making of a contract which was entered into several days before the letter was written or received by the defendants.

If we examine the evidence upon which the defendants predicate the claim that the plaintiff stated, before the contract was made, that he had a copyright for the Sardou plays, we shall see that the claim is without foundation. Miss Walsh was asked, "What did Mr. Hart tell you?" and she answered:

"He told me that he was the owner of the Sardou pieces or rights to them, or the copyright—whichever is the phrase used. * * * I do not know whether he said right or copy, but he is the owner of the Sardou pieces; probably that is the way he put it. * * * He told me he owned the rights to Sardou plays 'Fedora' and 'La Tosca.' That I never questioned.

"Q. Didn't you know that Miss Davenport had been playing the Sardou plays? A. Certainly.

"Q. Didn't you know that she had exclusive rights in playing such plays in America? A. Yes, sir. * * * I know Mr. Hart has a right to the Sardou plays. * * * I believed, and I believe that Mr. Hart has; whether it is a right or a copyright, I don't know what it is. However, he has got something to do with the Sardou plays.

"Q. Has that influenced you in agreeing to pay him \$20 a week? A. It has not. The only thing that influenced me was that he told me he would go to the managers and stop my booking."

The defendant Golden testified on this subject as follows:

"I am sure that he (Hart) claimed to have a copyright or translations of those plays."

[1] This evidence is insufficient to sustain the claim that the defendants were induced to enter into the contract by reason of Hart's fraudulent claim that he had a copyright to the Sardou plays.

[2] There remains to be considered only the claim of the respondents that the contract was entered into as a result of duress. The most that can be claimed from the proof is that the plaintiff made a claim that the defendants disputed, and that, rather than have the claim tested in the courts while "The Countess Nadine" was being produced, they agreed to pay the plaintiff a royalty of \$20 per week. The fact that the defendants made the agreement to avoid injunction proceedings does not establish duress. *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76. A mere threat to sue or to apply to the courts for an injunction is not duress.

"It is not sufficient in such cases to satisfy the trial court that the threats were uttered; but it must also be shown that they constrained the will of the promisor and induced the promise." *Dunham v. Griswold*, *supra*.

It is impossible to hold upon the proof before us that the claim of the plaintiff and his threat to sue thereon was such a threat, coercion, compulsion, or undue influence as to take away the volition of the defendants and therefore constitute duress.

The plaintiff, believing that the rights which he had purchased were being infringed, had the right to threaten to bring suit in the courts to establish that claim. When the plaintiff made this claim, the defendants had the right either to resist his claim and any legal proceedings which he might base upon that claim, or they had the right to buy their peace. They adopted the latter alternative, made the agreement upon which the plaintiff sues, and failed to pay the amount which they agreed to pay.

[3] Upon these facts the plaintiff could not be turned out of court because after the contract was entered into he made a statement calculated to convey the false impression that he had a copyright for the plays which he claimed to own.

It follows that the judgment must be reversed, and, as the facts are undisputed, judgment is awarded the plaintiff for the amount claimed, with costs in the court below and upon appeal. All concur.

(84 Misc. Rep. 415)

GRANNIS v. TEMPLE.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. USURY (§ 119*)—ACTION TO RECOVER—JURY QUESTION.

In a suit to recover money claimed by plaintiff to have been collected as an unlawful brokerage fee, and by defendant to have been collected as compensation for guaranteeing a loan, the question as to what the money was paid for *held* for the jury.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 343-357; Dec. Dig. § 119.*]

2. USURY (§ 28*)—WHAT CONSTITUTES.

Under General Business Law (Consol. Laws 1909, c. 20) §§ 380 and 381, respectively, providing that no person shall receive more than 50 cents per \$100 as a brokerage for procuring a loan or more than 38 cents for making or renewing any bill, note, or other security, and that any excess may be recovered by suit, one who merely guarantees a note so as to induce a third person to make a loan can charge any amount he sees fit so long as the transaction is not a cover for usury or the collection of unlawful brokerage fees.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 72; Dec. Dig. § 28.*]

Appeal from City Court of New York, Trial Term.

Action by Edward J. Grannis against Charles R. Temple. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Hurd & Grim, of Brooklyn (William B. Hurd, of Brooklyn, of counsel), for appellant.

Jeremiah J. Coughlan, of Brooklyn, for respondent.

SEABURY, J. The complaint alleges that on May 1, 1913, the defendant procured a loan of \$6,000 for the plaintiff from the Stapleton National Bank, and that he took and received thereafter the sum of \$2,000, \$1,500 of which was paid May 1, 1913, and \$500 thereof on June 11, 1913; that the plaintiff demanded the return of \$1,970; and that the defendant has failed and refused to pay the same, and demands judgment for this amount, together with interest from the date that the money was paid. The answer alleged as a defense that on or about the 1st day of May, 1913, the plaintiff applied to him to guarantee the payment of a note for \$6,000 to be made by the plaintiff to the Stapleton National Bank, payable on demand, and agreed to pay the \$2,000 if he would guarantee the payment of said note; that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant accepted said promise, and on May 1, 1913, the note for \$6,000 was made and delivered by the plaintiff to the said bank, together with an assignment of all moneys due or to become due on a contract between the plaintiff and the city of New York for the construction of a certain sewer between Bennett avenue and 181st street on Broadway, and the defendant by an instrument in writing guaranteed the payment of said note and delivered the same to the bank; and that said bank paid the plaintiff \$6,000, and the plaintiff paid the defendant the sum of \$2,000 therefor, as agreed between them.

Upon the trial the defendant testified in support of the allegations contained in this defense. The defendant also called the cashier and vice president of the bank, both of whom testified that, at the counting room of the bank at Stapleton on the day that the note was signed, they told the plaintiff that the bank would not loan him \$6,000 on his note secured by an assignment of the sewer contract, unless the defendant guaranteed the payment of the note, and that the note for \$6,000 was executed by the plaintiff, and in the presence of the plaintiff the defendant drew up and signed a guaranty in writing and delivered it to the bank. The plaintiff contradicted the testimony of the defendant and denied that there was any agreement between the defendant and himself that the defendant should receive compensation for guaranteeing the note, and claimed that the \$2,000 paid to the defendant was paid as brokerage only.

[1, 2] The plaintiff bases his right to recover, and the court below directed a verdict in favor of the plaintiff, under sections 380 and 381 of the General Business Law. Section 380 provides as follows:

"Sec. 380. Brokerage on loans. No person shall, directly or indirectly, take or receive more than fifty cents for a brokerage, soliciting, driving or procuring the loan or forbearance of one hundred dollars, and in that proportion for a greater or less sum, except loans on real estate security; nor more than thirty-eight cents for making or renewing any bond, bill, note or other security given for such loan or forbearance, or for any counter bond, bill, note or other security concerning the same."

Section 381 provides as follows:

"Sec. 381. Recovery of excess. Every person who shall pay, deliver or deposit any money, property or thing in action, over and above the rate aforesaid, and his personal representatives may, within one year after such payment, delivery or deposit, sue for and recover the same of the person so taking or receiving such money, property or thing in action, or of his personal representatives. In case such suit shall not be brought within the time above prescribed, in good faith, or in case it shall be discontinued, or willfully delayed, then the overseers of the poor of the city or town where the offense was committed, may, within one year after such neglect, discontinuance or delay, sue for and recover the money, property or thing in action, so received, delivered or deposited, from the person receiving the same, or his personal representatives, for the use of the poor of the county."

In our judgment a question of fact was presented which should have been submitted to the jury for determination. If the jury found as a fact that the claim of the defendant that the \$2,000 paid by the plaintiff was paid to the defendant to become a guarantor upon the note was not true, but that it was a mere cover for brokerage or usury, the verdict of the jury should have been for the plaintiff. If, how-

ever, the jury found the facts to be as testified to by the defendant and the witnesses whom he called, and was satisfied that the \$2,000 was paid by the plaintiff to the defendant to induce the defendant to become a guarantor of the note, the verdict of the jury should have been for the defendant.

The statute provides that no person shall take more than the prescribed amount "for a brokerage, soliciting, driving or procuring the loan," or more than the prescribed rate "for making or renewing any bond, bill, note or other security given for such loan, or for any counter bond, bill, note or other security concerning the same."

The respondent contends that the defendant, upon his own version of the facts, took more than the rate prescribed by law for "security given for such loan," and that therefore the facts proved raised no issue for the jury to determine. The words "security given for such loan," and other like phrases employed in the statute, refer to security given by the borrower to the lender, and not to money given to a third person in payment for guaranteeing the debt of the debtor. Such an agreement is, under the law, merely a sale or loan by one of his credit to another, and as such as not within the statute against usury. Here, under the defendant's version of the transaction, the defendant was not connected with the loan in any legal sense, except that he guaranteed its repayment. He did not himself lend the money to the plaintiff, nor was he in any way interested with the bank in the making of the loan. All that he did, according to his testimony and that of his witnesses, was to guarantee that the plaintiff would repay the loan to the bank. This agreement of guaranty he was not obliged to enter into, and if he did enter into it he could lawfully receive whatever he could get for the sale of his credit. Of course, if such was not in fact the true character of the contract, and if the contract was not entered into in good faith but was intended as a cloak to hide a contract of brokerage or a usurious transaction, it will avail the defendant nothing. It was for the jury to determine whether the contract which the defendant made was one of guarantee or whether it was "usury in disguise." Where, however, the contract involves merely a bona fide sale of credit, the seller may sell his credit as he can his property for what he can get for it.

In *More v. Howland*, 4 Denio, 268, the court through Bronson, J., said:

"As the law now stands, a man has as good a right to sell his credit, as he has to sell his goods or his lands; and, if he deal fairly, he may take as large a price as he can get for either of them."

In *Ketchum v. Barber*, 4 Hill, 224, affirmed 7 Hill, 444, Nelson, C. J., after reviewing the English and American authorities, says:

"An extravagant charge for a guaranty, purely as such, is no more usury within the sense and meaning of the law than if exacted or given for any article of commerce."

In *Dry Dock Bank v. American Life Insurance & Trust Co.*, 3 N. Y. 344, Judge Gardiner said:

"The credit of one person may be rendered available to another by gift, or sale, or in any other way."

The authorities upon the subject are fully reviewed in the cases cited and in the case of *Leavitt v. De Launy*, 4 N. Y. 363, and *Elwell v. Chamberlin*, 31 N. Y. 611.

In *Perrine v. Hotchkiss*, 58 Barb. 77, the court said:

"The law allows a party who becomes surety for another, by way of indorsement, or otherwise, to agree upon a certain price, for the use of his credit. It has been repeatedly held that a person may loan or sell his credit to another, at a price agreed upon, the same as any other commodity; and that such contract is not usurious, when it is for that purpose only. This is quite different from brokerage."

These cases make clear the rule of law applicable to the defense alleged, which required that the issue of fact in the case, whether the money was taken in payment of credit or as a brokerage and a cover for usury, should be submitted to the jury. In *Ketchum v. Barber*, supra, the court, after reviewing the authorities, said:

"In all these cases, however, if the transaction be a mere device to cover and conceal a loan at unlawful interest, it then comes within the statute. But whether there was such a device—a corrupt intention to evade the law—is a question of fact for the jury to determine upon a consideration of all the surrounding circumstances."

It follows that the judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

(84 Misc. Rep. 452)

MALONEY v. BRADLEY CONTRACTING CO.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. MUNICIPAL CORPORATIONS (§ 809*)—INJURIES TO PERSONS ON STREETS—LIABILITY.

A contractor engaged in building a subway, who tears up the sidewalk and replaces it with boards, while chargeable with knowledge of actual defects in construction, is chargeable only as would be the municipality with implied notice of defects arising thereafter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1688-1694; Dec. Dig. § 809.*]

2. MUNICIPAL CORPORATIONS (§ 803*)—INJURIES TO PERSONS ON STREETS.

Where unusual or dangerous conditions prevail in a highway where repair work is going on, a pedestrian must exercise such unusual care as the unusual conditions call for.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1673, 1682; Dec. Dig. § 803.*]

3. MUNICIPAL CORPORATIONS (§ 819*)—INJURY TO PERSON ON STREET—EVIDENCE.

In an action against a contractor, engaged in building a subway, for injuries sustained while plaintiff was traveling over a temporary sidewalk laid by the contractor, evidence held insufficient to show that the injuries were inflicted as claimed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1739-1743; Dec. Dig. § 819.*]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Action by Nora Maloney against the Bradley Contracting Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Frederick L. C. Keating, of New York City, for appellant.
Caldwell & Banister, of New York City, for respondent.

GUY, J. Defendant appeals from a judgment in favor of plaintiff for \$200, after trial before the court, without a jury.

The action is brought to recover damages for personal injuries which plaintiff alleges were caused by the slipping of a plank over which she was walking, which plank, with four others, she claims to have been laid as a temporary sidewalk in Lexington avenue near 106th street, by defendant, who was engaged at the time in excavation work connected with the construction of part of the subway. Plaintiff testified that as she was walking along said temporary sidewalk, during a rainy day in April, one of the planks slipped, and her foot and leg went down between the planks some 12 inches into a hole which had been excavated beneath said planking, thereby scraping and otherwise injuring her ankle and, in some unexplained manner, injuring her back; that she immediately got upon her feet, walked into the grocery store on the southeast corner of Lexington avenue and 106th street, bought provisions, came out, went back to the place of the accident, and inspected it, then proceeded to 104th street to a shanty occupied by defendant's workmen and there made complaint, then rode north to the quarters of another contractor in 116th street, then walked home to 104th street, and the following day visited a doctor in 127th street. It is clear, from the evidence as to the use she made of her ankle immediately following the accident, that the injury to the ankle must have been very slight. The physician who attended her was not produced as a witness; but about two weeks after the accident she was examined by defendant's physician, who testifies that at that time there was no evidence of any injury whatever to the ankle, and that plaintiff was then suffering from varicose veins and an ulcer above the ankle, neither of which conditions could by any possibility have been due to the accident.

Defendant called four witnesses who testified to statements made by plaintiff immediately after the accident that the accident did not occur by her foot slipping between the planks, but that she tripped on one of the planks. Three of these witnesses testified positively that, at the place pointed out by the plaintiff as the scene of the accident, there was no hole beneath the planks, but that the dirt excavated at that point had been replaced several weeks before the accident, and the planking rested upon and was imbedded in the dirt.

Plaintiff called no witness to corroborate her as to the manner in which the accident happened or as to the place where it happened. Her only witness was one Doyle, manager of the Butler store on that corner, who testified that, after the accident, plaintiff pointed out to him a place where she said it occurred, and that at that place there were five boards lying lengthwise of the sidewalk, "and I think it was the

third board from the outside of the sidewalk that there was a space about the size of a small bar." He did not state whether that space was under the planking or between the third plank and the adjoining plank; but he corroborated defendant's witnesses to the effect that the dirt had all been filled in at that place prior to the accident. The evidence is convincing that there was no hole under the planking at the place of accident, but that, on the contrary, the plank rested upon and was imbedded in the earth, and had been in daily use in such condition for a long period. There is no evidence whatever that the temporary planking was defective in construction or unsafe at the time it was placed there, or that, if any defect existed from which the accident resulted, it had existed for such length of time as to charge defendant with implied notice thereof.

[1] While defendant, if in control, would be chargeable with actual knowledge of a defect in construction, the same principle as to implied notice of a defect arising from use would apply in the case of a contractor as in the case of a municipality. *Keating v. Metropolitan St. Ry. Co.*, 105 App. Div. 362, 94 N. Y. Supp. 117; *Dolan v. New York Sanitary Utilization Co.*, 104 App. Div. 14, 93 N. Y. Supp. 217. There is also uncontradicted evidence that the planking connected with defendant's work was inspected every day by defendant's employés. The evidence is also contradictory as to the exact place where the accident happened, and whether it was under defendant's control. Three of defendant's witnesses, who had full knowledge of the work which was being done in that street by the defendant, testified that defendant's work ended opposite a star on the Butler house 15 feet south of the house line, and that the place pointed out to them by plaintiff as the place of the accident was farther north at a place under the control of another independent contractor.

[2] The proof is also very slight as to plaintiff's freedom from contributory negligence. The rule is well settled that, where unusual or dangerous conditions prevail in a highway where repair work is going on, a pedestrian must exercise such unusual care as the unusual conditions call for. *Walsh v. Central N. Y. Tel. & Tel. Co.*, 176 N. Y. 163, 68 N. E. 146; *Scanlon v. City of Watertown*, 14 App. Div. 1, 43 N. Y. Supp. 618; *Turner v. City of Newburgh*, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453. The temporary character of the sidewalk and its defects, if any existed, were plainly visible, and reasonable care on the part of the plaintiff would be such care as would be used by an ordinarily prudent person having in view such conditions.

In *Henry v. City of New York*, 119 App. Div. 435, 104 N. Y. Supp. 442, Justice Scott, writing for an unanimous court says:

"The evidence of the plaintiff's freedom from contributory negligence was * * * far from satisfactory. She knew that the subway excavation was going on and that the street had been in more or less disorder for some time before the accident. Notwithstanding this, she seems to have proceeded on her way without any particular care and without any attention to her surroundings. Under the circumstances disclosed by the evidence as to the perfectly obvious condition of affairs at or about the point at which the accident happened, the plaintiff was bound to use more than ordinary care to avoid an accident. * * * It does not appear she fulfilled this obligation."

Again, in *Keating v. Metropolitan St. Ry. Co.*, supra, Justice O'Brien writing the opinion, the Appellate Court says, at page 364 of 105 App. Div., at page 118 of 94 N. Y. Supp.:

"But when she had been apprised, as she was, that the permanent surface of the highway at this point had been disturbed and a temporary structure supplied in its place, she could not heedlessly disregard the precautions which the obvious situation suggested and proceed as though the roadway were free and unobstructed."

[3] The evidence also indicates that the extent of plaintiff's injury, resulting from the accident complained of, has been greatly exaggerated. Her statement that the varicose veins and chronic ulcer disclosed ten days later, upon examination by defendant's physician, did not exist prior to the accident seems to be unworthy of credence.

In view, therefore, of the lack of convincing evidence of defendant's negligence and of plaintiff's freedom from contributory negligence, and in view of the very great weight of evidence generally in favor of the defendant, it becomes necessary that the judgment herein should be reversed and a new trial ordered.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

STETSON v. STETSON.

(Supreme Court, Special Term, Kings County. March, 1914.)

1. DIVORCE (§ 129*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence that defendant had procured a railroad ticket for a woman not his wife and caused her to be transported to another state with intent to cohabit with her was not sufficient corroboration of defendant's confession of the charge of living in adultery, made in the complaint in a divorce action by his wife, so as to authorize a divorce on that ground.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 411-441, 454; Dec. Dig. § 129.*]

2. EVIDENCE (§ 318*)—HEARSAY.

A statement, purporting to be signed by a United States Commissioner and made under his official seal, reciting certain evidence given before him in a prosecution of the witness for violation of the "White Slave Act," cannot be considered as evidence in an action for divorce against the witness, even if the facts contained therein were relevant; not being properly presented as evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. § 318.*]

Divorce action by Catherine N. Stetson against Ralph W. Stetson. On application for interlocutory judgment. Application denied, with leave to make new application.

Thomas Moore Simonton, of New York City, for plaintiff.

BENEDICT, J. This is an application for interlocutory judgment in an undefended action for a divorce. The evidence presented is, I think, wholly insufficient to warrant the court in granting judgment

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the plaintiff. The complaint charges the commission of statutory offenses in New York City in April and May, 1912, with a named correspondent, and also that afterward the defendant left New York, accompanied by the correspondent; and lived in adulterous intercourse with her until about July 1, 1912, when he was arrested upon a charge of violating the federal laws relating to "white slavery," upon which charge he was afterward convicted and sentenced.

No direct evidence of the commission of the offenses charged was produced; but the plaintiff relies wholly upon a letter received by her attorney and purporting to be signed by the defendant, and also upon the record of the proceedings in the criminal prosecution in the United States District Court for the District of Nevada, referred to in the complaint.

The summons herein was served by publication, and the letter was apparently written upon receipt of the papers required by the order to be mailed to the defendant. The following is a copy of the letter, which was written by hand:

U. S. Penitentiary, McNeills Island Wn., April 28, 1913.

To Thomas Moore Simonton, Atty., 43 Cedar St., New York City, N. Y.—
Dear Sir: I am in receipt of a summons and complaint instituted by Catherine N. Stetson, making me defendant in a suit for absolute divorce. I wish to acknowledge same, and also state that I am the party mentioned in said complaint, and to further state that I am guilty of all the allegations set forth therein.

Yours very respectfully,

Ralph W. Stetson.

(Copy of reply to Justice Putnam, Supreme Court, Brooklyn, N. Y. P. S. T. M. S. Esq.)

Will you kindly let me know result of this action, when divorce is decreed and conditions thereof.

Yours very truly,

R. W. Stetson.

(Inclosure.)

[1] A witness, who testified that she was a former fellow employé of defendant, identified the handwriting of the letter as that of "Ralph W. Stetson, the defendant in this action;" but there is no proof that she knew the writer of the letter to be the husband of the plaintiff. Passing by this possible defect of proof, however, and treating the letter as a confession of the defendant, I am of opinion that there was not sufficient corroboration thereof to justify me in granting judgment to the plaintiff. The only other evidence presented was, as already stated, the record of the criminal prosecution, from which it appears that defendant pleaded guilty to an indictment which charged in the first count thereof (to which count only the plea of guilty applied) that the defendant had procured a ticket for the correspondent and caused her to be transported in interstate commerce with an unlawful intent, to wit, that she should live and cohabit with him as his mistress; but there is no allegation of cohabitation or unlawful intercourse. The plea of guilty did not therefore admit, nor does the resulting conviction prove, anything more than an intent to commit adultery, and some steps taken to carry out that intent.

The authorities will, I think, bear out the proposition that this evidence was entirely insufficient. *Lyon v. Lyon*, 62 Barb. 138; *Madge v. Madge*, 42 Hun, 524; *Sigel v. Sigel* (Super.) 20 N. Y. Supp. 377;

Fowler v. Fowler, 29 Misc. Rep. 670, 61 N. Y. Supp. 109; Diederichs v. Diederichs, 44 Misc. Rep. 591, 90 N. Y. Supp. 131; Timmann v. Timmann, 142 N. Y. Supp. 298.

[2] Annexed to the record from the federal District Court is a statement purporting to be signed by a United States Commissioner and under his official seal, reciting certain evidence given by the co-respondent before him, which evidence, if properly presented to this court, would entitle the plaintiff to judgment; but the statement of the commissioner cannot be regarded as evidence in this court for any purpose.

I will not dismiss the complaint, but will deny the application for judgment, with leave to the plaintiff to make a new application upon other or additional evidence in the present action at Special Term, Part 2, of this court, if she shall be so advised.

(84 Misc. Rep. 403)

RANDOLPH v. FIELD.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. DIVORCE (§ 209*)—SUIT FOR SEPARATION—ALLOWANCE OF ALIMONY.

In a wife's suit for legal separation, an allowance of alimony was unauthorized.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 605-609; Dec. Dig. § 209.*]

2. HUSBAND AND WIFE (§ 279*)—SEPARATION AGREEMENT—EFFECT OF ALIMONY IN SUIT FOR SEPARATION.

The fact that a wife receiving payments under a separation agreement brings suit for a legal separation and obtains an allowance of alimony does not relieve the husband of his liability under the agreement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1054, 1056-1060; Dec. Dig. § 279.*]

3. HUSBAND AND WIFE (§ 278*)—SEPARATION AGREEMENT—VALIDITY.

A separation agreement, whereby the husband is to make certain regular payments to the wife, is valid and binding.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.*]

4. HUSBAND AND WIFE (§ 279*)—AGREEMENT FOR SEPARATE MAINTENANCE—PREVIOUS AND SUBSEQUENT ADULTERY.

In a wife's action to recover payments due under a separation agreement, her adultery before such agreement, unknown to the husband, or her adultery after such agreement, constituted no defense.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1054, 1056-1060; Dec. Dig. § 279.*]

5. HUSBAND AND WIFE (§ 281*)—ACTION ON SEPARATION AGREEMENT—PLEADING—FRAUD.

In a wife's action to recover payments due under a separation agreement, the allegation of the answer that, before such agreement was signed, the wife had committed adultery, which fact was unknown to defendant, was not equivalent to an allegation of fraud perpetrated either by direct representations or concealment.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1061; Dec. Dig. § 281.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from City Court of New York, Special Term.

Action by Mary Randolph against Armstead W. Field. From an interlocutory judgment overruling demurrers to three separate defenses alleged in the answer, plaintiff appeals. Reversed, and demurrers sustained, with leave to defendant to amend.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Weissberger & Leichter, of New York City (M. M. Leichter, of New York City, of counsel), for appellant.

Jerome, Rand & Kresel, of New York City (William Travers Jerome, of New York City, of counsel), for respondent.

SEABURY, J. This appeal presents for determination the sufficiency of the first, third, and fourth defenses alleged in the answer. The complaint alleges a cause of action based upon a written agreement between the plaintiff and the defendant, and the action is brought to recover payments alleged to be due under such agreement. The agreement is attached to and made a part of the complaint.

The defendant and the plaintiff were husband and wife and entered into the separation agreement on January 12, 1911. The complaint alleges that under the terms of the agreement the defendant agreed, among other things, to pay the plaintiff the sum of \$15 per week for her use, support, and maintenance, and that said payments were made until about May 3, 1911, and from July 8, 1911, to about April 29, 1912, since which time the defendant has failed and refused to make the said weekly payments. The complaint demands judgment for the sum of \$1,000, the amount of the payments that accrued up to the time of the commencement of the action.

The first defense pleaded sets out the claim of the defendant that on or about May 12, 1911, he repudiated and renounced the agreement sued upon, and that the plaintiff accepted such repudiation and renunciation, and that thereupon and thereby the agreement referred to in the complaint became null and void. The third defense pleaded alleges facts showing that both before and after the agreement of separation referred to in the complaint was entered into the plaintiff committed adultery, that such adulteries were unknown to the defendant at the time of entering into the separation agreement, and that none of such adulteries was condoned or forgiven by the defendant and did not occur with his knowledge, privity, connivance, or procurement. The fourth defense alleged is pleaded as a partial defense and repeats the allegations contained in the first defense alleged. In reference to this partial defense it is only necessary at this time to point out that, if the first defense alleged is sufficient, this defense is sufficient; whereas, if the first defense alleged is insufficient, this defense is insufficient. It is therefore necessary to consider the first and third defenses alleged. The demurrers admit the facts alleged in each of these defenses. The conclusion which the defendant seeks to have drawn from the first defense is that, while the separation agreement was still executory, the defendant repudiated and renounced the agreement, and the plaintiff accepted such repudiation and renunciation and that by mutual consent

said contract was abrogated. The particular facts alleged upon which this conclusion is predicated are that, after said agreement was made, the plaintiff instituted an action against the defendant for legal separation on the ground of cruelty and abandonment, and that during the pendency of such action made application for temporary alimony and counsel fees, and that the justice before whom said application was made directed the defendant to and he did pay the plaintiff \$20 per week as temporary alimony and to pay her attorney as counsel fees \$250.

[1, 2] The first question requiring consideration is whether the commencement of such an action, while the separation agreement remained in full force and effect, was on the part of the plaintiff in effect an acceptance of and an acquiescence in the defendant's repudiation and renunciation of the contract. The provision for alimony in the action brought by the wife for a separation was unauthorized under the law of this state, although there may be a question as to the allowance of counsel fees. *Grube v. Grube*, 65 App. Div. 239, 72 N. Y. Supp. 529. The fact that alimony and counsel fees were allowed in that action is immaterial to the issues to be determined here.

As was said by Mr. Justice Bartlett in *Hughes v. Cuming*, 36 App. Div. 302, 309, 55 N. Y. Supp. 256, 261, reversed on other grounds in 165 N. Y. 91, 58 N. E. 794, referring to *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. Rep. 453:

"The rule thus laid down might require us to hold that the order for alimony was erroneous, but it does not avoid the articles of separation."

In *Chamberlain v. Cuming*, 37 Misc. Rep. 815, 76 N. Y. Supp. 896, this court held that the act of the wife in obtaining two distinct orders for alimony and counsel fees in suits for divorce and separation, respectively, and in accepting payments under said orders, did not constitute a waiver, abandonment, or abrogation of the agreement of separation.

In *Hofmann v. Nestel*, 146 App. Div. 305, 130 N. Y. Supp. 775, the plaintiff sued to recover amounts due her under a separation agreement, and the defendant pleaded as a defense that the plaintiff had commenced an action which was then pending for separation and alimony; but the court held that this fact, even if it was coupled with the fact that an order had been made requiring the payment of alimony in that action, "would present no bar to the present action."

In 21 Cyc. 1598, it is said that:

"The fact that the wife institutes a suit for divorce does not relieve the husband of his obligation to pay the periodic sum agreed on for the wife's maintenance when there is no condition in the deed to the contrary."

[3] The separation agreement was valid and binding. *Galusha v. Galusha*, supra. The repudiation and the renunciation on the part of the defendant certainly could not of itself affect the obligatory character of that agreement, and no act on the part of the plaintiff is alleged in this defense which operated to bring about a cancellation of that agreement even though it was executory. It follows that the demurrer to the first separate defense should be sustained on the ground that that alleged defense is insufficient in law on the face thereof.

[4] The third defense is based upon allegations that before and after the agreement of separation was made the plaintiff committed adultery. The respondent claims that there are two defenses set forth in this defense, and that, since no motion was made to require them to be separately stated and numbered, if either of them is sufficient the demurrer to the third defense must be overruled. For the purpose of this case we shall adopt this view and treat this defense as if it alleged two separate defenses, one charging the adultery of the plaintiff before the making of the separation agreement, and the other charging the adultery of the plaintiff after the making of the separation agreement.

We shall first consider the sufficiency of the defense which alleges that the plaintiff committed adultery after the separation agreement was made. In England it is settled that the adultery of the wife is no defense to an action based on a deed of separation where the adultery is committed after the separation agreement is made and the agreement contains no clause restricting the liability of the husband to such time as she shall be chaste. This was distinctly held in *Fearon v. Earl of Aylesford*, 14 Q. B. D. 792, in which the authorities upon this question were reviewed. That was a case where the plaintiff, as trustee for the defendant's wife under a separation deed, sued for arrears of an annuity, which the defendant had covenanted in unconditional terms to pay to the trustee in trust for the wife. Opinions were delivered by several of the judges, but the following quotation from the opinion of Lindley, L. J., expressed the view of all and summarized the authorities on the question. He said:

"The first (question) is whether the adultery of the wife is a defense to the action for the annuity. Now that appears to me to be settled and to be so settled by long authority, both at law and in equity, that it would be wrong for us to disturb that rule, even although we thought it unsound. It has been settled for at least 100 years, as may be seen by tracing the cases back from *Seagrave v. Seagrave*, 13 Ves. 439, and *Jee v. Thurlow*, 2 B. & C. 547. The earliest cases that I need mention are *Sidney v. Sidney*, 3 P. Wms. 269, decided in 1734, and *Blount v. Winter*, 3 P. Wms. 276 N, decided in 1781; in these cases the matter was discussed, and from the time of these decisions it has not been seriously argued in courts of either law or equity. I am aware that dicta may be found in the Court of Arches (see *Sullivan v. Sullivan*, 2 Addams, 299) which are not altogether in accordance with the view which has been taken in other cases. But this is a mere action at common law for an annuity due under a deed, and to that action adultery is no answer. That I take to be perfectly settled."

The rule applied in *Fearon v. Earl of Aylesford*, *supra*, was followed in *Sweet v. Sweet*, 1 Q. B. D. 12 [1895]. In 21 Cyc. 1597 the rule is stated as follows:

"The subsequent adultery of the wife will not, in the absence of a stipulation to the contrary, cause the setting aside of a valid deed of settlement."

In *Galusha v. Galusha*, *supra*, it was held that a separation agreement was valid and was not invalidated by a subsequent adultery of the husband and the granting of a decree of absolute divorce in favor of the wife against the husband on that ground. Judge Parker, referring to the agreement of separation, said:

"After its making it was not in the power of either party, acting alone and against the will of the other, to do an act which would destroy or affect that contract. The act of adultery did not of itself subvert the marriage contract. It enabled the wife, through the aid of the courts, to relieve herself from the legal restraint of the marriage tie. But she need not have availed herself of that privilege. She might have determined to condone the offense. Condonation is favored in the law. The wrongful act of the husband then did not of itself avoid even the marriage contract. Much less was it potent to affect a contract founded, not upon a promise to faithfully observe the marriage vows, but instead upon a legal obligation to support and maintain the wife."

In *Dixon v. Dixon*, 24 N. J. Eq. 133, in an action to set aside a deed of settlement it was held that the adultery of the wife subsequent to the making of the deed furnished no ground for relief.

Mr. Bishop, in his work on *Marriage, Divorce and Separation* (section 1282) says:

"With us, such separation deed does not ordinarily or necessarily preclude a divorce, even for an antecedent offense; but under special circumstances, and when expressed in special terms, it may amount to a condonation. So, likewise adultery or other misconduct of the wife or the bringing of a divorce suit against the husband or her marriage to another person does not necessarily or ordinarily make void his covenant to pay money to her; yet the writing may be in terms and admit of this consequence."

The only case contrary to these authorities, which has been called to our attention, is the case of *Roth v. Roth*, 77 Misc. Rep. 673, 138 N. Y. Supp. 573. That case was decided in the County Court. We do not regard it as well decided. It does not follow that, because the adultery of the wife may bar her from asserting certain rights that she otherwise has against her husband (*Hawkins v. Hawkins*, 193 N. Y. 419, 86 N. E. 468, 19 L. R. A. [N. S.] 468, 127 Am. St. Rep. 979, 15 Ann. Cas. 371; *Muth v. Wuest*, 76 App. Div. 332, 78 N. Y. Supp. 431; *Keller v. Shrady*, 40 App. Div. 460, 58 N. Y. Supp. 143), therefore her adultery precludes her from recovering against her husband under the terms of a valid agreement which contains no such provision.

That part of the third defense which alleges that, before the separation agreement was made, the plaintiff committed adultery, also alleges that that fact was unknown to the defendant. The same reasoning which has led us to hold that the adultery of the plaintiff subsequent to the making of the separation agreement is no defense to an action upon the agreement seems to us to require us to hold that the fact that the plaintiff committed adultery before the separation agreement was made constitutes no defense.

We have been referred to no case where this question has been decided. In *Dixon v. Dixon*, *supra*, which, as has been stated, was an action to set aside a deed of settlement, the plaintiff contended that before the deed was made the wife had been guilty of adultery and that this fact was concealed from him and unknown to him when the deed was made. The Vice Chancellor held, however, that the evidence was insufficient to establish that the wife committed adultery before the making of the deed of separation and expressed no opinion as to the question of law which would have been presented had the evidence been sufficient. If the parties had intended that that fact should avoid

the separation agreement, it is reasonable to suppose that they would have so provided in the agreement. Nor is the situation in any respect changed by the allegation in the defense that the plaintiff's adultery was unknown to the defendant at the time of making the agreement. The argument of the respondent is based upon the assumption that if the defendant had known that his wife had committed adultery he would not have entered into the separation agreement. This assumption is unwarranted and cannot be indulged in by the court. The court is not required to speculate as to the cause which induced the defendant to enter into the separation agreement. It is sufficient for the court to know that the agreement was entered into, and that it is valid, and that the defendant has repudiated his obligations under it.

[5] If the defendant had alleged that he was induced by fraud to enter into the agreement, whether the fraud was by direct representation of the plaintiff that she had not committed adultery, or by concealment of that fact, a different question would be presented. In such a case the fraudulent representation or the fraudulent concealment of the fact would have furnished the inducing cause which led the defendant to make the contract. Such a defense is not presented in the pleading now before us for consideration. The defense alleged simply asserts that the plaintiff had committed adultery before the articles of separation were signed and that this fact was unknown to the defendant. Such an allegation is not equivalent to an allegation of fraud perpetrated either by direct representation or concealment. Indeed, the defense alleged and the argument of counsel for the defendant are that the contract is void because there has been a failure of consideration. This argument, as we have already shown, rests entirely upon the assumption, which the court, as a matter of law, cannot indulge, that if the defendant had known the facts he would not have entered into the separation agreement.

We conclude therefore that the third alleged defense is insufficient in law upon the face thereof, and that the demurrer thereto should be sustained.

As to the fourth alleged defense, it is unnecessary to say more than that the reasons already given for holding the first alleged defense insufficient require us to hold that it is insufficient and that the demurrer thereto should be sustained.

It follows that the interlocutory judgment appealed from is reversed, with costs to the appellant, and the demurrers interposed to the first, third, and fourth defenses alleged in the answer are sustained, with costs, with leave to defendant to amend within six days after service of a copy of the order entered herewith with notice of entry of the same in the City Court upon payment of costs. All concur.

PEOPLE ex rel. PRINCE v. FALLON.

(Supreme Court, Special Term, New York County. October 4, 1911.)

WEAPONS (§ 4*)—CRIMINAL OFFENSES—POSSESSION.

Penal Law (Consol. Laws, c. 40) § 1897, as amended by Laws 1911, c. 195, effective September 1, 1911, providing that any person over the age of 16 years, who shall have in his possession in any city, village, or town any pistol, revolver, or other firearm of a size which may be concealed upon the person, without a license issued by a police magistrate or justice of the peace, shall be guilty of a misdemeanor, does not apply to the possession of revolvers by a pawnbroker, who received them prior to September 1, 1911, and holds them as unredeemed pledges, and is required by his contract with the pledgor and the laws of the state to hold them for at least one year unless sooner redeemed, in view of section 1914, as amended by the same act, which provides that every person selling a pistol, revolver, or other firearm of a size which may be concealed upon the person, whether a retail dealer, pawnbroker, or otherwise, shall keep a register in which shall be entered the date of the sale, the name, age, occupation, and residence of the purchaser, and the caliber, make, model, manufacturer's number, or other mark of identification on the pistol or revolver, especially as, if it were construed to so apply, it would violate the constitutional prohibition against laws impairing the obligation of contracts.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 4; Dec. Dig. § 4.*]

Habeas corpus by the People, on relation of Ivan Prince, against one Fallon, Warden of the City Prison. Writ sustained, and relator discharged.

GAVEGAN, J. This is an application to sustain a writ of habeas corpus and discharge the relator, who was held by a city magistrate for a violation of section 1897, c. 195, of the Laws of 1911, on the following undisputed facts: The relator was a licensed pawnbroker, and on September 1, 1911, had exposed for sale in a window of his pawnshop five revolvers, each of which was of such a size that it might be concealed upon the person. The revolvers had been in his possession for a period of over three months and were unredeemed pledges, title to which had passed to the relator, who had no license or permit for their possession. The particular provision of the statute in question, known as an act to amend the Penal Law in relation to the sale and carrying of dangerous weapons, was enacted May 25, 1911, became effective September 1, 1911, and reads in part as follows:

"Any person over the age of 16 years who shall have in his possession in any city, village or town of this state any pistol, revolver or other firearm of a size which may be concealed upon the person, without a written license therefor, issued to him by a police magistrate of such city or village, or by a justice of the peace of such town, or in such manner as may be prescribed by ordinance in such city, village or town, shall be guilty of a misdemeanor."

The only question to be decided in this proceeding is whether, under the said law, the relator, Ivan Prince, is guilty of a misdemeanor

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on the undisputed facts. Section 1914 of the same act contains another provision, by which, under certain restrictions, a pawnbroker may sell and dispose of firearms in his possession, and reads in part as follows:

"Sale of Pistols, Revolvers and Other Firearms.—Every person selling a pistol, revolver or other firearm of a size which may be concealed upon the person, whether such seller is a retail dealer, pawnbroker or otherwise, shall keep a register, in which shall be entered at the time of sale the date of sale, name, age, occupation and residence of every purchaser of such a pistol, revolver or other firearm, together with the caliber, make, model, manufacturer's number or other mark of identification on such pistol, revolver or other firearm. * * *

Then follow other restrictions and regulations concerning sale, failure to comply with which is declared to be a misdemeanor. It will be observed that there is no mention in this latter section of any license as a condition precedent to selling by a pawnbroker.

In view of the foregoing provisions regulating the sale of firearms by pawnbrokers, the law is so ambiguous on the question of their possession as to require interpretation. Literal interpretation thereof would lead to the result that a pawnbroker, who is a mere pledgee of goods belonging to another, would be guilty of a misdemeanor for having in his possession revolvers pledged to him long before the statute took effect. The pledgor's failure to redeem such property before September 1, 1911, would impose a penalty upon the pawnbroker in violation of the contractual relations existing between the parties, and contrary to the constitutional limitations upon the state Legislature to pass a law impairing the obligations of a contract. In other words, the pawnbroker is obliged, under the contract with the pledgor and under the laws of the state, to hold the property for one year at least, unless sooner redeemed. If a firearm were pledged within a year before the passage of the act and not yet redeemed, the pledgee, by performing his part of the contract in retaining possession of the goods to protect his lien, would be guilty of a misdemeanor. Since such absurd results could not have been intended by the Legislature and are clearly not within the spirit of the law, the legislative intent must be found by implication from the terms of the law itself. Inasmuch as the selling of firearms by pawnbrokers is made legal by the act under certain restrictions, which it does not appear the relator has in any way violated, and since such selling of firearms necessarily implies their possession, I am forced to the conclusion that it was not the intention of the Legislature to make the possession of revolvers, as unredeemed pledges by duly licensed pawnbrokers, a misdemeanor where such possession was legal at the time the law went into effect.

The writ is sustained, and the relator discharged.

PEOPLE v. VOGORITO.

(Supreme Court, Special Term, New York County. April 5, 1912.)

CRIMINAL LAW (§ 1073*)—CERTIFICATE OF REASONABLE DOUBT.

Accused was convicted of a violation of the statute prohibiting any person from having in his possession, in any city, a firearm which may be concealed about the person without a written license therefor, upon proof that, in depositing his valuables in a box for safe-keeping before entering a Turkish bath, he placed a revolver therein. *Held*, that a certificate of reasonable doubt should be issued; the validity of the statute being subject to question, and the proof not being evident that accused took the revolver from his person where he had it concealed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2780; Dec. Dig. § 1073.*]

One Vogorito was convicted of crime. On motion for certificate of reasonable doubt. Certificate granted. Affirmed by Appellate Division, 155 App. Div. 934, 140 N. Y. Supp. 1137.

C. S. Whitman, of New York City, for plaintiff.

Palmieri & Wechsler, of New York City, for defendant.

GERARD, J. Defendant, on reargument, moves for a certificate of reasonable doubt. Upon the former motion no question was raised as to the constitutionality of the statute upon which the conviction was based. This question is now raised. The particular provision under which the defendant was convicted is as follows:

"Any person over the age of sixteen years, who shall have in his possession in any city, village or town of this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, without a written license therefor, issued to him by a police magistrate of such city or village, or by a justice of the peace of such town or in such manner as may be prescribed by ordinance in such city, village or town, shall be guilty of a misdemeanor."

It appears that in this case the defendant entered a Turkish bath, and among the articles deposited with the clerk for safe-keeping was a revolver. The clerk handed defendant a box to put his valuables in, and did not see defendant take the revolver from his person; there was therefore no evidence that the revolver was concealed on defendant's person. In the case of *People ex rel. Darling v. Warden*, 74 Misc. Rep. 151, 134 N. Y. Supp. 335 (reversed in 154 App. Div. 413, 139 N. Y. Supp. 277), Mr. Justice Pendleton sustained a writ of habeas corpus sued out by one who had been arrested, charged with having a revolver in a cabinet in his house, saying, in his opinion:

"Under the pretense of prescribing a police regulation, the state cannot be permitted to encroach upon any of the just rights of the citizen which the Constitution intended to secure against abridgment, and under the guise of police regulations personal rights cannot be arbitrarily invaded. The courts must be able to see that the public needs is the end actually arrived at, and that the law in question is appropriate and adapted to that end. It may well be questioned whether a statute making every possible constructive possession a crime is appropriate and adapted to the end in view," etc.

In the case of *People ex rel. Prince v. Fallon*, 146 N. Y. Supp. 253, Mr. Justice Gavegan held that the possession of a revolver by a pawnbroker who exposed it for sale was not a violation of the statute. In

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the recent case of *People v. Persce*, 204 N. Y. 397, 97 N. E. 877 (reported in the advance sheets of March 16, 1912), the Court of Appeals passed on the question whether the portion of this law making the mere possession of a slung shot a felony was constitutional, and seems to make a distinction between weapons kept for purposes of legitimate defense and weapons such as sand bags and slung shots, saying:

"The act in question relates to instruments which are ordinarily used for criminal and improper purposes and which are not among those ordinary legitimate weapons of defense and protection which are contemplated by the Constitution and the Bill of Rights."

Of course, the Legislature is well within its constitutional power in making it a felony to carry concealed weapons, but, in this particular case there was no evidence that the defendant had concealed the weapon on his person. In a criminal prosecution nothing can be left to guess or conjecture. In the case before Mr. Justice Pendleton, the accused placed a revolver in a cabinet in his house. In that before Mr. Justice Gavegan the accused placed the revolver in a show window. Here the accused had the revolver in his constructive possession in a locker or drawer in a bath establishment. There was no element of concealment in any of these cases.

I think that, under these state of facts and the above decisions, there is such a reasonable doubt as to the validity of the conviction of the defendant as entitles him to the certificate provided by law.

(161 App. Div. 44)

LOCKE v. TAYLOR et al.

(Supreme Court, Appellate Division, Fourth Department. March 4, 1914.)

1. SUBSCRIPTIONS (§ 5*)—CONSIDERATION.

A subscription agreement to pay a sum to parties rebuilding a certain plant, being acted on, by the owners of the site and wreckage of the old plant rebuilding it, is supported by a consideration, making it a valid contract to pay them such sum.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. §§ 6, 7; Dec. Dig. § 5.*]

2. SUBSCRIPTIONS (§ 15*)—SECRET CONDITIONS.

The subscription paper not showing a subscription was made on condition of another equal subscription by certain other persons, such condition, not communicated to the persons for whose benefit the subscription was made, and who acted on it, may not be asserted in an action on the subscription.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. §§ 14-17; Dec. Dig. § 15.*]

3. EVIDENCE (§ 151*)—PAROL EVIDENCE—MEANING OF LANGUAGE.

While the meaning of the word "company," as used in a subscription agreement to pay to a "company to be organized" for building and equipping a plant, is properly left to the jury as a question of fact, a partnership and not a corporation being formed, testimony of a subscriber as to his understanding of its meaning when he signed is not material or competent thereon, in the absence of claim of fraud, misrepresentation, or mistake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Livingston County Court.

Action by Fred M. Locke against Vernon E. Taylor and another. From an order setting aside a verdict for plaintiff and granting a new trial, plaintiff appeals. Reversed, and verdict reinstated.

See, also, 154 App. Div. 918, 138 N. Y. Supp. 1126.

This action was brought to recover the sum of \$200, with interest thereon, alleged to have been subscribed by the defendants, for the purpose of inducing the rebuilding and reconstruction of a manufacturing plant in the village of Lima, N. Y., which had a short time before the subscription was made been destroyed by fire.

Plaintiff was unable to produce the subscription paper, and secondary evidence of its contents was received. Though defendants, who are partners, admit that a subscription paper was signed by one of them in the name of both, the form and contents of the paper so signed was a matter of dispute in the testimony on the trial. Plaintiff gave testimony tending to show that it was in the following form: "We, the undersigned, agree to pay the sums set opposite our respective names to parties rebuilding the Lima Insulator plant, the same to become due and payable on an equal amount being expended on the rebuilding of the plant." On the other hand, the testimony given on behalf of the defendants tended to show that it read: "We, the undersigned, agree to pay the sums set opposite our respective names to a company to be organized for the purpose of building and equipping an insulator plant upon the premises in the town of Lima lately occupied by the Lima Insulator Company upon the conditions following: The said sums are to become due and payable when an amount equal to the amount subscribed shall have been expended on the erection of said plant."

Whatever may have been the exact language of this subscription paper, it was actively circulated by and in behalf of a citizens' committee appointed for that purpose at a public meeting of the citizens of that village, convened to consider ways and means to secure the rebuilding of the plant; and many subscriptions in varying amounts were secured, aggregating inclusive of defendants' subscription nearly \$2,000. At this time plaintiff's wife was the owner of the site and wreckage of the old insulator plant, which she had purchased at a sale of the property by the trustee in bankruptcy of the corporation owning the plant at the time of the fire. The wife and son of plaintiff, then knowing that a subscription paper was to be prepared and circulated for the purpose therein indicated, began about that time the reconstruction and rebuilding of the plant, and thereafter expended in rebuilding the plant and equipping it with machinery upwards of \$25,000. The interest of the wife and son in the subscription here in question was thereafter assigned by them to this plaintiff.

Argued before KRUSE, P. J., and FOOTE, LAMBERT, and MERRELL, JJ.

George D. Peck, of Canandaigua, for appellant.

Charles D. Newton, of Geneseo, and George W. Atwell, of Lima, for respondents.

KRUSE, P. J. [1] The evidence warranted no other inference than that plaintiff's assignors rebuilt the insulator plant in the expectation of receiving the subscriptions made by these defendants and others, and to some extent at least in reliance thereon. The purpose for which the subscriptions were made, whichever may have been the true form of the subscription paper, was, primarily at least, to secure the reconstruction of the insulator plant. If it was in the form which plaintiff asserts without other limitation, then plaintiff, as the assignee of the right therein of the parties who actually rebuilt the plant, was

entitled to collect the subscription. The purpose of such a subscription agreement is to induce the parties who are or may become rightfully in the project of rebuilding to proceed with the enterprise. If acted upon by such parties, then the subscription agreement becomes an enforceable contract for their benefit. It is then no longer a naked promise to give or contribute a sum of money; but is, when thus acted upon, supported by a consideration sufficient to establish the agreement as a valid contract to pay the sum subscribed. *Keuka College v. Ray*, 167 N. Y. 96, 60 N. E. 325.

The learned trial judge in his charge to the jury submitted for their determination the question whether the subscription agreement was in the form as claimed by the plaintiff, or that asserted by defendants; further instructing them that, if they found it to have been as claimed by the former, plaintiff was entitled to a verdict; but, if they should find that defendants' version was correct, then they should further determine whether a company, within the meaning of that term as used therein, had been organized for the purpose of building and equipping the plant as therein expressed. It was conceded that no corporation had been formed for that purpose. But there was evidence that plaintiff's assignors had, while the reconstruction of the plant was proceeding, formed a partnership and were acting as partners in that business under the name of M. F. Locke Manufacturing Company. The jury was in effect further instructed that the words "company to be organized," as used in the subscription agreement, if found to be in the form claimed by defendants, were ambiguous, and might mean either a corporation or a partnership to be organized, dependent upon the understanding and intention of the parties as to the meaning of the words; and then left it to the jury to determine what the parties understood that expression to mean. If they should find that it was understood and intended that a corporation was to be organized for that purpose, then, as the court charged, plaintiff was not entitled to recover; but, if the partnership as formed met the understood requirements of the contract, then plaintiff was entitled to a verdict. Under the instructions of the court, to which no exceptions on the part of the defendants appear in the record, the verdict of the jury in plaintiff's favor seems to be supported by the evidence. Nor was the verdict disturbed by the trial court as being against the weight of the evidence.

[2] The single ground of reversal indicated in the opinion of the court was the exclusion of evidence offered by defendants to the effect that their subscription to the agreement as made was not to become effective and a valid subscription until another subscription by designated parties in an amount equal to defendants' subscription had been obtained. The exclusion of this evidence was considered by the trial judge as presenting error sufficient to require setting aside the verdict. It is to be observed that there is no suggestion that any such condition attached to defendants' subscription appeared either in the paper itself or in connection with defendants' signature thereto; nor is there any claim that either plaintiff or his assignors at any time down to the time the action was brought had any intimation of such a claim, or even that the fact that defendants' claim that their subscription was a condi-

tional one only had been called to the attention of any other subscriber to the paper. When the subscription was made by defendants without any condition appearing on the paper, or being in any way communicated to the parties for whose benefit it was ostensibly made, it became in effect an offer to pay the sum subscribed on compliance by those parties with the terms of the agreement. Acceptance of the contract on their part and their reliance thereon is shown by the fact that they thereafter continued the work of reconstruction of the plant with knowledge of the fact of defendants' subscription and its purpose.

Under the circumstances, defendants are estopped from now claiming that their subscription was to become effective as an actual subscription only in the event the condition, which it was sought by the excluded evidence to prove, was fulfilled. Such an oral, secret, collateral agreement is at variance with the terms of the writing and ineffectual. *Phoenix Warehouse Co. v. Badger*, 6 Hun, 293; *Yonkers Gazette Co. v. Jones*, 30 App. Div. 316, 51 N. Y. Supp. 973; *Lyell Avenue Lumber Co. v. Lighthouse*, 137 App. Div. 422, 121 N. Y. Supp. 802; *Id.*, 151 App. Div. 902, 135 N. Y. Supp. 1124, affirmed 208 N. Y. 628, 102 N. E. 1106. It follows that this evidence was properly excluded.

[3] It is also urged that it was error to exclude the evidence as to defendant Finucane's understanding of what was meant by the word "company" as used in the subscription paper which he testifies he signed. While the meaning of that word as used in the subscription agreement was properly submitted to the jury as a question of fact for their determination in the event they should find defendants' version of the contract to be the true one, yet the witness' understanding of its meaning when he signed was not material or competent on that question; there being no allegation or claim that the signature was obtained by fraud or was made by reason of misconception or mistake.

The order should be reversed, with costs, and defendants' motion for a new trial denied, with \$10 costs, the verdict of the jury reinstated, and judgment thereon entered for the plaintiff. All concur.

(161 App. Div. 91)

BLYDENBURGH V. ELY.

(Supreme Court, Appellate Division, Second Department. March 6, 1914.)

1. EASEMENTS (§ 58*)—RIGHT OF WAY—GATES.

Many trespassers having used the passage over defendant's land, right of way over which was reserved to plaintiff, and cattle being at times turned out on the land, it is in the court's discretion to permit defendant to maintain gates at its termini.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 121-127; Dec. Dig. § 58.*]

2. APPEAL AND ERROR (§ 888*)—AMENDMENTS AND FINDINGS ON APPEAL.

Even if the Appellate Division may, under Code Civ. Proc. § 1317, on appeal, amend the complaint and make findings accordingly on the evidence, it should not; the evidence having gotten in over objection of defendant, and he not being required to meet evidence not within the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3617-3619; Dec. Dig. § 888.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. EASEMENTS (§ 30*)—RIGHT OF WAY—ABANDONMENT.

An abandonment of W.'s right of way over another's land is not necessarily shown by W., who was keeping cattle on his land, nailing wires on his boundary line, across the passageway, to prevent the escape of his cattle.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77-79; Dec. Dig. § 30.*]

4. EASEMENTS (§ 58*)—RIGHT OF WAY—LOCKED GATES.

Defendant, over whose land plaintiff has a right of passage, reserved by deed, has no right to maintain locks on gates at the termini of the passage, though furnishing plaintiff with a key.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 121-127; Dec. Dig. § 58.*]

5. COSTS (§ 13*)—EQUITABLE ACTIONS.

The action being in equity, neither party is entitled to costs as matter of right.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 21, 25; Dec. Dig. § 13.*]

Appeal from Trial Term, Suffolk County.

Action by Morgan B. Blydenburgh against James R. Ely. From the judgment, both parties appeal. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

Rowland Miles, of Northport (Harold N. Eldridge, of Northport, on the brief), for plaintiff.

Charles D. Miller, of New York City (Ethelbert I. Low, of New York City, on the brief), for defendant.

CARR, J. This is an appeal from a final judgment in an equity action, tried in the Supreme Court in Suffolk county. There are cross-appeals. The plaintiff brought the action to establish a certain right of way in his favor across lands owned by the defendant. The complaint sets forth two causes of action. The first cause of action sets up the existence of a right of way over certain described lands of the defendant as arising from a deed made and delivered in 1842 by one who was then the common source of title. It alleges an obstruction of this right of way by the defendant in violation of the plaintiff's right. The second cause of action sets up a right of way in the plaintiff over the same means of passage, which is described in the first cause of action, but bases the plaintiff's claim of right upon adverse user and possession. The trial court found that the plaintiff was entitled to a right of way under a reservation made in the deed of 1842. This reservation appears in that deed in language as follows:

"Reserving to the said party of the first part his heirs and assigns the 'privilege' of passing and repassing through the above-described premises on the plain roads running through the same with the appurtenances and all estate, title and interest of the said party of the first part therein."

The trial court dismissed the second cause of action, namely, the one in which the right of way was alleged to have arisen also by adverse user and possession. In this it was right, as I think.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] In granting relief to the plaintiff, as to the right of way described in the first cause of action, the trial court permitted the maintenance of gates, at the termini of this right of way, by the defendant, but provided that these gates should be "unlocked gates." At the time this action was brought, the defendant maintained gates at the termini, but locked them. He offered keys of these gates to the plaintiff "without prejudice," but the plaintiff declined to receive them on this or any other terms. The plaintiff on this appeal complains that the trial court should not have permitted the maintenance by the defendant of any kind of gates at the termini of the right of way described in the first cause of action of his complaint, and he insists that it was error to do so. I think that this ground of appeal is without merit. The plaintiff's right of passage must be enforced, but it must also be enforced in such manner as will give him a reasonably full enjoyment of his right and at the same time cause no undue burden upon the defendant in the beneficial use of his land. It appears in the testimony, and was found by the trial court, that many trespassers had used this passage from time to time, and that it ran through woodland in which at times cattle were turned out. It likewise appears that at various times, since 1842, gates were maintained over this passage, although in the course of years some of these gates had fallen into decay. Although the plaintiff had owned his land since 1902, he seems not to have been aware that he had any right of passage over the defendant's land until some time in 1911. I am of opinion that the disposition of this question by the trial court was reasonable and within its discretion, and I do not recommend any interference with it.

[2] The plaintiff complains further as to that part of the judgment which dismissed his second cause of action. He contends that it was his intention, in the complaint, to claim adverse possession of a right or rights of way which included the right of passage set up in the first cause of action, and of others in addition, and that he offered proof at the trial to sustain his claim of adverse possession to the right of passage referred to in the first cause of action, and, in addition, to further rights of passage in other directions. In so far as the proofs went to any other right of passage, they were objected to by the defendant as not having been pleaded; but the objection was overruled. When the case was finally submitted to the trial court, it, on viewing the whole record, found that neither in the first nor second cause of action was there any pleaded claim for any other right of passage than that which arose from the deed of 1842, and hence, and for other reasons, it dismissed the second cause of action. The plaintiff-appellant contends that this was error, and that the complaint should have been so amended to conform with the proofs as to entitle him to judgment in his favor for all the rights of passage which he says he now has, notwithstanding his omission to plead them. There is nothing in the record that shows that the plaintiff ever moved at the trial to amend his complaint, as to the second cause of action, to conform to the proofs which he had offered and which were allowed to remain in the case notwithstanding the objections of the defendant. He argues that, under section 1317 of the Code, we may now permit an amendment of the

second cause of action and make findings accordingly on the evidence in the case. If we can do this, I think we should not attempt it, for the evidence on which we might base these additional findings, after a proper amendment was allowed, got into the case and remained in it over the objection of the defendant, and furthermore the defendant, while he could, was not obliged to introduce evidence to controvert other evidence not properly within the issues.

[3] The defendant complains of the judgment, on the ground that the trial court should have found that the right of way created by the deed of 1842 had been abandoned in the course of time by some of the plaintiff's predecessors in title. The trial court was requested to make such a finding, and refused. This finding could be based only on some evidence offered by the defendant, to the effect that one Wooley, a predecessor in title of the plaintiff, had run two strands of barbed-wire on his boundary line, which the right of way crossed. These wires were nailed to trees, and, at the time they were put up, Wooley was keeping some cattle on his land. It would seem to be the obvious purpose of this temporary inclosure to prevent Wooley's cattle from straying, and the trial court refused to find that it was also in furtherance of an intention to abandon any right of passage that Wooley had over the defendant's land. I think we should not be justified in interfering with the determination of the trial court on this question.

[4] The second ground of the defendant's attack upon the judgment is that, in any event, the defendant should have been allowed to maintain locked gates at the termini of this place of passage, providing he furnished the plaintiff with keys to said gates. Here, again, I see no reason for interfering with the decision of the trial court. Neither party to this action would seem to be satisfied with a reasonable *modus vivendi*. There is a seeming, but not a real, conflict of precedents on this point. The lands in this locality are not now situated as purely agricultural holdings. In a few years they will be held in small parcels, for the development of Long Island lands is in the direction of rural homes and not in that of agricultural holdings. A locked gate might be no serious incumbrance upon plaintiff's right of passage; but, if he has the right of passage, it cannot be burdened with the obligation of carrying a key whenever he seeks to enjoy it.

[5] The trial court awarded costs to neither party. As the action was one in equity, neither party was entitled to costs as a matter of right, and, while the plaintiff-appellant complains of the failure to award to him costs, I am not inclined to recommend a modification of the judgment on this ground.

The judgment should be affirmed, without costs. All concur.

(161 App. Div. 95)

NEALE v. NASSAU ELECTRIC R. CO.

(Supreme Court, Appellate Division, Second Department. March 6, 1914.)

EVIDENCE (§ 77*)—PRESUMPTION—FAILURE TO CALL WITNESS.

Where a witness for defendant testified to making a complete examination of plaintiff in the presence of B., and plaintiff testified he made no such examination, but told B. he would take B.'s findings, there is no presumption, from plaintiff not calling B. as a witness, that his testimony would have been adverse to her.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. § 77.*]

Appeal from Trial Term, Kings County.

Action by Maud Neale against the Nassau Electric Railroad Company. From a judgment for plaintiff, and from an order denying her motion for new trial for inadequacy of the verdict, plaintiff appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and STAPLETON, JJ.

Raymond D. Fuller, of New York City, for appellant.

D. A. Marsh, of Brooklyn, for respondent.

RICH, J. The plaintiff appeals from a judgment in her favor in an action to recover for personal injuries in consequence of the negligent operation of one of defendant's trolley cars upon which she was a passenger, and likewise from an order denying plaintiff's motion to set aside the verdict upon the grounds that the verdict was for inadequate and insufficient damages, and upon the exceptions taken on the trial.

The accident was due to a collision between two of defendant's cars, one of which was carelessly operated. The defendant concedes its liability, and the only serious question in controversy relates to the nature and extent of the injuries plaintiff sustained. At the time of the trial she was suffering from several more or less serious physical ailments, and the question as to whether her condition was caused by the accident was in dispute. If her present physical condition is due in its entirety to the accident, the verdict of \$1,000 is grossly inadequate. We are not to pass upon the question, however, as to whether the plaintiff failed to sustain the burden of establishing, by a fair preponderance of the evidence, that the accident was a competent producing cause of her present condition, because the judgment must be reversed upon another ground, and whether the verdict is against the weight of the evidence is of no concern.

Upon the trial, Dr. Arthur C. Brush was sworn as a medical expert for the defendant, and gave evidence tending to show that the plaintiff's present physical condition was not entirely due or attributable to the accident. The weight to be given to his testimony depended largely upon the determination of whether an examination he made of the plaintiff in the presence of a Dr. Barber was complete and thorough, and that by such examination he ascertained actual existent con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ditions upon which he based his expert medical conclusion. He testified that his examination was full, complete, and thorough, and stated in detail the conditions he found. The plaintiff denied that he made any such examination as he described; she said he told Dr. Barber that he would take his findings.

Dr. Barber seems to have been present in court on the first day of the trial but not after that day. He was not called as a witness, and no attempt was made to explain his absence, and the evidence was closed with this conflict in the testimony between the plaintiff and defendant's expert. Dr. Barber was not called to corroborate the testimony of either.

At the conclusion of the main charge, the court, at the request of counsel for the defendant, instructed the jury that, because of the failure to call Dr. Barber, they might consider that his testimony would have been adverse to the contention of the plaintiff if he had been called. This instruction permitted the jury to give much greater weight to the testimony of Dr. Brush and was prejudicial to plaintiff. The plaintiff made out a *prima facie* case. She was under no obligation to call the doctor, and her failure to produce the witness did not necessarily raise any presumption against her. *Reehil v. Fraas*, 129 App. Div. 563, 114 N. Y. Supp. 17; *Sugarman v. Brengel*, 68 App. Div. 377, 74 N. Y. Supp. 167; *Eldridge v. Terry & Tench Co.*, 145 App. Div. 560, 129 N. Y. Supp. 865; *Bleecker v. Johnston*, 69 N. Y. 309. The court subsequently said to the jury:

"As to the absence of the doctor, I have charged you that if he be a witness in the power of the party, and having been in court and not having been called, you may take that into consideration whether he would testify in plaintiff's favor or not. The presumption of law is that when he does not come here, and he is within the power of the party to bring, you may consider that he would testify adversely to that party."

I know of no such presumption, and the statement of the learned court did not cure the error but added another.

The judgment and order must be reversed, and a new trial granted; costs to abide the event. All concur.

DICKY v. GOERTNER.

(Supreme Court, Special Term, Kings County. January, 1914.)

1. MORTGAGES (§ 33*)—ABSOLUTE DEED ACCOMPANIED BY DEFEASANCE.

A deed to land subject to mortgages and a written agreement between the parties to the deed, to which the deed was made subject, providing that the conveyance was made to secure the grantee for advances made and to be made to the grantor, that the grantee might rent the premises and collect the rents applying them on one of the mortgages, that when the grantor should repay such advances with interest the grantee should reconvey such property, and that the grantee should have no right or power to sell, assign, or incumber the land except with the grantor's consent, created the relation of mortgagor and mortgagee with the right of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

possession in the mortgagee, and did not create any relation involving any special trust or confidence.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 67-82; Dec. Dig. § 33.*]

2. MORTGAGES (§ 559*)—FORECLOSURE—JUDGMENT FOR DEFICIENCY.

Where a deed absolute in form given to secure a loan is foreclosed as a mortgage, a deficiency judgment is authorized.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1592, 1600-1603, 1605-1608; Dec. Dig. § 559.*]

3. MORTGAGES (§ 529*)—FORECLOSURE—SALE—VACATING—INADEQUACY OF PRICE.

Inadequacy of price is not a sufficient ground for setting aside a foreclosure sale; but, where the mortgagee becomes the purchaser, it is a circumstance to be given some weight in determining whether the sale should be vacated.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1537-1548; Dec. Dig. § 529.*]

4. MORTGAGES (§ 529*)—FORECLOSURE—SALE—VACATING—GROUNDS.

A foreclosure sale will be set aside upon slighter grounds, where the mortgagee purchases, than where the purchaser is an outsider.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1537-1548; Dec. Dig. § 529.*]

5. MORTGAGES (§ 510*)—FORECLOSURE—SALE—NOTICE.

Where a grantor sued for an accounting under a deed absolute in form given to secure advances, and judgment was rendered foreclosing the deed as a mortgage, the mortgagor stood in the position of a mortgagor and owner of the equity of redemption, and was entitled to service of notice of the sale, as of a proceeding in the action, on his attorney or himself, where he appeared personally, distinct from the published notice, especially in view of the practice in New York City for many years of serving such notice in foreclosure suits.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1512; Dec. Dig. § 510.*]

Action by Paul Dickey against Christopher A. Goertner, in which a judgment was rendered in favor of defendant foreclosing a mortgage. On motion by plaintiff to vacate and set aside the foreclosure sale. Motion granted on conditions.

See, also, 159 App. Div. 913, 144 N. Y. Supp. 1112.

Paul Dickey, in pro. per.

G. H. Hinnau, of New York City, opposed.

BENEDICT, J. This is a motion to vacate and set aside a sale in foreclosure held on November 9, 1909, under a judgment of this court. As I have reached the conclusion that the motion should be granted, and as the circumstances of the case are unusual and extraordinary, I have felt it incumbent upon the court to examine the record for the purpose of deciding the claim of the plaintiff that he had been unjustly deprived of his property under the forms of legal proceedings. This investigation makes it proper to state at some length the history of this case, which has heretofore very frequently engaged the attention of this court, both at Special Term and in the Appellate Division.

The facts, in so far as I have been able to ascertain them from the record which is submitted on this motion, are substantially as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] Paul Dickey, the plaintiff, by a deed made in the year 1901 and recorded on October 18th of that year, conveyed to the defendant for a nominal consideration two lots of land on Seventy-Second street, near Twenty-First avenue, in the borough of Brooklyn, subject to two mortgages; the first for \$2,500, and the second for \$250. At the same time, the parties to the conveyance entered into an agreement in writing bearing date on the 28th day of September, 1901, to which the deed is made subject. By the terms of this agreement it was recited that Dickey was about to convey to Goertner the above-mentioned lots in fee, but that the true object of the conveyance and the intent of the parties was to vest the title in Goertner "in order to secure the party of the second part for certain advances of money heretofore made to the party of the first part, and for such other advances as may hereafter be made to said party of the first part." And it was agreed, first, that Goertner should have the power to rent the premises and collect the rents therefrom, applying any rents which he might collect toward the payment of the monthly installments due upon the second mortgage. Secondly, it was provided:

"Whenever the party of the first part shall repay to the party of the second part the full amount of money advanced by said party of the second part, including any advances that may be made subsequently to the execution of this agreement, with interest at the rate of six per centum per annum, then upon such payment the party of the second part shall reconvey to the party of the first part the fee title to all said above described property, free from all claims of the party of the second part, and the said party of the second part hereby covenants and agrees to reconvey said property and to execute a full covenant warranty deed thereof in the usual form immediately after and upon such repayment by said party of the first part to said party of the second part." Thirdly, "the party of the second part shall not have any right or power to sell or assign the said property or to in any way incumber the same except with the consent of the party of the first part until five years from the date hereof."

I think it is clear that the effect of this deed and agreement was simply to create the relation of mortgagor and mortgagee between the parties; the mortgagee having the right to go into possession of the mortgaged premises and to retain such possession until the satisfaction of the indebtedness provided for in the agreement. I think it is also clear that the relation so created was not one involving any special trust or confidence on the part of the grantee in the conveyance in favor of the grantor. *Lewis v. Duane*, 141 N. Y. 302, 36 N. E. 322.

After the lapse of several years, during the course of which the plaintiff had lost his eyesight, the plaintiff, in or about the month of January, 1906, began an action in this court setting forth the deed and agreement and stating that he had demanded an accounting from the defendant of the rents collected and the amounts disbursed and had offered to repay any amount due to the defendant and had demanded a reconveyance, and praying that an accounting be had, and that if it should be found that any amount was due to the plaintiff that the defendant be required to reconvey the property to him, and that if it should be found that any amount was due to the defendant that upon payment of such amount by the plaintiff the property be reconveyed. The defendant interposed an answer admitting the deed and

the agreement, but he alleged, as a separate cause of action and counterclaim, that he had advanced and expended various sums of money for the purpose of preserving and caring for the property, and in paying taxes and charges and in repairs to the building; that he had collected the rents from the tenants, and the rents were insufficient to liquidate the indebtedness of the plaintiff; that the aggregate amount of such payments was \$2,523.13; that he had received \$830 in rentals; and that there was due to him the sum of \$1,693.13. And he further alleged, as a separate cause of action and counterclaim, that he had rendered and performed labor and services consisting in caring and attending to the property and paying the debts of the plaintiff, preventing the liens on said property from being foreclosed, keeping the same in tenantable condition, superintending the work necessary to be done in this respect, renting and endeavoring to rent the same, collecting the rent, all of which services were of the reasonable value of \$1,125, and he demanded judgment for the said two sums of money, and for any other sums which he should further advance to the plaintiff during the pendency of this action and the costs and disbursements of the action. The plaintiff served a reply, putting in issue the payments so claimed to have been made, and denying the allegation respecting the alleged services. Some two years later, during which nothing appears to have been done, the defendant, upon motion, was permitted to serve a supplemental answer alleging further disbursements claimed to have been made by him on behalf of the plaintiff; the excess of which over the amount of rent collected during the last-mentioned period being \$314.75, for which he asked judgment.

With the issues in this condition, the case came on for trial before the Special Term of this court in December, 1908, and the court found and decided that the conveyance was, in fact, a mortgage, and that the amounts found due in the findings of fact, together with any amount found due by the referee appointed by the interlocutory judgment to compute the same, should constitute the amount due to the defendant from the plaintiff at the date of the trial. It also found that the plaintiff was entitled to redeem the premises from the mortgage upon payment of the amount so found due, with interest thereon, on or before 30 days from the service of notice of the entry of an order confirming the report of said referee; that the defendant was entitled to interlocutory judgment decreeing that, in the event of the plaintiff failing to redeem the premises within thirty days after service of notice of entry of an order confirming the referee's report, the defendant should have final judgment of foreclosure and sale on said mortgage.

Subsequently, the referee, to whom the matter was referred by the interlocutory judgment bearing date the 10th day of April, 1910, reported that there was due to the plaintiff from the defendant upon the 21st day of December, 1908, the sum of \$2,641.18. This report was confirmed, and a final judgment of foreclosure and sale was made upon the 4th day of October, 1909. An appeal was taken from this judgment to the Appellate Division, where it was affirmed without opinion on June 10, 1910 (139 App. Div. 910, 123 N. Y. Supp. 1114). This judgment,

therefore, became the law of the case for the parties hereto, and yet, in passing, and especially in view of the subsequent proceedings, it may not be improper to remark that if the question were an open one, and if the question were not now res judicata, it would seem that the deed could not be regarded as security for the claim of defendant for compensation for his own services as alleged in the fifth paragraph of his answer, because the original agreement did not so provide, and his remedy, if he were entitled to any compensation at all for such services, would be confined to an action at law for the recovery of their value; and it might be urged that the provision of the interlocutory judgment which required the plaintiff to pay the defendant the amount due him in 30 days was invalid for the reasons assigned by Mr. Presiding Justice Parker in *Foley v. Foley*, 15 App. Div. 276, page 282, 44 N. Y. Supp. 588, page 591, where he says:

"Such provision amounts to a strict foreclosure of the plaintiff's equity of redemption. It requires her to redeem in an unusually short time (*Perine v. Dunn*, 4 Johns. Ch. 140), and grants to the defendant relief that is rarely granted against a mortgagor in this state. The defendant's rights in the matter are but those of an ordinary mortgagee in possession, and do not require for their protection the enforcement of so severe a remedy. Certainly such relief is not warranted in an action where it is not suggested by either of the pleadings, and is very far outside of any issue tendered by them. *Smidt v. Jackson*, 11 Hun, 361; *Bolles v. Duff*, 43 N. Y. 469; *Denton v. Ontario County N. Bank*, 150 N. Y. 126 [44 N. E. 781]. No fact is found, or conclusion of law contained, in the decision which warrants a judgment directing any foreclosure whatever of the plaintiff's equity of redemption. It is not there found that plaintiff had made default in paying the amounts which the deed was given to secure."

It will be noticed, also, that the interlocutory judgment provided that the defendant should have, without notice to the plaintiff, the right as of course to enter the usual judgment of foreclosure and sale of the premises; said judgment to provide for the usual allowance of 2½ per cent. to defendant Goertner and costs of the action. It will be seen that this provision was violative of the right of the plaintiff to notice of the application for the judgment, and granted an extra allowance without giving to him, although entitled to notice of all proceedings in the action, any opportunity to be heard as to whether the report was correct, or as to the amount of the additional allowance. See *Citizens' Savings Bank v. Bauer*, 49 Hun, 238, 1 N. Y. Supp. 450, per Bartlett, J.

[2] The final judgment dated October 4, 1909, provided that a deficiency might be specified by the referee and that the plaintiff should pay the same to the defendant, who should have judgment and execution therefor.

There seems to be authority for giving a deficiency judgment in a case where a deed absolute in form is given to secure a loan, and where the deed is decreed to be foreclosed as a mortgage. See *Boocock v. Phipard*, 52 Hun, 614, 5 N. Y. Supp. 228, reported sub nom. *Bocock v. Phipard*, 24 N. Y. St. Rep. 267. Section 1204 of the Code of Civil Procedure provides that:

"Judgment may be given for or against one or more plaintiffs, and for or against one or more defendants, * * * and it may grant, to a defendant, any affirmative relief, to which he is entitled."

And section 1207 provides that:

"Where there is an answer, the court may permit the plaintiff to take any judgment, consistent with the case made by the plaintiff, and embraced within the issue."

[3, 4] Under the terms of the judgment of October 4, 1909, the referee advertised the property for sale and sold it upon the 9th day of November, 1909. At this sale the property was bid in by the defendant for the sum of \$150, subject to the two mortgages which were liens upon the property when the defendant took title to it in 1901, and the referee reported a deficiency in favor of the defendant amounting to \$2,944.10. The plaintiff claims that the price realized upon the sale was totally inadequate to the value of the property. This, of course, is not sufficient ground for setting aside a judicial sale; but where the mortgagee becomes the purchaser it seems to be a circumstance to be given some weight in reaching a determination as to whether a judicial sale should or should not be vacated, because where the mortgagee purchases the rule is well settled that the sale will be set aside upon slighter grounds than where an outsider becomes the purchaser. *Wiltse on Mortgage Foreclosure*, 629; *Tripp v. Cook*, 26 Wend. 143.

[5] The plaintiff bases the present application upon several grounds, all of which proceed upon the erroneous assumption that the foreclosure proceeding was the statutory foreclosure by advertisement, whereas it was a foreclosure by an action in equity; but one point which he does not raise seems to me to be controlling of this application. It is this: That there was no notice of the sale given to the plaintiff in this action, who, according to the judgment, stood in the position of a mortgagor and the owner of the equity of redemption. The referee's report, which was not confirmed, it is true, contained a statement that he "caused due notice of the sale of the said lands and premises on the 9th day of November, 1909, at the Brooklyn Real Estate Exchange, 189 Montague street, in the borough of Brooklyn, in the county of Kings, in the city of New York, to be given and published according to law and the rules and practice of this court, as will fully appear by the affidavits hereto annexed"; but nowhere annexed to the report is any affidavit or other proof that notice was given to this plaintiff, the only affidavits being those showing publication of the printed notice in two newspapers. The plaintiff's position under the pleadings and judgment in the action was unquestionably the same as that of a defendant in a foreclosure action who had appeared and answered. In my opinion, such a defendant is entitled to service upon his attorney, or, if he has appeared per se, then upon himself, of notice of the sale as of a proceeding in the action, separate and distinct from the notice of sale which is, under the provisions of the Code, required to be published by the referee appointed to conduct a judicial sale. This question has not, in so far as I have been able to ascertain, received definite and final judicial determination; but I think that the better rule, both upon reason and authority, is the one requiring notice of the sale to be given to parties who have appeared in the action, in addition to the notice published in the newspapers under the sections of the Code. Certainly this has been the practice at the bar in this city for many years, and it

is a practice which should be encouraged rather than discontinued. In *Eidlitz v. Doctor*, 24 Misc. Rep. 209, 53 N. Y. Supp. 525, Judge Daly says:

"It is conceded that no notice of sale was served pursuant to such appearance, and that no notice of the sale was given except by the usual advertisement by the referee in the papers. It is contended by plaintiffs' attorneys that, as such advertisement is the only notice prescribed by statute (Code, § 1678), and none other is prescribed by the rules of court, it is therefore the only notice called for under the exception in the waiver aforesaid. But it appears from the papers submitted on this motion, which include the certificate of many leading lawyers and law firms, that it is the practice of the bar under such a notice of appearance to serve, and the usage to expect, a special notice of the sale intended to advise the defendant of the time and place when such sale is to take place. In view of such a general practice and usage, it is to be presumed that the respective attorneys for the plaintiffs and the defendant in this case had knowledge of them and practiced with reference to them, and that the notice of appearance for Mrs. Mooney was given in reliance upon that practice and usage, and was received with knowledge of the obligation it entailed. The notice of sale mentioned in the exception in the waiver could not have been understood to refer to the advertisement, for, in that case, the exception would be meaningless, as the advertisement is compulsory in all cases. The plaintiffs' papers on this motion concede, in effect, the practice and usage upon which defendant relied, for plaintiffs' attorneys attempted to cure the omission by a subsequent consent or admission from Mrs. Mooney's attorneys. They understood, therefore, that the notice of appearance referred to individual express notice by service of a paper, containing it, and their retention of the notice of appearance was equivalent to an agreement to give such notice, which, it appears, ordinarily consists of a copy of the advertisement, inclosed and addressed and served upon the attorneys in the ordinary way. No such notice of sale was given, and the defendant and her attorney did not know of the sale until after it had taken place. The property was bought in by the plaintiff for a moderate sum, and it would seem that the defendant, who was deprived of the opportunity to attend at the sale, ought, without further proof, be granted the resale which she asks."

In the case at bar there was no waiver of any notice of any proceeding in the action, and the plaintiff was entitled to notice of every step taken. On the other hand, it was held in the County Court of Erie County (*Collins v. McArthur*, 32 Misc. Rep. 538, 67 N. Y. Supp. 460) that a notice of appearance interposed in an action of foreclosure and sale on behalf of the mortgagor does not entitle his attorney to notice of sale, as the sale is merely an execution of the judgment and is a step of which the attorney is not entitled to notice, and therefore, where the sale is regular and fair the failure to give him notice of it affords the mortgagor no ground for a subsequent motion to vacate the sale and judgment of deficiency entered thereon. In the case of *Frazier v. Swimm*, 79 App. Div. 53, 79 N. Y. Supp. 787, Mr. Justice Woodward, writing for the Appellate Division in this department, in speaking of this question, although perhaps it was not necessary to the determination of the case then before the court, says:

"Mr. Graves, by appearing and waiving all notice, except notice of sale and surplus proceedings, practically admitted that he had no interest in the foreclosure except in the event of a surplus, and it may be fairly questioned whether, in waiving all notices, except those of sale and surplus, the defendant does not waive all notices except such as are provided by the statute. He might waive such a notice if he saw fit, and, if all the parties in interest did likewise, the question of whether the statutory notice was published or not could not be raised. This appears to have been the construction put upon a

like exception in the case of *Collins v. McArthur*, 32 Misc. Rep. 538 [67 N. Y. Supp. 460]. While that case is not an authority for this court, it is, perhaps, under the facts here presented, quite as much entitled to controlling weight as that of *Eidlitz v. Doctor*, 24 Misc. Rep. 209 [53 N. Y. Supp. 525], relied upon by the appellant."

And he then proceeds to distinguish the last-mentioned case from the one in which he was writing. I think it is probable that the learned justice was not aware of the fact that *Collins v. McArthur* was reversed on appeal by the Appellate Division of the Fourth Department on March 19, 1901, because the fact of such reversal does not appear under the same title in any of the regular series of reports and is only found in 8 N. Y. Ann. Cas. 358. Under a note of the principal case the reporter writes as follows:

"Order reversed, without costs of this appeal, and a resale ordered in each case upon condition that the appellant, within 20 days, gives a bond in the penalty of \$250, to be approved upon notice, by the county judge of Erie county, conditioned that the amount realized upon such resale shall be sufficient to pay the expenses thereof and at least \$600 in addition thereto; and in the event that such bond is not given the order in each case is affirmed, with costs. Order to be settled upon two days' notice by Mr. Justice Spring. All concur. Laughlin, J., concurs in result, and favors absolute reversal of orders and a resale, upon the ground that the appellants' attorney was entitled to service of notice of sale."

This decision was reported under another title (*Collins v. Dunston*) in 59 App. Div. 626, 69 N. Y. Supp. 1132.

The motion will be granted upon condition that within 30 days from the entry of the order hereon the plaintiff furnishes security in the sum of \$150 for the costs of the resale, and \$850 to cover any loss which the defendant may be able to show that he has sustained since the date of the original sale; such security to be in the form either of a deposit of cash in the court, or a bond of a surety company to be approved as to form and sufficiency by one of the justices of this court. Settle order on notice. No costs of this motion.

(83 Misc. Rep. 582)

**HATHORN et al. v. NATURAL CARBONIC GAS CO. PEOPLE v. SAME.
PEOPLE v. NATURAL CARBONIC GAS CO. et al.**

(Supreme Court, Special Term, Albany County. January, 1914.)

INJUNCTION (§ 129*)—VOLUNTARY DISCONTINUANCE—RIGHT.

Where, in actions to enjoin defendant all parties agree that facts occurring since the commencement of the actions render the trial thereof futile so far as it may affect the merits of the issues, plaintiffs are entitled to a discontinuance without costs to either party or prejudice to any right of action which defendant may have on the injunction bond.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 279-287; Dec. Dig. § 129.*]

Three actions for injunction, one by Emily H. Hathorn and another, and two by the People, all against the Natural Carbonic Gas Company, others being joined as defendants in one action. Motion to discontinue actions allowed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

See, also, 140 App. Div. 943, 125 N. Y. Supp. 1123; 194 N. Y. 326, 87 N. E. 504, 23 L. R. A. (N. S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989; 196 N. Y. 421, 90 N. E. 441.

Rockwood, McKnight & McKelvey, of Saratoga Springs (C. C. Lester, of Saratoga Springs, of counsel), for plaintiffs Hathorn.

Thomas Carmody, Atty. Gen. (C. C. Lester, of Saratoga Springs, of counsel), for the People.

Morris & Plante, of New York City, for defendant Natural Carbonic Gas Co.

CHESTER, J. The plaintiffs in the first entitled action move for a discontinuance upon the ground that matters have arisen subsequently to the commencement of the action, and to the issuance of the temporary injunction therein, having no relation to the merits, which render it futile that the action proceed further. The defendant in that action makes a counter-motion to dismiss the action with costs because of the failure of the plaintiffs to diligently prosecute the same, and because the questions involved, except as to any damages that may have been sustained under the undertaking given by the plaintiffs to the defendant to procure the temporary injunction, have become academic, and that the plaintiffs could not now secure a permanent injunction. The defendant in the last two entitled actions moves to dismiss the complaints with costs for failure of the plaintiffs to prosecute, and because the questions involved have become purely academic. All these motions may be considered together. The actions were brought under the act known as the Anti-Pumping Law (Laws of 1908, c. 429), entitled "An act for the protection of the natural mineral springs of the state and to prevent waste and impairment of its natural mineral waters."

The complaints charged, in substance, that the defendant Natural Carbonic Gas Company had, by the use of wells drilled in the rock and powerful pumps used therein, caused an unnatural flow to its wells, and that this was done for the purpose of extracting from the natural mineral waters the excess of carbonic acid gas to be used for sale separate from the waters, and by that means had unlawfully impaired and diminished the natural flow at the wells of other owners in the vicinity. Injunctions were sought against the defendant to restrain such pumping, as being in violation of that law. Shortly after the commencement of the Hathorn action, the one first entitled, a preliminary injunction was secured by the plaintiffs therein, and as a condition of such injunction they were required to and did furnish an undertaking to the defendant with the National Surety Company as surety thereon, in the sum of \$20,000, conditioned that the plaintiffs would pay all costs and damages that might be sustained by the defendant by reason of said injunction if it should be finally decided therein that the plaintiffs were not entitled thereto. The decision granting such injunction is reported in 60 Misc. Rep. 341, 113 N. Y. Supp. 458. It was sustained on appeal to the Appellate Division in 128 App. Div. 33, 112 N. Y. Supp. 374, and in the Court of Appeals, with a slight

modification, in 194 N. Y. 326, 87 N. E. 504, 23 L. R. A. (N. S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989.

After the order granting the injunction had been sustained on appeal the last two above-entitled cases and various other cases brought in the name of the people of the state against this defendant and other parties, seeking substantially the same relief, were brought to trial at an extraordinary term of the Supreme Court in Albany county, and judgments were rendered for the plaintiffs upon the pleadings, but the Hathorn action was not then disposed of, for it was not then at issue. The judgments in favor of the people on such trials were affirmed pro forma by the Appellate Division, but were reversed and new trials granted by the Court of Appeals (196 N. Y. 421, 90 N. E. 441), because of the exclusion of certain evidence offered by the defendant upon the trial.

While these cases were pending there was also at issue an action brought in the United States Circuit Court by one Lindsley, a stockholder of the defendant, to restrain the plaintiffs and the Attorney General and others from enforcing the statute in question. This case finally reached the United States Supreme Court, where it was decided in March, 1911. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160. That court overruled the objections urged against the constitutionality of the statute in question, and affirmed the decree of the lower court in dismissing the bill of complaint.

Soon after the decision of the Court of Appeals reversing the judgments in favor of the plaintiffs above mentioned, all the cases were placed upon the calendar at the January, 1910, Trial Term of the Supreme Court in Albany county. The case first moved for trial at that term was *People v. New York Carbonic Acid Gas Co.*, having practically the same issues as the others. The trial of that case was commenced before Mr. Justice Betts, who presided at that term, without a jury. A vast amount of testimony was taken and numerous adjournments had. Justice Betts was assigned to the Appellate Division in the third department on the 4th day of January, 1911, before the trial had been concluded, so that it resulted in a mistrial. While there was no express stipulation that the testimony in the case being tried should be used in the other cases, it is apparent from the record that it was the understanding of the court and the parties that, because of the voluminous nature of the testimony it should not be repeated so far as it was applicable in the other cases, but should be read in evidence therein. It is also apparent that it was the intention of all of the parties to have all the cases tried before Mr. Justice Betts at that term, and that this was prevented by his designation to the Appellate Division.

Another complication arose by reason of an action brought in the United States Circuit Court against the defendant by one Stratton, late in the year 1910 or early in the year 1911, alleging the insolvency of the defendant and asking for the foreclosure of a mortgage upon the defendant's property, and for the appointment of a receiver thereof. A judgment of foreclosure was had therein and a receiver appointed, and a sale of all the defendant's lands and property, including its wells,

was made in March, 1911. Thereafter a new corporation bearing the same name was organized, for the purpose of acquiring title to the properties of the old corporation and operating the same, but there has been no substitution of the new corporation as defendant.

Another cause for delay, and one which changed the situation of the parties materially, is found in the fact that on the 16th day of February, 1911, the commissioners of the state reservation at Saratoga Springs, appointed pursuant to chapter 569 of the Laws of 1909, appropriated the lands of the plaintiffs in the first entitled action by virtue of the power of eminent domain, to constitute a part of the state reservation at Saratoga Springs.

The commissioners of the state reservation, too, pursuant to said chapter 569 of the Laws of 1909, made an agreement with the defendant or its successor under which its lands and wells were conveyed to the state on the 26th day of June, 1911, as a part of such state reservation, and since that date the state has been in continuous possession of all the defendant's lands in question upon which the pumping operations complained of had been carried on.

The defendant is seeking a discontinuance of the actions under an order which would have the effect of adjudicating that the plaintiffs were not entitled to the injunction in the Hathorn case, and undoubtedly a discontinuance on the plaintiffs' application opposed by the defendant, or the discontinuance on the defendant's application for failure to prosecute, would have that effect and would give the defendant a right to recover under the undertaking it holds. *Perlman v. Bernstein*, 83 App. Div. 203, 82 N. Y. Supp. 148; *N. Y. C. & H. R. R. R. Co. v. Village of Hastings*, 9 App. Div. 256, 41 N. Y. Supp. 492. But if the action is discontinued or the complaint dismissed for reasons arising after the delivery of the bond to secure a temporary injunction, such discontinuance or dismissal would not of itself entitle the defendant to damages. *Apollinaris Co. v. Venable*, 136 N. Y. 46, 32 N. E. 555; *Taylor Worsted Co. v. Beolchi*, 37 Misc. Rep. 693, 76 N. Y. Supp. 379.

The plaintiffs in the Hathorn suit also insist that the test of liability upon the undertaking is the final decision of the action, and, without that or something equivalent to it there is no breach of the condition of the undertaking, and cite in support of the contention *Benedict v. Benedict*, 15 Hun, 305, affirmed 76 N. Y. 600, *Palmer v. Foley*, 71 N. Y. 106, *Wilson v. Wilson*, 130 App. Div. 70, 114 N. Y. Supp. 455, and *Freifeld v. Sire*, 96 App. Div. 296, 89 N. Y. Supp. 260.

I am of the opinion, however, that in determining the motions now under consideration it is not essential to hold that the plaintiffs in the Hathorn suit were or were not entitled to the injunction at the time it was granted, and that that question could not properly be decided in these motions upon affidavits. The only questions to be determined are whether or not the actions should be discontinued or dismissed, and the reasons therefor, leaving the legal effect of any order for future consideration.

The Code of Civil Procedure in section 822 authorizes the court in its discretion to dismiss the complaint where the plaintiff unreasonably

neglects to proceed in the action, and rule 36 permits the court to dismiss the complaint wherever younger issues have been tried in their regular order upon the calendar, and the defendant insists that the actions should be dismissed for those reasons, but the discretion authorized to be exercised under this section of the Code and this rule is never exercised, and never should be when the plaintiff shows a reasonable excuse for the delay and the failure to prosecute.

From the recital of the facts surrounding these litigations contained in this memorandum, it appears to me that the plaintiffs have shown ample excuse and justification for their failure to secure an earlier trial of the issues presented.

Indeed, I would be reluctant to hold, in view of the difficult and unusual nature of the cases and the character and course of the litigations, that the plaintiffs in all the cases had not proceeded with reasonable diligence and taken every step open to them as soon as they reasonably could, and therefore it would be an improper exercise of discretion to dismiss the complaints because of the alleged delay in prosecuting.

Manifestly if a trial of any of the actions should now be had, no injunction could be had against the defendant to prevent pumping, because it does not now own the wells, the pumping of which it was sought to restrain, and because the state does own them. This condition arises, not because of anything affecting the merits of the controversy, but because of facts occurring subsequently to the commencement of the actions.

All parties agree that the facts occurring since the actions were commenced will now render the trial of the actions futile so far as determining any question affecting the merits of the issues involved is concerned. The courts should not be burdened with the trial of issues that will be of no avail to any one, and, if the defendant deems that it has been aggrieved because of the temporary injunction in the Hathorn case, it should be left to any action or proceeding on the undertaking it holds in that action, which it may be advised to take.

Orders may be presented for signature discontinuing all the actions without costs by either party as against the other, because of the after-occurring facts mentioned, and without prejudice to any action or proceeding which the defendant may be advised to take on the undertaking it holds in the Hathorn case.

Ordered accordingly.

(161 App. Div. 23)

COMESKY et al. v. FELLOWS.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

TRIAL (§ 280*)—REQUESTED CHARGE—INSTRUCTIONS GIVEN.

Where certain brokers sought to recover commissions on a sale made by the owner and the court clearly charged the law governing the case, and especially stated that defendant, acting in good faith, could sell his property where the broker had failed, it was not error to refuse to charge that, if defendant sold to the purchaser personally in continuation of ne-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gotiations begun before the brokers entered into the matter, whether or not plaintiff was still in his employ, he was not entitled to commissions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 280.*]

Appeal from Rensselaer County Court.

Action by Stephen Comesky and another doing business as Comesky & Morier against J. Frank Fellows. From a judgment for plaintiffs, and from an order denying defendant's motion for a new trial on the minutes, he appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Henry W. Smith, of Troy (S. B. Smith, of Troy, of counsel), for appellant.

Thomas F. Galvin, of Troy, for respondents.

WOODWARD, J. The plaintiffs bring this action, as brokers, to recover a commission alleged to have been earned by them in procuring a customer who purchased the defendant's premises at a price satisfactory to him. It is not disputed that the plaintiffs were, at one time, employed for the purpose of procuring a customer, and there is evidence that the defendant, while fixing an asking price of \$9,500, directed the plaintiffs to look for customers and to confer with him as to any offers which they might obtain. There is likewise evidence that the plaintiffs advertised customers, and that one Deavitt responded to the advertisement and made an offer of \$7,500, which was reported to the defendant, who rejected the offer, that after considerable negotiation Deavitt made an offer of \$8,000, which was likewise rejected by the defendant, and that in a few days after this offer through the plaintiffs, Deavitt purchased the premises from the defendant for \$8,200, without the knowledge of the plaintiffs, and the theory of the defense is that the plaintiffs are not entitled to the commission agreed upon because of the fact that some two years before the defendant had had some negotiations with Deavitt, who had at that time made an offer of \$8,000 for the premises, and that, as the plaintiffs failed to get Deavitt to raise the offer above that figure, they failed in the performance of their contract, and it is contended that the defendant had taken the property out of the hands of the plaintiffs before the sale was made. The issues involved were submitted to the jury; and, while it is true that there was a conflict of evidence, we are not able to discover such a weight of evidence in support of the defendant's contention as to justify a reversal of the judgment entered upon the verdict of a jury, and unless there was reversible error in the charge of the court, no ground is pointed out which is sufficient to defeat the plaintiffs' recovery. It may be that abstractly the request to charge "that if the jury decides on all the evidence that the defendant sold to Mr. Deavitt personally, in continuation of negotiations begun before the plaintiff entered into the matter, whether or not Mr. Morier, the plaintiff, was still in his employ, he is not entitled to commission" was proper enough, but the learned court had clearly pointed out the law governing the case, had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

indicated clearly that the defendant, acting in good faith, could sell his property where the broker had failed, and we are of the opinion that the case would have gained nothing in clearness from a granting of the request. The refusal does not, in our opinion, constitute reversible error, and the judgment should not be reversed.

The judgment and order appealed from should be affirmed, with costs. All concur.

(161 App. Div. 20)

LYONS v. EDMONDS.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

INJUNCTION (§ 62*)—RESTRICTIVE COVENANTS—MANDATORY INJUNCTION.

Mandatory injunction is properly granted against one who, in spite of repeated warnings, and in violation of restrictive covenants in his deed, builds his house nearer the street than the other houses in the block.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124-127, 129; Dec. Dig. § 62.*]

Appeal from Special Term, Monroe County.

Action by Jacob Lyons against William J. Edmonds. From a judgment dismissing the complaint on the merits, and granting defendant the relief prayed for in his counterclaim, plaintiff appeals. Affirmed.

See, also, 145 N. Y. Supp. 1131.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Merle Lewis Sheffer, of Rochester, for appellant.

William J. Maloney, of Rochester (Edwin C. Redfern, of Rochester, of counsel), for respondent.

WOODWARD, J. The plaintiff brought this action for the purpose of being relieved of certain restrictions as to the building and porch line in his deed of conveyance from the defendant of certain premises in the city of Rochester, alleging fraud in the transaction. The defendant put in issue the question of fraud, and counterclaimed, asking for an injunction restraining the plaintiff from violating his restrictive covenants, and the learned court, at an Equity Term, having dismissed the complaint upon the merits, and having granted the relief demanded by the defendant in his counterclaim, the case comes to this court on appeal from the judgment.

On the 3d of February, 1912, the plaintiff made a proposition in writing, under the name of Rosa Marcus, for the purchase of the premises in question, and on the same day the proposition was accepted in writing. Upon the closing day of the transaction, and on the 19th day of February, 1912, the defendant gave a deed of the premises, which deed contained a covenant that the plaintiff should not build upon the premises nearer than 25 feet to the street line; the language of the covenant being limited to the cellar wall. The deed also contained a covenant that the porch should not extend nearer to the street line than

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that of the other houses in the same block, and it is in reference to these covenants that the alleged fraud is suggested. The contract for purchase provided that the title should be free and clear of all incumbrances, and it appears from the evidence that there was some negotiation over the insertion of the covenants, one of them being modified in the deed as tendered, and the other being inserted by consent; but there is evidence, we believe, which justified the learned court at Equity Term in holding that the deed, as finally delivered and recorded, expressed the real contract between the parties, free from fraud. This being true, of course the complaint was properly disposed of.

It appeared, however, that the plaintiff, in the face of his covenants, and in spite of repeated warnings on the part of the defendant, constructed a house upon the premises involved in the litigation, the front porch of which was covered by the roof of the building, and the structure intrudes several feet into the restricted space, violating the letter and the spirit of the covenants, and the court has, we believe, very properly authorized a mandatory injunction commanding the plaintiff to remove so much of the same as interferes with the rights of the defendant. It appears that the premises in question were platted by the defendant's father; that there were originally no restrictions upon the lots, but that there came a time when the highway in front of the premises was made wider, and that in the readjustment the owners of the several properties mutually agreed to locate upon a given line, and that defendant's father made grants of lands to some of them for the purpose of getting the buildings upon a uniform line, the adjacent owners contributing to a common fund for the purpose of paying the expense of making one of the changes; and that since that time no lots have been conveyed which were not subject to the restrictions, and the heirs of the original platter have consented to place the same restrictions upon the three remaining lots, so that every consideration of equity and good faith would seem to demand that the plaintiff in the present action should be bound by his covenants.

While it is true that there is some evidence in the case which might have convinced the court that the plaintiff was misled, we are of the opinion that the court was not bound to reach a different determination as to the facts, and upon the facts as found the judgment is entirely in line with the leading authorities in this state. Indeed we are persuaded that the weight of evidence is clearly with the defendant in this case, and there is a strong suggestion that the plaintiff, after making his bargain, is disposed to overreach his neighbors, and to attempt to get something for which he has not paid, and which would operate unjustly upon those who have expended their money in developing an attractive residence street.

The judgment appealed from should be affirmed, with costs. All concur.

(161 App. Div. 208)

WITTHAUS v. ST. THOMAS' CHURCH IN CITY AND COUNTY OF
NEW YORK.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. RELIGIOUS SOCIETIES (§ 26*)—RIGHTS OF PEW HOLDERS.

A pewholder in a church has no title to the soil nor to the church edifice, but possesses only a limited usufructuary right to use the pew when the building is open for services, subject to the reasonable regulations of the church.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 168-179; Dec. Dig. § 26.*]

2. RELIGIOUS SOCIETIES (§ 26*)—RIGHTS OF PEW HOLDERS.

The rights of a pewholder in a church exist only so long as the church stands, and, when the church edifice becomes so dilapidated that it must be removed or is destroyed by fire, his rights are gone, and he is entitled to no indemnity.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 168-179; Dec. Dig. § 26.*]

3. RELIGIOUS SOCIETIES (§ 31*)—RIGHTS OF PEW HOLDERS.

Where a pewholder in a church is deprived of his pew for convenience or from expediency and not from necessity, his remedy is by an action at law for damages.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 190-207; Dec. Dig. § 31.*]

4. RELIGIOUS SOCIETIES (§ 26*)—RIGHTS OF PEW HOLDERS—"CHURCH."

In a deed by a church of the Protestant Episcopal denomination conveying a pew "so long as the church shall endure," the word "church" referred to the church edifice and not to the Protestant Episcopal church at large as an ecclesiastical body, and hence the rights of the pewholder ceased upon the destruction of the building by fire.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 168-179; Dec. Dig. § 26.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1152-1155; vol. 8, p. 7602.]

5. RELIGIOUS SOCIETIES (§ 31*)—ADMISSIONS—UNACCEPTED OFFERS.

In an action by a pewholder in a church, which was destroyed by fire, to compel an allotment of pews in a temporary structure erected in place of the destroyed building, an offer by officers of the church to pay plaintiff the value of his pews as carried on the books of the church, which was refused and withdrawn, could not be proved to show plaintiff's absolute ownership of the pews.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 190-207; Dec. Dig. § 31.*]

Appeal from Trial Term, New York County.

Action by Rudolph A. Witthaus against St. Thomas' Church in the City and County of New York, sued as the Rector, Churchwardens, and Vestrymen of St. Thomas' Church. From a judgment dismissing the complaint on the merits, plaintiff appeals. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Eustace Conway, of New York City, for appellant.
Hoffman Miller, of New York City, for respondent.

SCOTT, J. Plaintiff, as successor in title to his mother, became the holder of two pews in St. Thomas' Protestant Episcopal Church in the city of New York, one of which she had acquired in 1874, and the other in 1885. Plaintiff did not use them personally but rented one for \$374 per annum and the other for \$302.50 per annum. One pew was subject to the payment of an annual tax of \$99; the other was free of tax. The pews seem to have been valued on the books of the church at \$1,375 and \$1,000, respectively. On August 8, 1905, the church edifice was completely destroyed by fire. The church erected, among the ruins, a temporary wooden structure, which was used pending the erection of a new permanent building.

[1-4] Plaintiff's claim is that he became entitled to an allotment of two pews in the temporary structure, corresponding in size and location with those which he held in the destroyed church, and he seeks to compel such an allotment and to recover damages for the refusal to make such an allotment heretofore. The right which a pewholder has to a pew in a church is very well settled. He possesses no title to the soil upon which the church stands nor to the church edifice. He possesses only a limited usufructuary right of use involving the right to use it when the building is open for services, subject to the reasonable regulations of the church, and there is no right of access to it or right to use it for any other purpose or in any other manner. This right exists only so long as the church stands. If the church edifice has become so dilapidated that it must be removed, or is destroyed by fire, as in this case, the pewholder's rights are gone, and he is entitled to no indemnity. *Voorhees v. Church*, 8 Barb. 135; *Id.*, 17 Barb. 104; *Heeney v. St. Peter's Church*, 2 Edw. Ch. 611; *Abernathy v. Church*, 3 Daly, 7; *Wheaton v. Gates*, 18 N. Y. 395; *Went v. Methodist Church*, 80 Hun, 266, 30 N. Y. Supp. 157. It is only in cases wherein a pewholder is deprived of his pew for convenience or from expediency and not from necessity that he has a right to indemnity (*Voorhees v. Church*, *supra*), and when he has such right his appropriate remedy is by an action at law for damages. The plaintiff claims to have a right to a pew in the defendant church different from the right of pewholders generally. This he seeks to find in the habendum clause in the deeds by which the pews were conveyed to his ancestor laying stress upon the words "so long as the church shall endure." He would apply these words to the Protestant Episcopal Church at large as an ecclesiastical body, but we consider it quite clear that the words could reasonably have been intended to refer only to the church edifice mentioned in the deed.

[5] Plaintiff sought to show that at one time some officer of the church offered to pay to him the valuation at which his pews were carried on the books of the church; his contention apparently being that by making such an offer the church had admitted his absolute ownership of the pews. It may be that at some time the officers of the church, or some of them, may have believed that plaintiff was en-

titled, as matter of law, to indemnity for the destruction of his pews. If they did so believe they were mistaken. At all events the plaintiff refused the offer, and it was withdrawn.

The judgment appealed from must be affirmed, with costs. All concur.

(84 Misc. Rep. 439)

McCARTHY v. CITY OF NEW YORK.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. LIMITATION OF ACTIONS (§ 66*)—CONSTRUCTION OF STATUTE—ACTION AGAINST CITY.

Greater New York Charter (Laws 1901, c. 466) § 261, providing that no action shall be maintained against the city unless it appears that at least 30 days have elapsed since the claims upon which the action is founded were presented to the comptroller for adjustment, and that he has neglected to make payment thereof, for 30 days after such presentment, merely gives the city a plea in abatement until a notice of claim has been filed with the comptroller, and for 30 days thereafter, so that the 6-year limitations would run for 6 years and 30 days instead of 6 years, as to a claim against the city.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 353-375; Dec. Dig. § 66.*]

2. STATUTES (§ 183*)—CONSTRUCTION.

The spirit of a statute controls over its letter, and an equitable and uniform, rather than a technical and narrow, construction should be adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 261; Dec. Dig. § 183.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by John J. McCarthy against the City of New York. From an interlocutory judgment sustaining a demurrer to a defense, defendant appeals. Reversed, and complaint dismissed.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Archibald R. Watson, of New York City (Terence Farley, of New York City, of counsel), for appellant.

Walter L. Bunnell, of New York City, for respondent.

GUY, J. The defendant appeals from an interlocutory judgment sustaining plaintiff's demurrer to a defense set up by the defendant in its answer.

The action is brought to recover the value of certain work, labor, and services performed by plaintiff's assignor during the months of June, July, and August, 1903. Notice of claim was first served on the comptroller on October 18, 1907. The defense to which the demurrer was directed is as follows:

"That the alleged cause of action stated in the complaint did not accrue within six years and thirty days before the commencement of this action."

But a single question is involved in this appeal, namely, whether section 261 of the Greater New York Charter extends the operation

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the six-year statute of limitations for a period running for six years after the thirty days following notice of demand upon the comptroller, or whether it merely suspends the operation of the statute for the period of thirty days, so that, as to claims against the city of New York, the six-year statute of limitations shall be construed to run for six years and thirty days, instead of six years. Section 261 provides as follows:

"No action or special proceeding, for any cause whatever, shall be prosecuted or maintained against the city of New York, unless it shall appear by and as an allegation in the complaint or necessary moving papers that at least thirty days have elapsed since the demand, claim or claims upon which such action or special proceeding is founded were presented to the comptroller of said city for adjustment, and that he has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment."

[1, 2] The respondent contends that no right of action under the provisions of section 261 of the charter could accrue until thirty days after the filing of the claim. While specious, we do not think this contention is sound. In construing statutes the spirit controls the letter of the act; an equitable and uniform construction should be adopted, rather than a technical and narrow one. *Riggs v. Palmer*, 115 N. Y. 506, 509-514, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819. If respondent's construction of the statute is to be accepted, the effect would be that any one having a claim against the city of New York, to which the city might at the time be in a position to offer a good defense, could, by delaying the presentation of his claim for nearly six years, have the benefit of a statute of limitations running nearly twelve years, thus requiring the city to contest the claim at a time long after the occurrence, when material witnesses may have disappeared or their memories become impaired. The purpose of the statute was surely not the furnishing of a means for the perpetuation of dishonest claims, but rather the bringing about of prompt action upon just claims, thus avoiding unnecessary litigation. We think the spirit of the charter was simply to give the city a plea in abatement of the prosecution of all actions predicated upon claims against the city until a notice of claim therefor has been filed with the comptroller and for thirty days thereafter.

The plaintiff-respondent lays great stress upon the ruling in *Cary v. Koerner*, 200 N. Y. 253, 259, 93 N. E. 979, 982, that:

"The time when 'the cause of action has accrued,' as that term is used in those provisions of the Code of Civil Procedure limiting the periods within which actions must be commenced, means the time when the plaintiff first became enabled to maintain the particular action in question."

The issue involved in that case was whether the right to bring an action under a special statute accrued at the time of the passage of the act and before the time provided in the statute for the bringing of an action. The right to begin an action, however, except where specifically provided by statute, accrues upon the happening of the events which are the basis of the right of action. Thus it has been held in actions for personal damages or damages to property that the right of action accrues upon the happening of the event which caused the injury. And where a tax or assessment has been judicially declared invalid, the

cause of action to recover the invalid tax or assessment accrues upon the adjudication declaring it invalid; but the right to bring or prosecute the action is stayed by statute until a claim has been duly filed with the comptroller.

In *Brehm v. Mayor, etc.*, of New York, 104 N. Y. 186, 10 N. E. 158, the Court of Appeals, Justice Rapallo writing the opinion, says:

"Conceding that the statute began to run on the 4th of December, 1871, when the order, or judgment, vacating the assessment was dated, the period of limitation would have expired on the 4th day of December, 1877, but for the provision of section 408 of the Code of Civil Procedure, which is that 'when the commencement of an action has been stayed by injunction or other order of a court, or judge, or by statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action.' On the 17th of November, 1877, at which time the right of action was not barred, the plaintiff presented her claim to the comptroller. She would at that time have been entitled to commence her action, but for section 105 of the Charter of 1873 [Laws 1873, c. 385], which required her to wait until the comptroller had neglected for thirty days after such presentation, to pay her claim. That section in express terms prohibited her from maintaining any action until the lapse of the thirty days. We think that section 408 of the Code of Civil Procedure was framed to meet just such a case, and to suspend the running of the statute during the term of the statutory prohibition."

In *Dickinson v. Mayor*, 92 N. Y. 585, 589-591, it was held that the three-year statute of limitations in favor of the city in negligence cases was not extended by reason of the plaintiff delaying four years and three months after the accident before filing a notice of claim.

Again, in *Bernreither v. City of New York*, 123 App. Div. 291, 107 N. Y. Supp. 1006, affirmed in 196 N. Y. 506, 89 N. E. 1096, the learned Appellate Division held that:

"Where no notice of intention to sue for personal injuries was presented to the corporation counsel of New York City within six months from the time the injuries were received, no action could be maintained, though such notice was presented within six months after presentment of a claim to the comptroller pursuant to the charter."

In affirming the judgment of the Appellate Division, the Court of Appeals held that the notice of intention to sue required by the act of 1886 (Laws 1886, c. 572) and the demand required by the provisions of the city charter are concurrent in their obligations, "both being conditions precedent to the right to maintain the action"—not precedent to the accruing of the right of action.

Again, in *Sheehy v. Mayor*, 160 N. Y. 139; 143, 54 N. E. 749, it was held that the service of a proper notice of claim against the city did not constitute a part of the plaintiff's cause of action; that the absence or presence of such a notice relates to and affects the procedure or remedy only, and not the right of action.

In *Taylor et al. v. Mayor*, 82 N. Y. 10, Folger, Ch. J., writing the opinion, in construing the effect of a provision requiring presentation of claims to the comptroller, the court said:

"Failure to present a claim or suit affects the remedy only. * * * The presentation does not in any way determine the existence of or create the debt. * * * There is a cause of action, and there is a remedy by action. They are different rights. * * * A rule of law, or a statute, may affect the remedy without affecting the cause of action. * * * The rule that one under disability may not bring an action affects his remedy, but does not touch

the cause of action. * * * So it must be when it is a statute that suspends the remedy by action, but does not touch the cause of action. * * * Suppose that an infant held the promissory note of a tailor, and that it was past due and payable. He would have a cause of action thereon. He could not maintain an action upon it. His remedy by action would be suspended until he had procured the appointment of a *prochein ami*. Though he had a good cause of action, should he come into court with it without such next friend, he would be worsted. By a rule especial to a case like his, there is a prerequisite to his maintaining an action, a prerequisite not found in the terms or conditions of the note out of which his cause of action grew, not attaching to the debt as a debt, but to it as held by him."

Plaintiff's cause of action having accrued more than six years and thirty days before the commencement of his action, his claim is barred by the statute of limitations, and the interlocutory judgment, for that reason, must be reversed, the demurrer overruled, and the complaint dismissed, with costs in this court and in the court below. All concur.

(161 App. Div. 67)

NIAGARA ALKALI CO. v. CHAMPION COATED PAPER CO.

(Supreme Court, Appellate Division, Fourth Department. March 4, 1914.)

BAILMENT (§ 14*)—CONTRACT—LIABILITY OF BAILEE.

Plaintiff entered into a contract to sell defendant a two years' supply of muriatic acid in tank cars, and agreed to ship to defendant 500 empty carboys to remain in defendant's possession during the life of the contract without charge to be used for the storage of acid; the carboys to be returned at the end of the contract, and all not returned to be paid for. The carboys, while stored in a safe place by defendant, were carried away by an unprecedented flood. *Held*, that the contract merely made defendant a bailee of the carboys, and hence there was no liability for their loss occurring through an act of God, for the provision as to payment for the carboys merely contemplated payment for those broken, and would not have allowed defendant to retain them upon payment of the agreed price.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 45-55; Dec. Dig. § 14.*]

Kruse, P. J., dissenting.

Submission of controversy between the Niagara Alkali Company and the Champion Coated Paper Company. Judgment for defendant.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Parton Swift, of Buffalo, for plaintiff.

Moot, Sprague, Brownell & Marcy, of Buffalo (Harry T. Klein, of Cincinnati, Ohio, of counsel), for defendant.

MERRELL, J. The admitted facts over which this controversy has arisen are as follows: The plaintiff is a domestic corporation, having its principal office at Niagara Falls, N. Y. The defendant is a foreign corporation, organized and existing under the laws of the state of Ohio, but doing business in the state of New York, having been duly authorized so to do upon compliance with the laws of this state. On July 15, 1911, at the city of Buffalo, N. Y., the parties hereto entered

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

into a contract in writing whereby the plaintiff, therein called the "seller," agreed to sell, and the defendant, therein called the "buyer," agreed to buy, a two years' supply of muriatic acid in tank cars. Said written contract contained the following provision:

"The seller will ship to buyer 500 empty carboys to remain in buyer's possession during this contract without charge and to be used by buyer for storage of muriatic acid. These carboys to be returned at end of contract term, and all carboys not so returned to be paid for by buyer at \$2 each."

The plaintiff duly performed all the covenants and conditions of said contract on its part to be performed, including the shipment to defendant of the 500 empty carboys. The term of said contract ended on July 15, 1913, and on said date the defendant had failed to return 470 of the 500 carboys which plaintiff had furnished it, or to pay plaintiff therefor at the rate of \$2 each. After the termination of said contract, plaintiff demanded of defendant the return of the 470 carboys or that defendant pay therefor at the rate mentioned, demanding of defendant the sum of \$940, no part of which has defendant paid.

It is further admitted by the parties that it is not within the power of the defendant to return these 470 carboys, owing to the fact that while they were in the possession of the defendant, in a safe and proper place for their storage at its plant in Hamilton, Ohio, the same were, without any fault or want of care on the part of the defendant, washed away and destroyed by an unprecedented flood of such a character that it swept away a part of the defendant's plant as well as bridges, houses, large buildings, and surfaces of the streets, and destroyed many human lives, which flood was caused by a continuous and unprecedented rainfall. While the precise date of the destruction of these carboys does not appear from the submission agreement, it was conceded upon the argument that it occurred during the life of the contract between the parties, and that the flood occurred in March, 1913, and was the same general flood that visited the city of Dayton, Ohio, and other localities in the state with destructive results.

Plaintiff demands judgment herein against the defendant for the sum of \$940, with interest thereon since July 15, 1913, with costs. Defendant demands judgment dismissing plaintiff's claim, with costs.

The plaintiff contends that, under the terms of its contract, defendant was in reality an insurer of the carboys loaned, and at the termination of the contract term had the alternative of either returning the carboys or paying plaintiff therefor at \$2 each, and that, while defendant was prevented from returning them by reason of the flood, yet it had the other alternative of paying for them.

At first glance one might be impressed with the force of plaintiff's contention; but an analysis of the contract and the relations of the parties convinces me that such is not defendant's liability. To construe the contract under consideration, we must, if possible, search out the intention of the contracting parties at the time the contract was made. That both parties then contemplated the existence of the carboys at the end of the contract term cannot seriously be questioned. They were "to remain in buyer's possession during this contract." It cannot be claimed but that the parties contemplated their existence at the end of the con-

tract term. It is true provision for payment of such carboys as should not be returned was stipulated at \$2 each. The carboys were of glass, and natural wear and breakage would be expected to levy some toll, and it was evidently to cover such loss that the \$2 for each carboy not returned was provided. It surely must be conceded that the parties anticipated no such wholesale destruction by the elements as did occur. The destruction was by act of God, and occurred without fault of the defendant. No such catastrophe or destruction having been contemplated by the parties when the contract was made, the provision for the return of the carboys or payment of the \$2 for each vessel not returned is unenforceable. The title to the carboys never passed to defendant. It would be absurd to claim that, under the terms of this contract, if the carboys had not been destroyed, defendant could have retained them by paying \$2 each, and have successfully resisted repossession thereof by plaintiff. Clearly the parties contemplated the existence of the carboys at the end of the contract and their return to plaintiff, with allowance for such as might have been broken by ordinary use. I am unable to agree with plaintiff's interpretation of the contract as permitting defendant the alternative of returning the carboys or paying for them. I think no such alternative existed. The contract reads: "These carboys to be returned at end of contract term." Here we have a positive provision that the chattels bailed are to be returned to the bailor. They were to remain plaintiff's property, a condition quite at variance with the position now taken by plaintiff that the defendant had the option to retain them if he wished and pay for them at \$2 each. Defendant had no such alternative. At the end of the contract term they were to be returned; defendant paying for such as were not so returned. The contract might have easily been so framed as to have permitted defendant the alternative of returning or paying for the carboys as it chose, but such evidently was not the intention of the parties. Therefore I do not think the numerous cases cited by plaintiff to the effect that the removal of one alternative does not relieve defendant from the performance of the one remaining, applicable to the situation here.

It seems to me that this contract is one of simple bailment for the mutual advantage of both parties. The bailment of the carboys was an inducement for the purchase of the acid in bulk. We must assume that the loan of the glass carboys in which to store the muriatic acid shipped to defendant in tank lots was a material consideration to defendant in some degree inducing the purchase of the acid, so that the bailment was one for the mutual advantage of both contracting parties, and the bailee, the defendant, was called upon to exercise only ordinary care in the preservation of the property bailed. It is conceded by the plaintiff that defendant kept the carboys in a safe and proper place of storage, and that while so stored, without fault or want of care on defendant's part, they were destroyed. The flood which wrought the havoc was unprecedented and attracted nation-wide attention at the time. The resulting destruction of property cannot but be considered as the act of God, within the usual meaning of that term. And when the destruction of these carboys occurred without fault on de-

fendant's part, and while it was in the exercise of ordinary care over them, defendant cannot be compelled to make good the loss. In other words, as bailee of the carboys, defendant, under well-settled principles of law, cannot be held to answer for the value of the property lost. If the contract had contained a provision for the contingency which actually occurred, the destruction of the carboys, then, if defendant had agreed to pay for them, doubtless it would have been liable, but no such contingency was contemplated or provided for by the parties.

Nor, for the reasons hereinbefore suggested, do I think it can be held liable under its special agreement to pay for the carboys not returned. I think the case comes well within the principle enunciated by Chief Justice Andrews in *Lorillard v. Clyde et al.*, 142 N. Y. 456, at page 462, 37 N. E. 489, 491 (24 L. R. A. 113), where that learned jurist, in discussing the obligation of contracts, the performance of which is rendered impossible by inevitable accident, says:

"But it is now well settled that when performance depends on the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation."

And again at same page:

"When the executory contract relates to specific chattels, and the subject-matter is destroyed without fault of the party, the implied condition arises and excuses performance."

It cannot be doubted but that the parties to the contract under consideration assumed, as the basis of the agreement, the continued existence of the carboys. Their destruction relieved defendant from performance. *Whitehead v. Vanderbilt*, 10 Daly, 214; *Keystone Watch Case Co. v. Romero*, 36 Misc. Rep. 381, 73 N. Y. Supp. 636.

I therefore am of the opinion that the defendant is entitled to judgment in this action against the plaintiff, with costs. All concur, except KRUSE, P. J., dissenting in a memorandum.

KRUSE, P. J. (dissenting). The defendant seeks to avoid liability for the glass carboys not returned upon the ground that the carboys were destroyed by an unprecedented flood and without any fault upon its part. I think that would be so but for the terms of the express contract under which the carboys were delivered to the defendant.

The plaintiff agreed to sell, and the defendant to buy, a certain quantity of muriatic acid, covering a certain period of time, and to furnish the defendant free of charge a certain number of carboys for storing muriatic acid, and at the end of the contract term the defendant agreed to return the carboys or to pay therefor at the rate of \$2 apiece for such as were not returned. The defendant has done neither, although the contract term has expired.

While I do not think the defendant had the option under the contract of purchasing the carboys at \$2 apiece, I am of the opinion that it was intended that defendant should be liable absolutely for the value of the carboys at that rate for such as were not returned by the defendant.

The plaintiff's place of business was in this state, while that of the defendant was in Ohio. The carboys were placed in the exclusive possession of the defendant. They were of glass and breakable, and it might be very difficult for the plaintiff to show that a carboy was broken, lost, or destroyed through the fault of the defendant. The very purpose, as it seems to me, of providing for the return of the carboys, or in the alternative to pay therefor, was to avoid the difficulty of making the defendant liable under the ordinary rule applicable to bailments. It is true that it can be argued that the price at which a lost or destroyed carboy is to be paid for was to fix the measure of compensation in the event that there was a legal liability against the defendant, under the ordinary rules applicable to bailments. But, if that was intended, it would have been an easy matter so to provide in the contract, and not leave it to rest upon mere inference and implication.

While the unprecedented flood has made it impossible for the defendant to return the carboys, that affords no good reason, as it seems to me, from relieving it from the alternative promise to pay therefor.

I think judgment should be directed for the plaintiff.

(161 App. Div. 201)

GIBBONS v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. NUISANCE (§ 50*)—PRIVATE NUISANCE—NOMINAL DAMAGES.

Proof of a private nuisance, consisting of a gas plant emitting black smoke heavily charged with soot, which settled on plaintiff's adjoining houses, was of itself sufficient to entitle plaintiff to recover nominal damages.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 118-127; Dec. Dig. § 50.*]

2. NUISANCE (§ 53*)—PRIVATE NUISANCE—SUBSTANTIAL DAMAGES.

Plaintiff brought suit against defendant for maintaining an alleged nuisance, consisting of a gas plant located directly opposite plaintiff's houses, and proved that the operation of the plant caused the emission of black smoke heavily charged with greasy soot, which settled on the houses and penetrated the interior. There was also evidence that the rentals of the houses decreased materially after the plant was in operation, and never recovered, while similar houses in other parts of the borough produced higher rentals. *Held*, that such evidence was sufficient to take the question of plaintiff's right to recover compensatory damages to the jury, nor was such right affected by proof that the low rentals which plaintiff received might be accounted for by the fact that the neighborhood was largely devoted to manufacturing.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 129; Dec. Dig. § 53.*]

Appeal from Trial Term, New York County.

Action by Granville Gibbons against the New York Central & Hudson River Railroad Company. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial granted.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

George H. Taylor, Jr., of New York City, for appellant.
Robert A. Kutschback, of New York City, for respondent.

SCOTT, J. [1] Plaintiff, the owner of houses and lands upon the westerly side of Locust avenue in the borough of Bronx, city of New York, sues for damages caused by the maintenance by the defendant of a nuisance, consisting of a plant for the manufacture of Pintsch gas, situated on the easterly side of said Locust avenue directly opposite the houses owned by the plaintiff. In the course of the operation of the plant thick, black smoke is emitted, heavily charged with a greasy soot, which when the wind is in a certain quarter settles on plaintiff's houses, and even penetrates into their interiors. That the plaintiff's proof established the fact of the nuisance is clear, and is not disputed. The complaint was dismissed at the close of plaintiff's case because, in the opinion of the learned trial justice, the plaintiff had failed to furnish adequate proof of damages sustained. This, as we think, was error. The fact of the nuisance itself entitled plaintiff to at least nominal damages, but the proof was sufficient to enable a jury to find actual and substantial damage.

[2] It appeared that the rentals received decreased materially soon after the plant had been put into operation, and never recovered, and that similar houses in other parts of the borough of Bronx produced higher rentals. This was sufficient to take the question of damages to the jury under proper instructions. The respondent argues that an adequate reason for the low rentals which the plaintiff received is to be found in the general character of the neighborhood, which is largely devoted to manufacturing purposes. This argument goes only to the quantum of damages, and should be addressed to the jury rather than the court.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

(84 Misc. Rep. 432)

LEOPOLD v. HOTEL SHELBURNE, Inc.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

MASTER AND SERVANT (§§ 30, 40*) — CONTRACT OF EMPLOYMENT — ACTION FOR BREACH.

In a suit for breach of a contract of employment, evidence held to show that it was a condition of employment that plaintiff, the servant, should procure a surety bond to protect the defendant against any defalcations, justifying his discharge on his failure to do so after a reasonable time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 30-36, 47-49; Dec. Dig. §§ 30, 40.*]

Appeal from City Court of New York, Trial Term.

Action by Charles Leopold against the Hotel Shelburne, Incorporated. From a judgment for plaintiff and an order denying its motion for new trial, defendant appeals. Reversed, and complaint dismissed.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 146 N.Y.S.—19

Charles Fischer, of New York City (Nathan Salisbury, of New York City, of counsel), for appellant.

Yankauer & Davidson, of New York City (Myle J. Holley, of New York City, of counsel), for respondent.

GUY, J. Plaintiff sues to recover for breach of contract of employment, alleging that on or about the 25th day of January, 1913, the defendant employed him as bookkeeper for the office of the Hotel Shelburne, at Brighton Beach, for the term of five months from the 1st day of May, 1913, at a monthly salary of \$125, together with board and lodging; that he entered upon said employment and continued therein until the 10th day of May, 1913, when he was wrongfully discharged. The answer denies employment for a definite term and, for a separate defense, alleges that, as part of the contract of employment, plaintiff agreed to furnish a surety company bond for the faithful performance of his duties; that he failed to comply with such requirement, and upon May 10, 1913, left defendant's employ.

Plaintiff testified that he entered into an oral contract of employment with defendant, through its president, on January 25, 1913, for a period of five months, to begin May 1, 1913; but that no mention was made of a bond at the time of the making of said contract. He further testified that on April 30, 1913, before he entered upon the performance of his duties, he was notified by defendant's president that he would be required to give a bond, and that he acquiesced in such requirement and immediately made application for a bond; that his application was temporarily approved by a surety company placing his name on the general bond given by it to cover all employees of defendant, but that subsequently, on May 2, 1913, the surety company notified defendant and plaintiff that it withdrew its acceptance of plaintiff's application; that, at the suggestion of defendant, he made application, without success, to other companies; that on May 2, 1913, defendant's president notified plaintiff that he must furnish a bond on or before May 10, 1913, or he could not continue in defendant's employ; that his efforts to obtain a bond were unsuccessful; that on May 10, 1913, he was notified by a representative of the defendant that he was discharged, and he thereupon left defendant's employ; that a few days later he received a notice from the surety company which had rejected him that, on reconsideration, they had decided to grant his application, but that he did not notify defendant that he had received such notice for the reason that he knew some one had been employed in his place.

Defendant's president testified that the fact that a bond would be required was stated as one of the conditions of employment at the first interview on January 25, 1913, and was repeated at subsequent interviews. Two other officers of the defendant company were called as witnesses and to some extent corroborated the testimony of its president on this point. The evidence shows that plaintiff, in the course of his duties, was required to handle large sums of money, and that the giving of a bond by him was essential to the safe conduct of defendant's business and in keeping with the general rule established by de-

fendant that all of its employes should be under bond. Whether it was part of the original contract of employment entered into on January 25, 1913, or whether by mutual consent, as testified to by the plaintiff, the original oral contract was modified by the parties in April, before plaintiff entered upon the performance of his duties, the evidence fully establishes that, at the time plaintiff entered defendant's employ, his contract required him to furnish a surety company bond, that he was given a reasonable time in which to comply with this requirement, and failed to do so, and his discharge by defendant was therefore justifiable.

Plaintiff is evidently a man of excellent character and reputation and suffered great hardship and injustice by reason of the surety company's refusal of his application, but this was not due to any breach of contract on the part of the defendant. On the contrary, the defendant company showed him great consideration and forbearance, and only discharged him after he had repeatedly failed to obtain a bond, as required by his contract.

Plaintiff having failed to make out his cause of action for wrongful discharge, the judgment must be reversed, with costs, and the complaint dismissed, with costs. All concur.

(161 App. Div. 63)

In re FARLEY, State Excise Com'r.

(Supreme Court, Appellate Division, Fourth Department. March 4, 1914.)

INTOXICATING LIQUORS (§ 66*)—LIQUOR TAX CERTIFICATE—CONSENT OF INFANT OWNERS.

Within Liquor Tax Law (Consol. Laws 1909, c. 34) § 15, subd. 8, as amended by Laws 1910, c. 503, § 2, requiring, with an application for a liquor tax certificate, the consents of the owners of at least two-thirds of the dwellings, within 300 feet of the property on which the traffic is to be carried on, consent can be given by infant owners.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 66; Dec. Dig. § 66.*]

Kruse, P. J., and Foote, J., dissent.

Appeal from Special Term, Onondaga County.

Petition of William W. Farley, State Commissioner of Excise, for revocation and cancellation of Liquor Tax certificate No. 16,893, issued to William Thater and transferred to Catherine Cronin. From an order canceling and revoking the certificate, said Cronin appeals. Reversed and dismissed.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Walter Welch, of Syracuse, for appellant.

Louis M. King, of Schenectady, for respondent.

LAMBERT, J. This is a proceeding under the Liquor Tax Law, instituted by the State Commissioner of Excise, for the cancellation and revocation of a liquor tax certificate, issued to one Thater, and now claimed to be owned by the respondent, Cronin. The sole ground

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the application, here involved, is the sufficiency of the consents obtained from adjacent property owners, in pursuance of subdivision 8 of section 15 of the Liquor Tax Law. That section requires that with the application for a certificate, there shall be filed the consents, "executed by the owner or owners, or by a duly authorized agent, or agents of such owner or owners of at least two-thirds of the total number of such buildings, within 300 feet, so occupied as dwellings, and acknowledged as are deeds, entitled to be recorded."

It is conceded that there are adjacent to the certificated premises some 24 buildings, occupied exclusively as dwellings and within the prescribed 300 feet of the said premises. It follows therefore that there was required to be filed consents covering 16 of such 24 buildings. The respondent shows what purports to be such consents for some 18 of such buildings. Two such were held by the trial court to be insufficient, for insufficiency of acknowledgment and because revocations thereof had been filed. In such conclusion, such court was clearly correct. There still remain, however, the requisite number, if all such remaining are valid. It is made to appear, however, that 4 of these 16 properties are held by several tenants in common, of whom 2 are infants, and question is raised as to the power or right of the infants, by reason of their infancy, to execute or authorize the execution of any such consents. It is agreed that not only did the infants each execute such consents in person, but that an uncle of both also executed same as agent, "duly authorized," in their behalf, and such consents, so signed, and properly acknowledged, are urged as sufficient. The trial court has held the same void and has placed such determination solely upon the infancy of such owners. Upon the correctness of that conclusion depends the sustaining or reversal of the order appealed from, for no other error is urged, which even approaches sufficient reason for a reversal.

In reaching his conclusion, the trial court relied upon the case of *People v. Griesbach*, 211 Ill. 35, 71 N. E. 874, and adopted the reasoning of that decision. We are referred to no authority in this state upon this question, and I am able to find none. The question is to be determined wholly from the statute and the general principles and policies adopted and recognized by this state.

It first appears that the statute nowhere expressly declares the incompetency of an infant to execute such a consent, although it is apparent that many properties within the statutory provision must be owned by infants, in various instances. In the same connection it is to be observed that the same statute (Liquor Tax Law) in various of its provisions does expressly declare a disqualification of infants in various particulars.

By section 21 of the Liquor Tax Law, it is expressly provided that no person under 21 years of age shall traffic in liquors. By section 29, the sale of liquors to infants is prohibited. By section 30, subd. "f," minors under 18 years are prohibited from serving liquors and from remaining in any barroom.

From such circumstances, it is argued, with some force, that the failure of the Legislature to disqualify infants, in the provisions as to

the consents, indicates an intention to permit such to sign, or at least overcome any contrary presumption. Such argument rests in the doctrine, *expressio unius est exclusio alterius*. *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57, 57 N. E. 168, 79 Am. St. Rep. 565.

Attention is further drawn to the well-established rule that an infant's deed is not void, but voidable only, and at the sole election of the infant. *O'Donohue v. Smith*, 130 App. Div. 214, 114 N. Y. Supp. 536; *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461, 123 Am. St. Rep. 609, 14 Ann. Cas. 505. Of course, the execution of such a consent does not attain to the dignity or formality of a transfer of real property. The right conveyed by the signing is a mere naked right and of doubtful value. It is in no sense a right of property, but is personal in its character and partakes of the nature of a privilege. It is therefore difficult to see why the execution of such a consent should be hedged about with more particularity or greater restriction than is a conveyance of real property. It is equally difficult to see the right of the commissioner to assert a standing that has always been regarded as purely personal to the infant. The infants are not personally nor through legal representation questioning any supposed invasion of their rights, and, until they do, I cannot see how any one else is in a situation to do so, regardless of motive, so long as such action is not for the benefit of the infants.

Again, the courts have always jealously guarded the property and personal rights of infants, as wards of the courts. With this in mind, subdivision 6 of section 15 of the Liquor Tax Law becomes important in the solution of this question. That subdivision expressly requires a like consent to be executed and acknowledged by the owner of the property upon which the traffic is to be carried on. Assume an instance, where, by the death of the owner of a valuable hotel property, the title to such has vested in certain minor heirs. If there is no way in which such owners can give the required consent, then the traffic cannot be carried on upon such premises and the right to again traffic thereon would eventually be lost. In such manner the property of such infants would undoubtedly lose a large part of its value, and all for no other reason than the infancy of such owners. Under such circumstances, we anticipate the courts would be astute to find some way to permit such infants to consent to such traffic.

But the Liquor Tax Law, itself, furnishes the most compelling reason for permitting the consents of infants. Subdivision 8 of section 15 requires the consents of two-thirds of the dwellings within the prescribed 300 feet. The statute expressly and without exception requires that all the dwellings be counted as within the class, while the holding of disqualification prohibits the obtaining of the consents from such, no matter how willing the owners might be to grant same. This, in effect, creates a greater restriction against the applicant than is especially prescribed by the statute, i. e., two-thirds. In this particular instance, the applicant would be required to obtain the consents of 16 out of 24, but would be limited to solicitation of only 20 of such 24. I assume no such situation was ever intended to be created.

About the only substantial argument to be advanced in support of the

disqualification of the infants is that the public good and welfare are involved in the giving of such consents, and that public policy requires the exercise of a mature judgment in making the determination, and that an infant is to be presumed not to have such judgment. As against the arguments advanced to the contrary, such contention seems of little weight. No such policy is expressed in the Liquor Tax Law, and there is no very clear reason for its adoption. At least, until such policy is declared by the Legislature, the courts should not seek to read it into the statute. The question involved is new, novel, and not free from doubt, and should receive the interpretation of the Court of Appeals.

The order is reversed, and proceedings dismissed, with costs. All concur, except KRUSE, P. J., and FOOTE, J., who dissent.

(84 Misc. Rep. 427)

ROCHE v. NEW YORK EDISON CO.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

ELECTRICITY (§ 16*)—INJURIES—NEGLIGENCE.

Defendant maintained an electric light post on a public street through which highly charged electric cables passed, and plaintiff, a boy 4½ years of age, while walking with his mother and a half block ahead of her, picked up a 6-inch nail and inserted it in a hole three-eighths of an inch in diameter in the post, causing it to come in contact with one of the charged cables and injuring him. The hole was necessarily placed at the lower end of the post as an outlet for accumulating gases. The jury found that the insulation upon the cables was defective. *Held*, that the accident was not caused by any negligence of defendant.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.*]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by William Roche, an infant, by James Roche, his guardian ad litem, against the New York Edison Company. From a judgment for plaintiff, and an order denying defendant's motion for new trial, defendant appeals. Reversed.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Beardsley, Hemmens & Taylor, of New York City (Thomas H. Beardsley, of New York City, of counsel), for appellant.

Strouse & Strauss, of New York City (I. T. Flatto, of New York City, of counsel), for respondent.

SEABURY, J. The facts in this case are peculiar, and, as we view them, fail to establish negligence on the part of the defendant. The defendant maintained an electric lighting post at Forty-Third street and Second avenue, through which post passed highly charged electric cables. The plaintiff is a boy 4½ years old, and on the day of the accident was on the street with his mother. The boy was about a half block ahead of his mother. The boy picked up a nail about 6 inches long and, discovering a hole three-eighths of an inch in diameter

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the post, inserted the nail in the hole, and caused the nail to come in contact with one of the charged cables therein, and the boy was instantly burned on the hand and wrist.

The evidence shows that the hole was necessarily placed at the lower end of the post as an outlet for accumulating gases. There was conflicting evidence as to whether the insulation upon the cables within the post was defective, and, in view of the verdict of the jury for the plaintiff, we must assume that the plaintiff's version upon this aspect of the case is correct.

It does not seem to us that the defendant, in the exercise of reasonable care and prudence, could have guarded against this accident. The hole in the post was very small, and, ordinarily, it would have been impossible for any pedestrian to have come in contact with the charged cable. The accident, therefore, was not caused by the negligence of the defendant. It was due entirely to the fact that the infant plaintiff, finding a long nail and observing the small hole in the post, inserted the nail in the hole.

The accident not having been due to the fault or the neglect of the defendant, it follows that the recovery in favor of the plaintiff cannot be sustained.

Judgment reversed; with costs, and complaint dismissed, with costs. All concur.

(161 App. Div. 203)

FABER v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. MUNICIPAL CORPORATIONS (§ 768*)—PERSONAL INJURIES—CONDITION OF STREET.

Municipalities are not liable as for negligence by reason of slight depressions or differences of grade in the street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1622, 1624, 1625; Dec. Dig. § 768.*]

2. MUNICIPAL CORPORATIONS (§ 821*)—PERSONAL INJURIES—CONDITION OF STREET—QUESTION FOR JURY.

In an action for the death of the driver of a truck by a fall occasioned by the wheel of the truck running into a depression in the street, evidence held to require the dismissal of the complaint for failure to show negligence of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

Laughlin, J., dissenting in part.

Appeal from Trial Term, New York County.

Action by Mary Faber, as administratrix of the estate of Rudolph Faber, deceased, against the City of New York. From a judgment for plaintiff, and from an order denying motion for new trial, defendant appeals. Reversed, and complaint dismissed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

Clarence L. Barber, of New York City, for appellant.

Henry M. Dater, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SCOTT, J. Plaintiff's decedent, a truck driver by occupation, came to his death on December 8, 1911, in consequence of a fall from a truck which he was driving and upon which was loaded a high pile of lumber. The jury have found by their verdict that his fall was occasioned by the fact that the front wheel of his truck ran into a hole or depression in the roadway at or near the corner of Division and Suffolk streets in the city of New York. The sole question upon this appeal is whether it appeared from the evidence that the defect in the roadway was of such a character and had existed for such a length of time as to charge the defendant with negligence in suffering it to remain unrepaired.

[1] The rule is now firmly established in this state that municipalities are not to be held liable, as for negligence, by reason of slight depressions or differences of grade in the highway. This rule is supported by a great number of decisions, many of which are collated in *Terry v. Village of Perry*, 199 N. Y. 79, 92 N. E. 91, 35 L. R. A. (N. S.) 666, 20 Ann. Cas. 796. The obvious reason for the rule is that to hold otherwise would subject municipalities to a burden beyond that which they are reasonably required to bear.

[2] In the present case the hole on the roadway which, as it is said, caused the accident was clearly due to the wearing away of the asphalt pavement, which had been laid, as it is frequently done over the stone block pavement. The thickness of the asphalt was shown to have been not more than two or three inches. The superficial area of the hole was about two feet square. Some of the witnesses testified that the hole had existed for about two months, but not always of the same size, for it had gradually extended by wearing away of the asphalt as the street traffic passed over the spot. As to the depth of the hole or depression, the estimates of the witnesses differed widely, some making it as much as nine inches, resulting, as it was said, from the sinking of the stone blocks underlying the asphalt, but there is no evidence whatever as to how long this condition had existed. There is no evidence that any official or representative of the city had ever been notified of the defect in the pavement; the claim being that notice is to be presumed from the length of time that the defects had existed. So far as concerns the breaking away of the asphalt, it may be that a sufficient lapse of time was shown to warrant a presumption of notice, but there is no such lapse of time shown as to any sinking of the stone blocks. Opposed to the guesses or estimates of plaintiff's witnesses is the testimony of an officer of the city who actually measured the depth of the hole, and a street sweeper who assisted him. They make the depth at the deepest point only three inches and at other points materially less. The case thus presented is nearly on all fours with *Lalor v. City of New York*, 208 N. Y. 431, 102 N. E. 558, wherein a dismissal of the complaint was sustained. It is significant as to the character of the depression that, although there is much traffic at the place where the accident happened, no evidence was produced to show that any accident had ever happened there before.

The evidence was insufficient to show culpable negligence on the part of the defendant, and the defendant's motion to dismiss the complaint should have been granted.

Judgment and order appealed from reversed, and complaint dismissed, with costs to defendant in all courts.

INGRAHAM, P. J., and McLAUGHLIN and HOTCHKISS, JJ., concur.

LAUGHLIN, J. I concur in the reversal of the judgment and order, but dissent from the dismissal of the complaint.

DORLAND v. FIDELITY DEVELOPMENT CO. et al. (ROBIN, Intervener).
(Supreme Court, Appellate Division, First Department. February 18, 1914.)

APPEAL AND ERROR (§ 91*)—RIGHT TO APPEAL.

An order granting a motion for leave to intervene as a defendant will be affirmed on appeal, if the order does not affect a substantial right of the defendants appealing therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 612-641; Dec. Dig. § 91.*]

Appeal from Special Term, New York County.

Action by Louise M. Dorland, a creditor, on behalf of herself, against the Fidelity Development Company, impleaded with others. From an order granting a motion of Joseph G. Robin for leave to intervene, the Development Company and others appeal. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Robert McC. Marsh, of New York City, for appellants.

Robert D. Ireland, of New York City, for respondent.

PER CURIAM. The order appealed from is affirmed, with \$10 costs and disbursements, upon the ground that the order granted does not affect a substantial right of the appellants.

In re HARMON AND HIMROD STREETS IN CITY OF NEW YORK.

(Supreme Court, Special Term, Kings County. January, 1914.)

1. EMINENT DOMAIN (§ 237*)—ASSESSMENT BY COMMISSIONERS—MISTAKE—VACATION OF CONFIRMATION.

Where it appears that, through a mistake, those upon whom the assessments for benefit are imposed are burdened with the payment of damages for a building which did not exist when title to damage parcels vested in the city, the Supreme Court may as to such parcels vacate the order confirming the report of the commissioners.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 604-613; Dec. Dig. § 237.*]

2. EMINENT DOMAIN (§ 153*)—PROCEEDINGS—RIGHTS OF CLAIMANT.

A claimant purchasing the property and acquiring whatever rights he claims to a damage award some months before the report of the commissioners was confirmed, and before it was signed, but subsequent to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

time when a building thereon was destroyed by fire, has no standing as a bona fide purchaser of the award.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 407-416; Dec. Dig. § 153.*]

3. EMINENT DOMAIN (§ 237*)—CONFIRMATION OF AWARD—SETTING ASIDE ORDER.

The award upon confirmation of the final report of the commissioners of estimate is not a vested right which cannot be destroyed by setting aside the order of confirmation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 604-613; Dec. Dig. § 237.*]

4. EMINENT DOMAIN (§ 237*)—CONFIRMATION OF AWARD—VACATION IN PART.

The Supreme Court, having power to set aside an order confirming the final report of commissioners of award, may set aside as to certain damage parcels, and is not bound to set it aside in toto.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 604-613; Dec. Dig. § 237.*]

Application by the City of New York to vacate an order confirming the final report of the commissioners of estimate as to certain damage parcels and to have the matter sent back to the commissioners. Application granted, and report referred to the commissioners, with directions.

Archibald R. Watson, Corp. Counsel, of New York City (Joel J. Squier and George E. Draper, both of New York City, of counsel), for the motion.

Halbert & Quist, of Brooklyn, opposed.

BENEDICT, J. This is an application by the city of New York to vacate the order entered in this proceeding on May 18, 1911, confirming the final report of the commissioners of estimate, in so far as it confirms the award for damage parcels 31, 32, 33, and 34, and also an order entered August 25, 1913, directing the payment to Andrew Weissenberger of the award made for said damage parcels, which was originally made to William Sommer; and it is further sought to have the matter sent back to the commissioners, so far as said damage parcels are concerned, for a further report. The ground of the motion is that pending the proceedings and prior to the confirmation of the final report the building on said premises was destroyed by fire, and that the award as made included the damage resulting from the taking of part of such building.

The commissioners in this proceeding were appointed by an order entered January 6, 1909. The damage map used by them showed a building, part of which stood on damage parcels Nos. 31 and 32, and it is apparent from the map that the taking of these parcels would result in a total destruction of the building. William Sommer, it is assumed, put in proof of title to damage parcels 31-34, inclusive; but it is not made to appear whether or not he put in proof of damage.

On July 25, 1910, the building on the premises which would have been damaged by the improvement was destroyed by fire. On or about December 21, 1910, William Sommer sold the premises of which the above-mentioned damage parcels formed a part to the present claim-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

ant, Andrew Weissenberger, who opposes this motion, by a deed containing an assignment of the award in this proceeding for the taking of said damage parcels. This deed was recorded December 28, 1910. On or about March 27, 1911, the commissioners signed their final report dated that day, and on May 18, 1911, an order was entered confirming the report, and on that date title vested in the city. In or about April, 1913, Weissenberger applied to have the award for said damage parcels paid to him, and upon the report of a referee an order was made on August 18, 1913, directing it to be so paid.

It appears from the motion papers that a single award of \$3,400 was made for the four damage parcels, and the commissioners did not indicate how much was for land taken and how much for the damage to the building. It appears, however, from the moving papers that in the directions given by the commissioners for making up their report they indicated that \$1,900 was awarded for the damage to the building and \$1,500 for the land.

[1] Thus it appears that through a mistake those upon whom the assessments for benefit are imposed are burdened with the payment of \$1,900 for damage to a building which did not exist when title vested in the city. It is obvious therefore that the order confirming the report, so far as it confirms the award for the damage parcels in question, ought to be vacated, if the court has power to do so. And I think under recent decisions the court has that power. In *Matter of City of New York (Decatur St.)* 196 N. Y. 286, 89 N. E. 829, 37 L. R. A. (N. S.) 281, the Court of Appeals had before it on appeal a dispute as to the ownership of an award made to an unknown owner by the report of the commissioners, which had been duly confirmed without opposition. It appeared that the award should have been a nominal award instead of a substantial award. The Court of Appeals reversed the orders of the courts below, which directed the distribution of the award, and remitted the proceeding to the Special Term, "with leave to any party or to the city of New York to move to set aside the award and assessment, if any, and for a rehearing before the commissioners, or others to be appointed in their stead." This is a clear intimation, to say the least, that in the opinion of the Court of Appeals the Supreme Court at Special Term has power to grant such an application as is made in the case at bar. In *Matter of City of New York (Titus Street)*, 152 App. Div. 752, 137 N. Y. Supp. 817, the Appellate Division in this department reversed an order denying a motion to vacate the order confirming the final report of the commissioners and also an order of reference in a subsidiary proceeding to obtain payment of an award made to unknown owners, and granted the motion, on the ground the award should have been nominal and not substantial.

These cases furnish sufficient authority in support of the power of the court to grant the present motion. They must be deemed to have overruled several earlier cases which seem to support a contrary doctrine. See *Matter of Albany Northern R. R. Co. v. Cramer*, 7 How. Prac. 164; *Morning Side Park Case*, 10 Abb. Prac. (N. S.) 338; *Vischer v. Hudson River R. Co.*, 15 Barb. 37; *Matter of Elmwood Ave.*, 10 N. Y. St. Rep. 272.

It may, however, be worth while briefly to answer the objections interposed by the claimant to the granting of this motion, other than the objection that the court is without power under the statute to grant it, which has already been answered.

[2] 1. The claimant has no standing as a bona fide purchaser of the award—even if the bona fide purchaser rule applies to a property right of the kind in question—for the claimant purchased the property and acquired whatever rights he claims to the award some months before the report of the commissioners was confirmed, and even before it was signed; but subsequent to the time when the building was destroyed by fire.

[3] 2. It is also objected that the award upon confirmation became a vested right, which cannot be destroyed by setting aside the order of confirmation. The Decatur Street Case and the Titus Street Case, above cited, fully answer this objection; for in each of those cases the right of the court to set aside an order of confirmation, where it appears that a mistake has been made, was expressly recognized, and in the latter case the court made an order directing that to be done. The only possible distinction between those cases and the case at bar is that in each of those cases the award was made to an "Unknown Owner," while in the case at bar it was made to an individual by name—not to the person who was the owner at the time the final report was signed or at the time it was confirmed, but to his predecessor in the title. In my opinion, however, an award made to an unknown owner is as much a vested right in the person who actually owns the property as is an award made to a known owner; and, if this view is right, there is no distinction between the cases cited and the case before me.

Cases such as *People ex rel. Gaslight Co. v. Common Council of Syracuse*, 78 N. Y. 56, where the condemnor seeks arbitrarily to discontinue the proceeding after the awards have become finally fixed, would seem to have no application to the present case.

[4] 3. Finally it is objected that, if the order of confirmation is set aside at all, it must be set aside in toto, and cannot be set aside as to certain parcels. That objection would seem to be supported by a decision of the Buffalo Superior Court (*Matter of Elmwood Ave.*, supra); but that case, so far as the question now under consideration is concerned, proceeded upon a misapplication of the decision of the Court of Appeals in *Matter of Flushing Ave.*, 101 N. Y. 678, 5 N. E. 561, where it was held that an order appointing commissioners of estimate could not be set aside as to some of the parties interested and left to stand as to others. But an order confirming awards for a number of separate parcels is a very different matter. The valuation of each parcel or group of parcels is virtually a distinct proceeding, and as a result it not infrequently happens that a commissioners' report will be confirmed as to some awards and sent back for rehearing as to others. In the case at bar the report can be sent back to the same commissioners or to new commissioners for a reconsideration of the award for damage parcels Nos. 31-34, without in any way affecting the other awards.

An order may therefore be presented vacating the order confirming the report of the commissioners, in so far as it confirms the award of \$3,400 for the said damage parcels, and also vacating the order directing payment of such award to Andrew Weissenberger, and providing that the report as to said damage parcels be referred to the same commissioners with directions to reconsider their award with respect to said parcels, with authority to take such additional proof as may be offered by either party, and directing them to make a supplemental report as to said parcels stating how much they allow for land, and how much, if anything, for any building thereon affected by the improvement, upon condition that the city of New York pay \$10 costs of this motion, and also the reasonable expenses of the claimant in producing proof of damage before the commissioners, to be taxed by a justice of this court, the same to be charged against any reduction in the award, and the amount of such reduction, after deducting such costs and expenses, to be distributed pro rata among those assessed for benefit, either by crediting the amounts on the assessments if unpaid, or by repayment if the assessments have been paid.

Motion granted to the extent above indicated. Settle order on notice.

(161 App. Div. 122)

AYER v. BONWIT.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. LANDLORD AND TENANT (§ 37*)—LEASE—CONSTRUCTION.

An additional liability will not be imposed on a tenant unless it is clearly within the provisions of the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 98; Dec. Dig. § 37.*]

2. LANDLORD AND TENANT (§ 37*)—LEASE—CONSTRUCTION.

The court will so construe a lease as to carry out the intent of the parties, if possible.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 98; Dec. Dig. § 37.*]

3. LANDLORD AND TENANT (§ 148*)—LEASE—CONSTRUCTION.

Where a tenant for a term of years, who has covenanted to pay all taxes so that a certain net rental shall be received by the landlord, has paid all taxes, so that the landlord has received the rental reserved without deduction, an additional liability for taxes assessed but not payable before the term expired cannot be imposed.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 520-532; Dec. Dig. § 148.*]

Dowling, J., dissenting.

Appeal from Trial Term, New York County.

Action by Charles F. Ayer against Paul J. Bonwit. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, DOWLING, and HOTCHKISS, JJ.

Fernando Solinger, of New York City, for appellant.

Alexander S. Andrews, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

INGRAHAM, P. J. On the 7th of March, 1900, Charles F. Ayer, as landlord, rented to the defendant certain real premises known as No. 20 West Twenty-Third street, in the city of New York, with the appurtenances, for the term of ten years from the 1st day of May, 1902, at the yearly rent or sum of \$20,000 for the first two years and \$20,500 for the following eight years. In said lease the defendants covenanted that "in addition to said rent they will pay all taxes, assessments and Croton water rates as may be assessed against said property so that the said rental above referred to shall yield a net rental to Charles F. Ayer." In the year 1902, the first year of the term demised to the defendant, the taxes upon this property, which had not been assessed at the time of the making of the lease, but which became payable presumably on the 1st of October, 1902, were paid by the tenant, so that the plaintiff received the net rental of \$20,000 for that year. Each succeeding year the taxes were paid when payable, down to the year 1911. So for each year the plaintiff received the stipulated rental without deduction. In the year 1912, the lease expiring on or before the 1st of May in that year, the property was assessed for taxation at \$302, which assessment was completed prior to the 1st of January, 1912. After the books, called the "Annual Record of Assessed Valuation of City Property," wherein said assessments were entered, were completed, they were open for public inspection, examination, and correction, and on objection made to this assessment the board of taxes and assessments reduced the assessed valuation of the property to \$273,000, at which amount the property was assessed for taxation for the year 1912. This amount was certified to the board of aldermen on the 1st day of March, 1912, and thereafter, and prior to the 1st day of May, 1912, an ordinance was passed by the board of aldermen ratifying and confirming the assessment and fixing the tax for the year 1912 at \$4,995.90, and the rolls were delivered to the receiver of taxes, who was required to collect from the several persons the several sums mentioned and to pay the same from time to time, when collected, to the chamberlain of the city of New York. Under the provisions of the charter (section 914), as amended by chapter 455, Laws of 1911, one-half of all taxes upon real estate were due and payable on the 1st day of May, 1912, and the remaining and final one-half were due and payable on the 1st day of November, 1912, and such taxes could not be paid before the 1st day of May, 1912. These facts as to the assessment of taxes were alleged in the complaint and admitted in the answer. Upon the trial the plaintiff introduced the lease in evidence and waived all taxes, except the proportion of the annual tax for the four months of the year 1912, when the lease was in force; that is to say, one-third of the total tax assessed for the year 1912, amounting to \$1,665.30. The defendant then introduced in evidence the lease made by the plaintiff to the Pierce Rupert Company, dated January 2, 1912, of the same premises for the term of one year, commencing on May 1, 1912. This lease required that the lessee should pay to the lessor all taxes which might be assessed and become due and payable during the term demised; said payment by the lessee to the lessor to be made as follows:

"The taxes which become a lien on May 1, 1912, shall be payable to the lessor on November 1, 1912, and the taxes which become a lien on November 1, 1912, shall be payable on the first day of each and every month commencing November 1, 1912, up to the end of the term in equal monthly payments."

This evidence was objected to by plaintiff, and was only admitted as a practical construction by the plaintiff of the obligation of the defendant as to taxes for the year 1912. By the lease between the plaintiff and the defendant, the defendant undertook to pay, in addition to the rent, "all taxes, assessments and Croton water rates as may be assessed against said property so that the said rental above referred to shall yield a net rental to Charles F. Ayer." By this agreement the defendant did not covenant to make a payment of the taxes to the plaintiff (the landlord). There was no obligation of the tenant in regard to the payment of the tax except the undertaking that he would pay and discharge any tax imposed upon the property, so that the landlord should receive the rental reserved in the lease as a net rental. If there was no tax assessed which would reduce the net rental to the landlord below the sum reserved in the lease, there would be no obligation of the tenant to make payment of the taxes for 1912 to anybody. When the lease commenced in 1902, four months of the current year had passed. No tax had been assessed for that year, but subsequently a tax was assessed payable October 1, 1902, which undoubtedly the defendant was bound to satisfy and discharge, otherwise the rent reserved for that year from May 1, 1902, to May 1, 1903, would have been reduced by the amount of the tax that would become a lien upon the premises, although, as a matter of fact, four months of the current year after which the tax was imposed had passed before the term demised had commenced. For the last year of the term, which commenced on the 1st day of May, 1911, and ended on the 1st day of May, 1912, the plaintiff had received a net rental of \$20,500, the rent reserved by the lease, so no tax was assessed for that year which reduced the rent received by plaintiff below the rent reserved by the lease. The liability of the defendant must depend upon the obligation that he assumed when he executed the lease under which he held the premises, and of course that must depend upon the construction to be given to this provision of the lease.

By the lease the defendant did not undertake to pay the taxes which should be assessed against the property during the term demised, nor did he agree to pay any particular tax which should become a lien during the term or at any other time; what the defendant agreed to do was to pay, in addition to the rent reserved, "all taxes, assessments and Croton water rates as may be assessed against said property so that the said rental above referred to shall yield a net rental to Charles F. Ayer." The cases relied upon by the court below and by the respondent upon this appeal as to when a lien for the payment of the tax is imposed do not apply. What it seems to me the parties clearly intended was that the tenant would pay any tax, assessment, or Croton water rates that became a lien upon the property, and which the landlord would be required to pay, which would reduce the rental that he would receive below the rent reserved by the lease, and it was not

important when a tax was assessed or when it became payable. What the plaintiff was entitled to was the rent reserved as a net rent during the term, and that the plaintiff has received. To impose upon the defendant the obligation to pay taxes for the year 1912 would increase the net rent that the plaintiff received above that reserved to him by the lease, which it seems to me would violate the clear intention of the parties.

[1, 2] The general principle in the construction of instruments of this character is well settled that an additional liability will not be imposed upon a tenant unless it is clearly within the provisions of the lease; but "it has been held in many cases that the court will so construe a lease as to carry out the intention of the parties, if possible." *Buchanan v. Whitman*, 151 N. Y. 253, 45 N. E. 556.

[3] Where, as in this case, the obligation of the tenant depends entirely upon a covenant that he would pay, not a particular tax or lien, but all taxes that may be assessed against the property, so that a certain net rental should be received by the landlord, and where he has paid all taxes or charges assessed against the property which insures the landlord the rental reserved without any deduction or obligation, the tenant has complied with this covenant, and an additional liability cannot be imposed.

I agree with the court below as to the other items to which the plaintiff claimed to be entitled, and, as under this view of the lease the plaintiff has received the net rental which the parties contemplated he should receive, I do not think that the plaintiff was entitled to a recovery. I think, therefore, that the motion made by the defendant at the end of the testimony to direct a verdict in favor of the defendant should have been granted. The parties stipulated that the jury be dismissed and that a verdict might be directed in the absence of a jury with like force and effect as if the jury were present. It was conceded that there was no question of fact for the jury. If my construction of this lease is correct, the defendant was entitled to the direction of a verdict, and on this appeal such a verdict should be directed in favor of the defendant.

The judgment appealed from is therefore reversed, with costs to the appellant, and judgment directed for the defendant.

McLAUGHLIN, LAUGHLIN, and HOTCHKISS, JJ., concur.
DOWLING, J., dissents.

In re FEINBLATT.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

ATTORNEY AND CLIENT (§ 44*)—DISBARMENT—GROUNDS.

Where an attorney, engaged to collect part of the proceeds of an estate belonging to nonresident infants, misappropriated the funds and tried to conceal his misappropriation by false testimony, he should be disbarred.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Application by the Bar Association to discipline Sigmund Feinblatt, an attorney. Respondent disbarred.

See, also, 158 App. Div. 927, 143 N. Y. Supp. 1117.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Einar Chrystie, of New York City, for petitioner.

INGRAHAM, P. J. The respondent was charged with misappropriating the sum of \$450 which he had collected for the inmates of an orphan asylum at Atlanta, Ga., who were legatees under the will of one Harris Levy, who died a resident of the city of New York. The respondent admits the receipt of the money. He testified that he gave it to his brother in cash to take to his clients in Georgia, and that his brother had disappeared without delivering the money to his clients. The matter was referred to an official referee, who, after careful consideration, has filed his report finding the respondent guilty as charged, and that, to try to save himself, the respondent has testified falsely as to his disposition of this money. The official referee further states that the charges set forth in the petition are sustained, and the respondent is guilty of misconduct in his office as an attorney and counsellor at law. The testimony fully justifies the referee's report.

The report is therefore approved, and the respondent is disbarred. All concur.

EPSTEIN v. HILLER et al.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. FRAUDS, STATUTE OF (§ 159*)—QUESTION FOR JURY.

Where, in an action for breach of an oral contract of employment, plaintiff in his testimony made two contradictory statements as to dates, one of which would bring the contract within the statute of frauds, the court should have submitted the case to the jury.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 378; Dec. Dig. § 159.*]

2. TRIAL (§ 165*)—MOTION TO DISMISS.

Where, in an action for breach of an oral contract of employment, plaintiff in his testimony made two contradictory statements as to dates, the court on motion to dismiss should have adopted the theory most favorable to plaintiff.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

Appeal from City Court of New York, Trial Term.

Action by Joseph Epstein against Morris Hiller and others. From a judgment for defendants, plaintiff appeals. Reversed, and new trial ordered.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Joseph Gans, of New York City, for appellant.

Samuel Fine, of New York City, for respondents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
146 N.Y.S.—20

SEABURY, J. [1, 2] Plaintiff sued for damages for a breach of a contract of employment alleged to be for a period of one year. The answer was amended so as to permit the defendant to plead the statute of frauds. The complaint alleged that the contract of employment was entered into "on or about the 26th day of June, 1913." Upon the trial the plaintiff testified that the contract was made on June 25th and that he entered immediately upon his employment. Subsequently, upon cross-examination and upon examination by the court, he testified that the contract was made on June 25th and that his employment was to commence on June 26th. The court below accepted this latter view as the plaintiff's version of the matter and dismissed the complaint on the ground that the contract proved was within the statute of frauds. As the plaintiff made two contradictory statements as to the date when the employment was to commence, there was no more reason for accepting the version adverse to the plaintiff than there was for adopting the version favorable to the plaintiff. Moreover, the rule, which requires that upon a motion to dismiss the complaint the plaintiff is entitled to have the court adopt the view most favorable to the plaintiff, should have led to a denial of the motion to dismiss the complaint. Any ambiguity which existed in the plaintiff's testimony should have been left to the jury for their determination.

Judgment reversed, and new trial ordered, with costs to the appellant to abide the event. All concur.

WILLIAMS PATENT CRUSHER & PULVERISER CO. v. LYTHER TILE CO.

(Supreme Court, Special Term, Erie County. January, 1914.)

PLEADING (§ 339*)—COUNTERCLAIM—REPLY—APPLICATION TO WITHDRAW.

Plaintiff, a foreign corporation, having designated no person in New York on whom process could be served, sued defendant in replevin, and, plaintiff having replied to a counterclaim alleging damages by reason of certain fraudulent representations, plaintiff applied to withdraw the reply and demur to the counterclaim, on the ground that the matters set forth were not available to defendant as a counterclaim in replevin. *Held*, that since the effect of granting the motion if the demurrer should be sustained on that ground would be to compel defendant to sue plaintiff on the counterclaim in Missouri concerning a transaction had in New York and growing out of representations claimed to have been made there, the application would be denied, except that plaintiff would be permitted to withdraw its reply in order to demur to the counterclaim for want of facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1033-1045; Dec. Dig. § 339.*]

Action by the Williams Patent Crusher & Pulveriser Company against the Lythe Tile Company. Motion by plaintiff for permission to withdraw reply and demur to defendant's answer. Denied.

Frank Gibbons, of Buffalo, for the motion.

Eugene Bartlett, of Buffalo, opposed.

WHEELER, J. The action is one of replevin to recover certain machinery. The defendant set up a counterclaim alleging damages by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

reason of certain alleged false representations. To this the plaintiff replied, but now asks permission to withdraw the reply and to demur to the counterclaim on two grounds: First, that the answer, wherein it attempts to set up a counterclaim, does not set forth a cause of action; second, that the matters set forth are not available to defendant as a counterclaim in an action of replevin.

On the second proposition, the case of *Van v. Madden*, 132 App. Div. 535, 116 N. Y. Supp. 1115, seems to sustain the plaintiff's contention; but the question remains whether the plaintiff should be permitted at this time to withdraw its reply and raise the question by demurrer. The defendant strenuously objects to an order permitting this to be done, and an unpleasant controversy has arisen between the attorneys as to whether certain things were said and done, which might have a bearing on the propriety of granting the plaintiff's motion. This court does not propose to determine who is right and who is wrong in their recollection of what was said and done. We think this motion should be disposed of on other grounds.

It is undisputed the plaintiff is a foreign corporation, with no designated person in this state on whom process can be served. If the plaintiff's motion is granted, and a demurrer on the second ground is interposed and sustained by the court, then the defendant will be compelled to sue the plaintiff in the courts of Missouri for the damages alleged in the counterclaim. And this, too, in a transaction had in New York, and growing out of representations claimed to have been made here. It seems to us that, as matter of public policy and a duty the state owes its own citizens in a matter of discretion, the courts of this state should not take such judicial action as will deprive its own citizens of the benefit of its own forums of justice in which to assert and try out on the merits their alleged demands against nonresident parties. For this reason, we think this court should deny the motion so far as permission is asked for leave to demur on the second ground stated.

Permission, however, is given for leave to demur on the ground that the alleged counterclaim does not set forth a cause of action.

So ordered.

ENGEL v. CITY OF NEW YORK.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

1. MUNICIPAL CORPORATIONS (§ 768*)—TORTS—DEFECTS IN STREETS—SIDEWALKS.

A city was not liable for injuries sustained from a fall caused by plaintiff's stubbing her toe at a place where there was a drop in the sidewalk, which plaintiff's witnesses estimated at 3 to 4 inches, but which other witnesses, who made actual measurements, testified was only 1½ inches, especially where it was not shown that the city had notice.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1622, 1624, 1625; Dec. Dig. § 768.*]

2. MUNICIPAL CORPORATIONS (§ 763*)—TORTS—DEFECTS IN STREETS—CARE REQUIRED IN GENERAL.

A city is required to use reasonable care to keep its streets safe, in view of the extent of territory over which such care is to be exercised; but it is not an insurer of the safety of pedestrians, and is not rendered

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

liable because the surface of the street is such that it is possible for one to stub his toe and fall.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1612–1615; Dec. Dig. § 763.*]

Guy, J., dissenting.

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Josephine Engel against the City of New York. From a judgment for plaintiff, the defendant appeals. Reversed, and complaint dismissed.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Archibald R. Watson, of New York City (Terence Farley and Clarence L. Barber, both of New York City, of counsel), for appellant.

Albert Gross, of New York City, for respondent.

SEABURY, J. [1] Plaintiff has recovered a judgment against the city of New York, predicated the charge of negligence upon the claim that the sidewalk laid in front of 146 East Seventh street dropped about 3 inches below the sidewalk laid in front of 148 East Seventh street. The plaintiff testified:

"When I came to 146 East Seventh street, my left foot caught in a bad sidewalk; one stone was higher than the other."

She testified that she fell on her hands and knees and sustained the injury of which she now complains. This is the only evidence as to how the accident happened. While the plaintiff said that her foot "caught," the testimony of all the witnesses makes it clear that there was no open space between the sidewalk laid in front of 148 and the sidewalk laid in front of 146. What happened was that the plaintiff stubbed her toe and fell.

The witnesses called by the plaintiff estimated the difference in grade at from 3 to 4 inches; but two witnesses, who made actual measurements, testified that the difference was only 1½ inches. There is no evidence that the city had notice of the difference in grade complained of, and, even if it had, I do not think that under the circumstances disclosed any liability attached to the city because of this accident.

[2] Without attempting to lay down any hard and fast rule applicable under all circumstances, I do not think that negligence can be predicated upon the facts here proven. Reasonable care to keep the streets safe, in view of the extent of territory over which such care is to be exercised, is the measure of duty which the law requires of the city. It is not an insurer of the safety of all pedestrians, and is not rendered liable because the surface of the street is such that it is possible for one to stub his toe and fall. No liability on the part of the city was proved.

The judgment should be reversed, with costs, and the complaint dismissed, with costs.

DELANY, J., concurs. GUY, J., dissents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SALINGER et al. v. STERN et al.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

SALES (§ 88*)—DELAY—DELIVERY—JURY QUESTION.

Where a contract for the sale of goods, to be imported by the seller, provided that all orders were accepted subject to a reasonable delay in delivery, and that samples should be delivered between July 15th and August 1st, but the samples were not delivered until August 20th, and the goods were shipped to the buyer as soon as they were received from abroad, whether there was an unreasonable delay in shipment and delivery to the buyer was a jury question.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 248-250; Dec. Dig. § 88.*]

Appeal from City Court of New York, Trial Term.

Action by Berthold Salinger and another against S. Sidney Stern and another. From a judgment for plaintiffs and an order denying a new trial, defendants appeal. Reversed, and new trial ordered.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Strasbourger, Eschwege & Schallek of New York City (Samuel Strasbourger and Max L. Schallek, both of New York City, of counsel), for appellants.

William Kaufman, of New York City, for respondents.

SEABURY, J. This is an action for damages for the alleged failure of the defendants to deliver goods which it is claimed they agreed to deliver upon specified dates. Plaintiffs placed with the defendants a written order for merchandise to be delivered to them upon specified dates. The order was accepted by the defendants. The order contains the following provision: "All orders are accepted subject to a reasonable delay in delivery." Sample quantities of the goods were, under the terms of the order to be delivered between July 15 and August 1, 1913. These sample quantities were not delivered up to August 20, 1913, upon which date the present action was commenced.

The defendants showed upon the trial that the goods were imported from abroad, and that the shipment of the goods to them was delayed, and that as soon as they received them they shipped them to the plaintiffs. The learned court below held that as a matter of law the defendants had breached their contract, and directed a verdict in favor of the plaintiffs.

The terms of the order seem to have contemplated the possibility of delay incident to the importation of the goods from a foreign country, and whether the delay was unreasonable under all the circumstances of the case was a question of fact for the jury to determine. In view of the fact that the action was commenced within 20 days after the time specified for delivery and the clause in the order that "all orders are accepted subject to reasonable delay in delivery," the court would not as a matter of law determine that the delivery had been unreasonably delayed. If the contract itself had not provided that the delivery

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

should be "subject to a reasonable delay," a different situation would be presented. Whether the delay which occurred was reasonable or unreasonable was clearly for the jury. *Eppens, Smith & Wiemann Co. v. Littlejohn*, 27 App. Div. 22, 50 N. Y. Supp. 251, affirmed 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811.

Judgment reversed, and new trial ordered, with costs to the appellant to abide the event. All concur.

(161 App. Div. 185)

BEINKAFNER et al. v. FENDERSON-BALDWIN LUMBER CO.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

EVIDENCE (§ 594*)—WEIGHT—UNCONTRADICTIONED TESTIMONY.

Where, in an action to recover a balance due for sawing logs at a specified price per thousand, plaintiffs swore that they sawed 82,907 feet and received on account \$282.19, leaving a balance of \$48.99, and such evidence was uncontradicted, defendant was not entitled to a verdict because plaintiffs were illiterate and were unable to keep an account of the number sawed, but kept track of each board, with its width, length, and thickness, made a memorandum thereof with the number of pieces and the dimensions, etc., and later, with the aid of a lumberman's manual, computed the quantity sawed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

Appeal from Albany County Court.

Action by Joseph Beinkafner and another, doing business as Beinkafner Bros., against the Fenderson-Baldwin Lumber Company. From a judgment of the Albany county court affirming a justice's judgment in favor of defendant, plaintiffs appeal. Reversed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Visscher, Whalen & Austin, of Albany (J. Harris Loucks, of Albany, of counsel), for appellants.

William A. Glenn, of Albany, for respondent.

JOHN M. KELLOGG, J. The plaintiffs agreed to saw with their mill, and did saw for the defendant, the lumber on the O'Neil lot at \$4 per thousand. They swear that they sawed 82,907 feet and have received on account \$282.19, leaving a balance due of \$48.99. Neither of them could read or write, but when the logs were sawed they kept track of each board, with its width, length, and thickness, and made a memorandum thereof at the time, stating the number of pieces and the dimensions, and later, with the aid of the lumberman's manual, computed the amount and swore to the amount sawed as above stated.

The defendant introduced no evidence. The justice rendered an opinion as follows:

"Taking into consideration the manner of keeping tally, and that the plaintiffs are not competent to keep an account that could be sworn to with a degree of certainty, I decide that there is no cause of action, and assess costs on the plaintiffs."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiffs were running a mill for sawing lumber. The fact that they could not read or write does not impeach their testimony or throw a doubt upon the memorandums produced by them. If the defendant had offered evidence showing that they had not sawed the amount claimed, the manner in which they kept the account would have been a fair subject for consideration. But, their evidence being uncontradicted, the determination of the justice was clearly erroneous.

The judgments of the county court and of the justice court are reversed, upon the law and the facts, with costs to the appellants in all the courts, and a new trial directed before a justice of the peace of the same county, to be designated in the order, which will fix the time and place for such trial. The court reverses the findings of fact that the plaintiffs did not saw the lumber charged, and that they have not proven the performance of the service and the value thereof. All concur.

FEDERAL SIGN SYSTEM (ELECTRIC) v. PESCIA.

(Supreme Court, Appellate Term, First Department. March 5, 1914.)

JUDGMENT (§ 90*)—VACATION—RIGHT TO VACATE.

After issue joined in an action in the Municipal Court, the parties entered into an agreement stipulating that defendant's answer should be withdrawn and that plaintiff should have judgment for the amount claimed, but that no execution should issue for a certain time. Judgment was entered in accordance with the stipulation, and, after the time within which execution should not be issued had expired, defendant moved for a vacation of the judgment on the ground that his attorney had signed the stipulation under the impression that the amount claimed was very much less than the amount of the judgment. *Held*, that as the amount claimed clearly appeared from the complaint and summons, and as Municipal Court Act (Laws 1902, c. 580) § 1, subd. 16, authorizes that tribunal to enter judgment with consent of the parties, an order vacating the judgment was improper and should be reversed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 148, 149; Dec. Dig. § 90.*]

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by the Federal Sign System (Electric) against Enrico V. Pescia. A judgment for plaintiff was vacated on defendant's motion, and plaintiff appeals. Order reversed, and judgment reinstated.

Argued February term, 1914, before SEABURY, GUY, and DELANY, JJ.

Paine & Harrison, of New York City, for appellant.

Bernard S. Deutsch, of New York City, for respondent.

GUY, J. After issue had been joined in this action, the attorneys for the respective parties entered into a written stipulation dated and signed on September 19, 1913, by the terms of which it was agreed that the answer of the defendant should be deemed withdrawn, and that the plaintiff should have judgment for the amount claimed in the complaint with costs, and that the defendant should have a stay of all

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proceedings to enforce the judgment, and that no transcript of the judgment should be docketed and no execution issued until November 15, 1913. Judgment in favor of the plaintiff was thereupon entered. On December 18, 1913, the defendant made a motion for an order "vacating and setting aside the judgment heretofore rendered in favor of the plaintiff and against the defendant and opening the default of the defendant and setting the case down for trial." This motion was granted, and from the order granting the same the plaintiff appeals.

The grounds of this motion were that the defendant's attorney had signed the stipulation "under the impression that the amount claimed by the plaintiff was only the sum of \$10.35, instead of \$441.41." How or why the defendant's attorney received such an impression is not disclosed in the moving papers. The summons claimed \$441.41, and the complaint set forth two causes of action, one in paragraph 3 claiming \$10.35, and one in paragraph 5 claiming \$431.06, and each paragraph was specifically denied by the answer. The Municipal Court Act, § 1, subd. 16, confers jurisdiction upon the Municipal Court to enter a judgment in an action upon "consent of both parties," and the judgment in the case at bar was therefore not a default judgment.

Order reversed, with costs, and judgment reinstated. All concur.

PRINTOGRAPH SALES CO. v. AMERICAN ADDRESSING & MAILING CO.
(Supreme Court, Appellate Division, First Department. February 13, 1914.)

ABATEMENT AND REVIVAL (§ 39*)—DISSOLUTION OF CORPORATION.

The dissolution of defendant corporation abates an action against it, and no proceeding can be taken in the action until it is revived, and hence an appeal from the refusal to declare the action abated and to cancel a bond given to discharge an attachment will be dismissed.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 194-204; Dec. Dig. § 39.*]

Appeal from Special Term, New York County.

Action by the Printograph Sales Company against the American Addressing & Mailing Company. From an order denying a motion to abate the action or to cancel the bond given to discharge an attachment, defendant appeals. Appeal dismissed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

E. Crosby Kindleberger, of New York City, for appellant.
David H. Bilder, of Paterson, N. J., for respondent.

PER CURIAM. The appeal is dismissed, upon the ground that the dissolution of the defendant corporation abates the action, and no proceeding can be taken in it until the action is revived.

Appeal dismissed, with \$10 costs and disbursements.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LINITZKY v. GORMAN.

(City Court of New York, Trial Term. February 18, 1914.)

1. MALICIOUS PROSECUTION (§ 26*)—ELEMENTS—MALICE.

In order to maintain an action for malicious prosecution, plaintiff must show malice by defendant.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 59; Dec. Dig. § 26.*]

2. MALICIOUS PROSECUTION (§ 27*)—"MALICE."

"Malice," as an element of malicious prosecution, may consist of personal hatred or ill will, or any improper or sinister purpose, or reckless disregard of the rights of others which is inconsistent with good faith, but the mere existence of an ulterior purpose or of personal hostility does not necessarily show malice.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 60; Dec. Dig. § 27.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4298-4304; vol. 8, pp. 7712, 7713.]

3. MALICIOUS PROSECUTION (§ 28*)—MALICE.

The "malice" necessary to maintain an action for malicious prosecution must be malice in fact, as distinguished from presumptive malice, though if the proceeding was instituted from improper or wrongful motive, it is not essential that actual ill will be shown.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 61; Dec. Dig. § 28.*]

4. MALICIOUS PROSECUTION (§ 29*)—MALICE—EVIDENCE.

Malice may be implied in an action for malicious prosecution, in that it may be inferred by the jury from circumstances, like any other fact, as by showing that defendant's conduct, considered as a whole, is inconsistent with proper motive.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 62; Dec. Dig. § 29.*]

5. MALICIOUS PROSECUTION (§ 15*)—WANT OF PROBABLE CAUSE.

Want of probable cause, as well as malice, is essential in order to maintain an action for malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 18; Dec. Dig. § 15.*]

6. MALICIOUS PROSECUTION (§ 56*)—BURDEN OF PROOF—WANT OF PROBABLE CAUSE.

The burden is on plaintiff, in an action for malicious prosecution, to prove want of probable cause, as well as malice by defendant.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 112-116; Dec. Dig. § 56.*]

7. MALICIOUS PROSECUTION (§ 32*)—WANT OF PROBABLE CAUSE—EVIDENCE—MALICE.

Proof of want of probable cause is not, as a matter of law, proof of malice in an action for malicious prosecution, though ordinarily malice may be inferred as a fact from proof of want of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 67, 68; Dec. Dig. § 32.*]

8. MALICIOUS PROSECUTION (§ 71*)—JURY QUESTION—MALICE.

The existence of malice is exclusively a question for the jury in an action for malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 160-167; Dec. Dig. § 71.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

9. MALICIOUS PROSECUTION (§ 24*)—FAVORABLE TERMINATION OF ACTION.

If a proceeding brought against defendant before a magistrate terminates in his favor, he may maintain an action for malicious prosecution, and the termination of a criminal proceeding in defendant's favor, though reversed by a higher tribunal, is ground for an action for malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 49-55; Dec. Dig. § 24.*]

10. MALICIOUS PROSECUTION (§ 67*)—DAMAGES—ELEMENTS.

Plaintiff, in malicious prosecution, is entitled to adequate compensation for all the elements of the injury suffered, including loss of time, peril to life and liberty, injury to reputation, character, and health, mental suffering, general impairment of social and business standing, actual injury to property or credit, and decrease in earning capacity.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 155, 156; Dec. Dig. § 67.*]

11. MALICIOUS PROSECUTION (§ 66*)—DAMAGES—PROXIMATE CAUSE.

The damages recovered, in an action for malicious prosecution, must be the direct and proximate result of the former proceeding.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 154; Dec. Dig. § 66.*]

12. MALICIOUS PROSECUTION (§ 69*)—DAMAGES—INADEQUACY.

Plaintiff, while riding on a street car, was accused by defendant of trying to pick his pocket, though defendant only had 30 or 40 cents in his pocket at the time, and defendant had plaintiff arrested under a charge of "grand larceny," and plaintiff was taken five or six blocks through the streets by a policeman, placed in a patrol wagon, and taken to police headquarters some half mile away, where his finger prints were taken, from which place he was taken to the police court and placed in the jail about four hours, and was required to furnish bail and be examined, after which he was discharged. *Held*, that plaintiff was entitled to compensatory damages, so that a verdict of six cents was inadequate; all of the circumstances being recoverable elements of damage.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 158; Dec. Dig. § 69.*]

13. MALICIOUS PROSECUTION (§ 31*)—"MALICE."

Where defendant knew when he made a charge of grand larceny against plaintiff that such a crime had not been committed because defendant's pocket only contained 30 or 40 cents when plaintiff attempted to pick it according to defendant, the making of the complaint charging grand larceny of itself constituted "malice" by defendant.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 64-66; Dec. Dig. § 31.*]

14. NEW TRIAL (§ 81*)—FAILURE TO REQUEST INSTRUCTIONS.

Where plaintiff in a malicious prosecution did not request a charge that, under the uncontroverted evidence, he was entitled to substantial damages, the court cannot on motion, set aside a verdict for him for nominal damages, though he was entitled, as a matter of law, to substantial damages.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 131; Dec. Dig. § 81.*]

Action by Barnet Linitzky against John J. Gorman. On motion by plaintiff to set aside a verdict for nominal damages. Motion denied.

Abraham Mann, of New York City, for plaintiff.

D. W. Steele, Jr., of New York City (Joseph P. Shelby, of New York City, of counsel), for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

FINELITE, J. This is a motion made by the plaintiff to set aside a verdict rendered by the jury in his favor for the sum of six cents damages. The motion is made by the plaintiff on the ground that the verdict is inadequate and the result of a compromise, that the damages awarded are clearly shown to be entirely too small to compensate him for his injury, and on the further ground that the jury in rendering their verdict wholly disregarded the law of damages as laid down by the court. The action was brought against the defendant to recover damages for malicious prosecution. Upon the trial the plaintiff proved that the defendant caused his arrest on a charge of attempted grand larceny.. The uncontradicted proof of the defendant himself is that he had in the pocket which he accused the plaintiff of trying to pick only *30 or 40 cents*. The proof also showed that the defendant signed an affidavit before the magistrate at the police court, in which he accused the plaintiff of the crime of attempted grand larceny, on which charge the plaintiff was held by the magistrate in the sum of \$1,500 bail, which was furnished by the plaintiff, and after which he was temporarily released until the day of examination; that on the day he was held by the magistrate his friends were unable to obtain bail for at least three or four hours; that during the meantime he was placed in a cell at the Tombs Prison with derelicts, and was obliged to remain there until he was released on bail; that an examination thereafter took place, at which the defendant reiterated that the plaintiff attempted to pick his pocket and deprive him of the contents thereof; that after examination of the defendant by the magistrate, as well as by the attorney who represented the plaintiff, it was stated that all said defendant had in his possession was the 30 or 40 cents before mentioned. The facts causing the plaintiff's arrest were as follows: The plaintiff and defendant were riding downtown in a subway train. The plaintiff was in the habit of chewing gum, and was sitting in the center seat of one of the cars; he removed the wrapper from a package of gum and placed his hand behind the back of the complainant, a partial partition separating them, with the intention of dropping the wrapper, and that at no time did the plaintiff's hand come in contact with the person or pocket of the complainant. The complainant swore before the magistrate that the plaintiff's hand did come in contact with his person, and that he grabbed his hand at the pocket of his coat; that he thereupon charged the plaintiff with attempting to rob him, which he denied; that when they reached the station at Fourteenth street the plaintiff was about to leave said car, but was detained by the complainant, who thereupon asked a guard to call a policeman and cause the plaintiff's arrest, which the guard refused to do; that the plaintiff was thereupon deprived of his liberty until he reached the station at the Brooklyn Bridge; that as they ascended from the subway to the street level a friend of the complainant approached, whereupon the complainant stated, "What do you think of this man trying to pick my pocket?"; that thereupon complainant's friend stated that he looked as though he was a bad one, and that he ought to cause his arrest; that the friend thereupon called a policeman, and after a statement by the complainant the plaintiff was placed under arrest and marched

through the public thoroughfares from the Brooklyn Bridge terminal on Park row, in the city of New York, down to the Oak Street Police Station, a distance of five or six blocks; that information was there demanded of him in reference to his pedigree, and that after his statement was made he was placed in a patrol wagon with the complainant, the friend of the complainant, and in the custody of the officer who arrested him; that he was taken to police headquarters, where he was subjected to the Bertillon system and his finger prints taken; that he was taken from there in the custody of said officer, and with the complainant and his friend to the Tombs Police Court, and after remaining there for a period of time, the magistrate on hearing the complainant caused the latter to make an affidavit charging the plaintiff with grand larceny, and that an examination was afterwards had, which resulted in the plaintiff's discharge. The question of the charge made by the complainant, and the humiliation suffered by the plaintiff before the magistrate, was sufficient for the jury to say was the act of the complainant done maliciously and without probable cause. This question was squarely submitted to the jury upon the law as laid down by the court, to which no exception was taken. The verdict of the jury in nominal damages as found by them, the plaintiff contends, was inadequate for the arrest and humiliation that he was compelled to suffer by reason of the acts of the defendant herein, and he therefore claims that the verdict should be set aside and a new trial granted.

[1] An essential element in a cause of action in malicious prosecution cannot be made out unless malice on the part of the responsible cause of the original proceeding, who is defendant in malicious prosecution, is affirmatively shown by plaintiff. To constitute malice there must be *malus animus*, denoting that the party who instituted the original proceeding was actuated by wrong motives. And it is held that no distinction exists in this respect between an action for instituting a civil suit and an action for instituting a criminal prosecution.

[2] The rule is well settled that malice may consist of any personal hatred or ill will, any improper or sinister purpose, or any reckless disregard of the rights of others which is inconsistent with good faith or the mere purpose to further the ends of justice. Indeed the broad rule that whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party is in legal contemplation malicious, has been applied to actions for malicious prosecution. But an unlawful act is not necessarily a malicious act. The mere existence of an ulterior purpose or personal anger and hostility towards the person proceeded against is not always inconsistent with good faith in bringing the proceedings, and does not necessarily create liability therefor.

[3] Malice necessary to sustain an action for malicious prosecution may be expressed, actual, or, as it is frequently called, malice in fact, resulting in intentional wrong. Indeed, malice in fact, or actual or expressed malice, as distinguished from malice in law—such, for instance, as the law presumes in actions for libel or slander—is essential to the maintenance of an action for malicious prosecution; it is a fact to be found by the jury, and not a fact to be established by legal presumption. However, the term "legal malice" is sometimes used with

reference to actions for malicious prosecutions, not as being synonymous with malice in law, as referred to above, but to distinguish malice in its enlarged legal sense from malice in its more restricted popular sense, and in this sense it is said that legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or corrupt design be shown. This enlarged conception of malice is, however, classified by other authorities as malice in fact.

[4] Moreover, malice may be implied in the sense that it may be inferred by the jury like any other fact from circumstances, and need not be proved by direct evidence. Thus it may be proved by defendant's conduct which, considered as a whole, is inconsistent with proper motives. So it is held that malice may be presumed, not only from the total absence of probable cause, but also from gross and culpable negligence in omitting to make suitable and reasonable inquiries. *Thorp v. Carvalho*, 14 Misc. Rep. 554, 36 N. Y. Supp. 1. On the other hand, it is held that while to accuse and prosecute a person for crime without probable cause is matter of such serious consequences that malice may be inferred therefrom, but not necessarily so; the rule is otherwise with reference to an ordinary act of negligence, and unless the injury complained of was intentional, or so reckless or wanton as to indicate bad faith, malice is not to be inferred therefrom. [5, 6] Malice and want of probable cause are both essential and distinct ingredients of a cause of action in malicious prosecution, and the burden is upon the plaintiff to allege and prove it. *Schultz v. Greenwood Cemetery*, 190 N. Y. 276, 278, 83 N. E. 41, and cases cited.

[7] It has been held that by proof of circumstances which establish want of probable cause a prima facie case of malice is made out, and that the burden of proof is on defendant to disprove it. But the more general opinion is that neither one is dependent on nor inferred from the other as a matter of law, and that from the circumstances establishing want of probable cause the jury may, and as a matter of fact ordinarily does, infer malice, but is nevertheless not necessarily required to draw inference. *Owens v. New Rochelle Coal & Lumber Co.*, 38 App. Div. 53, 56, 55 N. Y. Supp. 913; *Siefke v. Siefke*, 6 App. Div. 472, 477, 478, 39 N. Y. Supp. 601; s. c., 36 App. Div. 632, 55 N. Y. Supp. 1148, affirmed 162 N. Y. 656, 57 N. E. 1124. [8] Malice is a question exclusively for the jury. *Scott v. Dennett Co.*, 51 App. Div. at page 326, 64 N. Y. Supp. 1016; *McCarthy v. Weir*, 113 App. Div. 435, 99 N. Y. Supp. 372. [9] The proceeding before the magistrate, having terminated in favor of the plaintiff, gave the plaintiff a right to a cause of action (25 Cyc. p. 50; *Rosenkranz v. Hass*, 1 Misc. Rep. 229, 20 N. Y. Supp. 880), although the termination of a criminal proceeding in plaintiff's favor, reversed by a higher tribunal, is nevertheless ground for an action for malicious prosecution (*Francisco v. Schmeelk*, 156 App. Div. 335, 141 N. Y. Supp. 402, 404).

[10] The damages awarded to the plaintiff are, in the mind of the court, inadequate. The plaintiff, as injured, is entitled to adequate compensation covering all the elements of the particular injury. Such elements of damage include loss of time, peril to life and liberty, in-

jury to fame, reputation, character and health, mental suffering general impairment of social and mercantile standing, actual loss or injury to property, interest, and credit, decrease in earning capacity, and all losses sustained in business.

[11] Such damages must be direct, natural, and proximate results of the former suit. Add. Torts (7th Ed.) 230; Newell, Mal. Pros., § 492; Ball v. Harrigan, 19 N. Y. Supp. 913; Strang v. Whitehead, 12 Wend. 64; Thompson v. Lumley, 7 Daly, 74; Williams v. Garrett, 12 How. Prac. 456; Scott v. Dennett, 51 App. Div. 321;¹ Voltz v. Blackmar, 64 N. Y. 440; Craven v. Bloomingdale, 171 N. Y. 439, 64 N. E. 169; Thorp v. Carvalho, 14 Misc. Rep. 558, 36 N. Y. Supp. 1.

[12] From the elements stated damages flow. The plaintiff proved the restraint at the Fourteenth Street Station by the defendant herein; the arrest at the Brooklyn Bridge Station; his being taken through the public thoroughfares to the Oak Street Station, a matter of five or six blocks; that he was then placed in a patrol wagon and carried to police headquarters, a distance of half a mile, where his finger prints were taken; that he was taken from there to the Tombs Police Court, where he was placed in a cell for about four hours; that he was obliged to furnish bail and then attend an examination on the charge made against him—all of which are elements of damage (Rown v. Christopher & 10th St. R. R., 34 Hun, 472-475); and the jury by awarding a verdict of six cents did not find a sum sufficient to compensate the plaintiff for the humiliation and suffering that he endured.

[13] The plaintiff was entitled to at least compensatory damages for the suffering and humiliation as aforesaid, but the jury, believing that the plaintiff would be amply compensated by a verdict in his favor, found for him for six cents. The charge lodged against the plaintiff by the complainant was done maliciously and without probable cause. The complainant knew at the time the charge was being pressed against the plaintiff that all he had in his possession was 30 or 40 cents, and that no part of said money had been extracted from his pocket; that he had said sum in his pocket during the period of time that he was at the police station, at police headquarters and at the Police Court. He knew at the time that he was pressing the charge against the plaintiff for grand larceny that no such crime had been committed. Therefore it was malice in itself to make such a complaint. The magistrate, in justice to the parties herein, considered that the charge made against the plaintiff was false and untrue; that it was not substantiated by any evidence sufficient to enable him to hold the plaintiff, and he thereupon discharged him from custody. The defendant contends that he cannot be held liable for malicious prosecution, and fortifies himself with a decision by Lord Chief Justice Isaacs, reported in the Law Journal (London) December 13, 1913, and quoted on the editorial page (1580), of the New York Law Journal of December 30, 1913, wherein his lordship said:

"Actions for malicious prosecution and for false imprisonment, though somewhat analogous and sometimes confounded, are perfectly distinct, and a private prosecutor is often liable for the one cause of complaint when he is not

¹ 64 N. Y. Supp. 1016.

for the other. The distinction between the two is sharply brought out in the recent case of *Walters v. W. H. Smith & Son*, in which the Lord Chief Justice delivered a considered judgment, his first, last week (December 3), after hearing arguments on the legal points involved. The defendants—the well-known book selling agents—having suffered repeated losses from one of their book stalls, had given the plaintiff, who was an assistant at it, in charge for the theft of a particular book which was found to be missing, but had not in fact been stolen. On the plaintiff bringing his action for damages for false imprisonment and malicious prosecution, the jury found: (1) That the defendants had taken no reasonable care to inform themselves of the true facts; (2) that they honestly believed that the defendant had stolen the book; (3) that they reasonably believed that the plaintiff had stolen moneys and stock other than the particular book; and (4) that they were not actuated by malice in instituting the proceedings. The judge ruled that there was no absence of reasonable and probable cause for the prosecution, and on these findings the plaintiff failed upon the claim for malicious prosecution. But the claim for false imprisonment remained, and it was urged for the plaintiff that, as it turned out that no felony had in fact been committed in respect of the particular book on which the charge was made, there was no defense to disclaim. Now, the gist of an action for false imprisonment is that a trespass has been committed by one man against the person of another by arresting and detaining him without legal justification, and the defendants contended that all they need establish as legal justification for the imprisonment was: (a) That an actual felony or felonies had been committed; and (b) that they had reasonable and probable cause for suspecting the plaintiff of such felony or felonies. In other words, it was argued that it was not essential to the defense to prove that the felony for which the plaintiff was arrested had in fact been committed. That contention, the Lord Chief Justice, after an elaborate review of the authorities rejected, holding that it was contrary to the common law that a private person could justify his action in causing the arrest of another on suspicion, without being able to prove that a felony had actually been committed, and that the felony must be that for which the arrest was made. This has, it is true, never been expressly decided before, but the classical authorities (*Hawkins' Pleas of the Crown* and *Hale's Pleas of the Crown*) show that this has always been the accepted view, viz., that to justify an arrest the private prosecutor must show that the very same crime for which he made the arrest was actually committed. To hold otherwise now would, as Mr. Justice Byles said in one of the leading cases on the subject, be 'disturbing foundations,' and the Lord Chief Justice was conservative enough in a case involving the liberty of the subject not to find lawful excuse where the very basis had failed upon which any such defense must rest. This first reserved judgment of his is a model of actual reasoning and will long be cited as a statement of the whole law on the subject. * * * The defendant now attempts to protect and shield himself behind the act of the magistrate, and claims it was not he that lodged the complaint against the plaintiff, but the magistrate himself; that by directing him to make an affidavit and swear to the same it was the magistrate's act and not an act of his own, and fortifies himself as stated in said editorial, and it seems to be good law that "it would seem proper in false imprisonment, as well as malicious prosecution, where a prosecuting witness merely states facts truthfully to a public prosecutor or a magistrate, to exonerate the witness for any action which the official bases upon the information conveyed to him, or for the legal form and complexion which the official on his own responsibility places upon the transaction complained of. * * *

In *Nowak v. Waller*, in the General Term of the New York Supreme Court, Second Department (56 Hun, 647, 10 N. Y. Supp. 199) it being held that:

"One who, without malice or bad faith, makes a statement before a magistrate of what he regards as constituting a criminal charge against plaintiff, but does not ask that a warrant issue, or take any part in its service, is not

liable to action for false imprisonment on the consequent arrest of plaintiff, though such arrest is not warranted by law or the facts of the case."

[14] But in the case at bar the defendant knew, or should have known, that the charge of grand larceny pressed against the plaintiff herein before the magistrate, when he had but *40 cents in his pocket*, which he charged that the plaintiff attempted to steal, was made with the intent to do wrong to the plaintiff. This in itself is sufficient to convince the court that it was maliciously intended and without want of probable cause. Therefore the essential elements in a case for malicious prosecution have been shown by the evidence, and the court would, without hesitancy, set aside the verdict of the jury for a nominal sum found, but unfortunately there is an objection which prevents the court from so doing, and that is that the plaintiff should have asked the court to charge that the uncontroverted evidence was that the damages that the plaintiff had sustained were substantial and not nominal, which the court would have done, and charged the jury that if they believed the facts in the case, and that the charge lodged against the plaintiff before the magistrate was done maliciously and without want of probable cause, they should have awarded the plaintiff substantial damages. But the plaintiff failing to request the court to charge, therefore the question of damages was left to the jury for their determination; the court is not without power to set aside the verdict or grant a new trial herein on the question of damages as found by the jury. *Toomey v. D., L. & W. R. R.*, 4 Misc. Rep. p. 392, at page 395, 24 N. Y. Supp. 108; *Field, Dam.*, § 687; 3 *Suth. Dam.*, § 703. And as the court has said in the *Toomey Case*, taking an elderly man into custody and marching him through a crowded thoroughfare in charge of an officer, depriving him of his liberty, away from friends and facilities for bail, putting him on trial, causing fear and suspense, are acts sufficient to call for *substantial* rather than the mere *nominal damages* sometimes awarded for a mere technical trespass or wrongdoing.

For the failure to request the court to charge as above stated, the motion for a new trial must therefore be denied. Settle order on one day's notice.

(161 App. Div. 381)

LASHER v. S. BOLTON'S SONS.

(Supreme Court, Appellate Division, Third Department. March 13, 1914.)

DAMAGES (§ 206*)—EXAMINATION BEFORE TRIAL—X-RAY PHOTOGRAPH.

The examination of a witness before trial is purely statutory, and the statute authorizing the physical examination of a party to an action does not authorize the taking of photographs or X-ray pictures of any portion of the party's anatomy, especially where the party has already submitted to a physical examination for defendant's benefit.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 531; Dec. Dig. § 206.*]

Kellogg and Howard, JJ., dissenting.

Appeal from Trial Term, Rensselaer County.

Action by Bernice L. B. Lasher, an infant, by Chesley A. Lasher, her guardian at litem, against S. Bolton's Sons. From an order directing plaintiff, a female infant, to submit to the taking of an X-ray photograph of her right foot, she appeals. Reversed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

E. Deane Vincent and John B. Holmes, both of Troy, for appellant. Thomas S. Fagan, of Troy, for respondent.

WOODWARD, J. This action was brought to recover damages for injuries alleged to have been sustained to the plaintiff's right foot through the negligence of the defendant; it being alleged that the latter ran over the plaintiff's right foot with a heavy beer wagon, crushing the bones, etc. The plaintiff, through her attorney, consented that a physician, James T. McKenna, might make a physical examination of the foot in behalf of the defendant, and such examination appears to have been made on the 16th day of May, 1913. After the case was noticed for trial, and upon being reached on the calendar, an order was granted directing the plaintiff to show cause, on the 29th day of September, 1913, why the plaintiff should not submit to have an X-ray picture taken of her right foot, at the request of defendant, by a physician to be named, and such picture taken at one of the hospitals in the city of Troy, N. Y. Upon the return of the order to show cause, the learned court at Trial Term granted an order allowing defendant's motion. From this order the plaintiff appeals.

We are clearly of the opinion that there is no foundation in law for this order. The examination of witnesses before trial is purely statutory, and authority for a physical examination of a party to an action does not include authority to take photographs or X-ray pictures of the party, and this is specially true where the defendant has already, by consent of the plaintiff, had the advantage of a physical examination. The general purpose of the statute was to change the rule of the common law (*Lyon v. Manhattan R. Co.*, 142 N. Y. 298, 302, 37 N. E. 113, 25 L. R. A. 402), and under well-established rules the authority is not to be extended beyond the clearly expressed intention of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 146 N.Y.S.—21

statute, and the statute expressly provides that, in the event that the party to be examined is a female, she shall be entitled to have such examination before physicians or surgeons of her own sex, and this rule is not limited to adult females but applies to all females. The order here under consideration simply directs a particular physician, a man, to take an X-ray picture of the plaintiff's right foot, though it appears from the record that the physician is not an X-ray operator, and the order itself seems to contemplate that it shall be actually taken by some other person, for it is to be done under the direction of this physician, who is not authorized under the rules of practice to act as a referee (rule 79, General Rules of Practice), and who has, according to the language of the order, "already made a physical examination of the infant plaintiff for and on behalf of the defendant."

We are unable to discover that the fact that the plaintiff has had an X-ray picture taken of the right foot has anything to do with the question of the rights of the defendant; she has the burden of proving her case by a fair preponderance of evidence. She is bound to show the injury to her foot, and she has the right to introduce any competent evidence of the injury, but that does not give the defendant a right to go farther in a personal examination of the plaintiff than the statute clearly provides, and it must be assumed that when the plaintiff was examined, by consent, in May, the examination went as far as the defendant was entitled to go. Having completed that examination, and the party who made the same being still alive, no good reason suggests itself why the female plaintiff should be called upon to appear before the defendant's physician, not for examination, but for the purpose of taking a picture which he may examine.

There is no inherent right in the court to compel a physical examination of a plaintiff. Without the statute there would be no such right, and the fact that the plaintiff is an infant does not enlarge the powers of the court nor permit it to overlook the rules under which the right is given.

The order appealed from should be reversed, with costs. All concur, except KELLOGG and HOWARD, JJ., dissenting.

(83 Misc. Rep. 529)

NEW YORK CENT. & H. R. R. CO. v. GENERAL ELECTRIC CO.

(Supreme Court, Trial Term, Schenectady County. January, 1914.)

1. CARRIERS (§ 35*)—DISCRIMINATION—CONTRACT TO PAY SHIPPER FOR SERVICES—VALIDITY.

A carrier's contract to pay a shipper 20 cents per ton for "spotting" cars on the shipper's tracks in its own yards, being a contract for services constituting no part of the transportation and not part of the service covered by the lawful published freight rate, was in effect a contract to pay an unlawful rebate, and hence invalid under the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94; Dec. Dig. § 35.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CARRIERS (§ 30*)—DISCRIMINATION IN SHIPMENT CHARGES—TERMINAL CHARGES—PUBLICATION.

Under Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]), as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1292), providing that terminal charges shall be stated in the published schedules, a shipper's charge against a carrier for "spotting" cars on the shipper's tracks in its own yards could not be collected as a terminal charge, where it had never been published as such.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. § 30.*]

3. CARRIERS (§ 30*)—DISCRIMINATION IN SHIPMENT CHARGES—"TERMINAL CHARGES."

As used in the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]), as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1292), providing that the published schedules shall state separately all "terminal charges," the words quoted mean a separate rate for a service at a terminal, not always rendered in transportation from place to place, for a privilege or facility not furnished to all shippers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. § 30.*]

4. CARRIERS (§ 32*)—DISCRIMINATION IN SHIPMENT CHARGES—"CONNECTED WITH."

As used in the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1911, p. 1301), providing that a shipper rendering service "connected with" the transportation may be paid therefor by the carrier, the phrase quoted is a synonym of "a part of it"; it does not mean something in addition to transportation that touches or is attached to transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1434; vol. 8, p. 7612.]

5. RAILROADS (§ 216*)—PRIVATE SIDING—RIGHT TO DISCONTINUE.

A contract under which a private siding has been connected with the main line of a railroad, no time being fixed for its continuance, will not be permanently enforced, but is terminable at the carrier's election when the safety or the welfare of the public demands.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 713; Dec. Dig. § 216.*]

6. JUDGMENT (§ 641*)—DECISION OF INTERSTATE COMMERCE COMMISSION—CONCLUSIVENESS.

Where a carrier refused to comply with its contract to pay a shipper 20 cents per ton for "spotting" cars on the shipper's tracks in its own yard, and the shipper filed complaint with the Interstate Commerce Commission under Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1911, p. 1301), authorizing the Commission to fix charges to be paid by a carrier for services rendered, which complaint the carrier answered, the Commission's decision against the shipper, not having been reviewed or modified, was conclusive in a subsequent action by the carrier against the shipper wherein the shipper set up a counterclaim for services in "spotting" cars.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1155; Dec. Dig. § 641.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by the New York Central & Hudson River Railroad Company against the General Electric Company, for balance due for freight. Judgment for plaintiff.

Lewis E. Carr, of Albany, for plaintiff.

R. D. Moot, of Schenectady (Adelbert Moot, of Buffalo, of counsel), for defendant.

VAN KIRK, J. This action is brought to recover from defendant a balance of \$618.53 due for freight. This cause of action is admitted. The defendant sets forth a counterclaim to recover 20 cents per ton under a contract made in 1894, modified in 1903, by which it was in substance agreed that the plaintiff should pay to the defendant 20 cents per ton upon all in and out freight (certain commodities excepted) for services rendered by it in "spotting" cars on its tracks in its yards, which services defendant claims are a part of the transportation service covered by the published freight rates. The sole issue is upon this counterclaim.

There is no dispute as to the facts of the case. The facts are stated in the findings. An outline of these facts is set forth in *General Electric Co. v. New York Central & Hudson River R. R. Co.*, 14 Interst. Com. Com'n R. 239. I shall make but a brief reference to the facts. In 1886 the business now belonging to the defendant was moved to Schenectady and used about eleven acres of land and two factory buildings. For a time thereafter freights less than car load lots were delivered at the plaintiff's freight house and carted to and from the defendant's plant; later ferry cars were used for such freight. The Delaware & Hudson Company had a switch track running into the yard and car load freights were delivered over this track to the two said buildings. Freights coming over this plaintiff's line were delivered through the Delaware & Hudson Company. In 1891 the defendant purchased a switching locomotive. With this was done part of the work in moving freight in and out without compensation. In 1894 the contract on which this counterclaim is based was made, and the parties acted thereunder until 1906, during which time defendant moved all the cars in its yards to and from the "storage and delivery tracks." In 1900 this defendant purchased other locomotives, and from time to time its plant has been extended until to-day within its fenced yard it includes about 150 acres of land and many buildings, and has constructed and is using about 12 miles of standard gauge track and 7 miles of narrow gauge track. These tracks make a network throughout the plant and yard, and over them the defendant, not only transfers materials and partly manufactured products from shop to shop, but also conveys the car loads of in and out freight to and from the storage and delivery tracks. The present practice is briefly as follows: Within the yard of the defendant and adjoining the lands and tracks of the plaintiff, the defendant has constructed and owns "storage and delivery tracks," so called. The plaintiff makes up in its yards a train of in-going freight and delivers this train upon those storage and delivery tracks. It also takes from the storage and delivery tracks such cars, loaded or empty, as are to be taken out. The

defendant company receives the cars upon the storage and delivery tracks, breaks the seals to inspect or determine the character of the freight contained in a car, marks upon the cars its destination in the yard, then takes, with its own motors, the car to the scales for weighing, and then to the shop or platform for unloading. Being unloaded, the car, if suitable for outgoing freight, is placed for reloading, or to await reloading. Being reloaded, or being a car which is not suited for any out-going freight, the car is taken again to the scales, weighed, and returned to the storage and delivery tracks. The defendant claims that it is entitled from plaintiff to one movement, in and out (to the unloading and from the loading platforms), in addition to the placing of the cars upon, and taking them from, these storage and delivery tracks; that the defendant performs this movement with its own motors, and the 20 cents per ton is in payment for that service; that the same is a reasonable charge therefor. It urges that the plaintiff spots cars for other patrons and that it is entitled to have cars spotted for it (meaning said one movement in and out). Under the contract and for such service, from 1894 to 1906, the plaintiff has paid to the defendant many thousands of dollars. There are of in and out freight, at the present time, about 100 cars per day each.

In or about 1906 this plaintiff and the Delaware & Hudson Company were indicted in the federal courts for having made such payments, which it was alleged were unlawful rebates. At each of the two or three trials of the indictments the juries disagreed. The indictments are now dismissed. The defendant has continued to perform the services, but since the indictment the plaintiff has refused to make payments under the said contract until such time as it should be determined that it could lawfully do so.

The contract is valid between the parties and at common law. *Root v. Long Island R. R. Co.*, 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. Rep. 643. Whether or not terminable at the will of one party, it has not been terminated, and the plaintiff is apparently ready to perform, provided it may lawfully do so. The defendant has continued to perform and is entitled to recover on its counterclaim, unless the contract is in violation of the statute.

[1] The Act to Regulate Commerce, § 2, is as follows:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, draw-back, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatever, or to subject any particular person, company, firm, or corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Again, from section 6:

"No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs; provided, that wherever the word 'carrier' occurs in this act it shall be held to mean 'common carrier.'"

If plaintiff, by or under said contract, (1) demands or receives a less compensation for service rendered to defendant than it demands or receives from another shipper for a like contemporaneous service in transporting a like kind of traffic, or (2) gives to defendant any undue preference or advantage, or (3) subjects another shipper to any undue prejudice or disadvantage, or (4) transports property of defendant without having published the rate and charge therefor in accordance with the act, or (5) demands or receives a less or different compensation for such transportation or any service connected therewith than is covered in the published rate or charge, or (6) in any manner refunds to defendant any portion of the published rate, or (7) extends to defendant any privilege or facility in transporting property not specified in its published tariffs (unless in payment for a service rendered connected with such transportation, or an instrumentality furnished therein by defendant [section 15]), then the contract offends against this act and is illegal.

The "twenty cents per ton" paid to the General Electric Company has never been published as a "terminal charge," or in any manner except in the through rate, nor has the privilege or fact been published in any tariff.

[2, 3] We may exclude all question as to terminal charges, because no charge in question is a terminal charge. Section 6 of the Act to Regulate Commerce contains the following:

"The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect or determine any part of the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedules shall be printed in large type and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation and facilities defined in this act."

The terminal charge is a separate rate, to be stated "separately," for a service at a terminal, not always rendered in transportation from

place to place, for a privilege or facility not furnished to all shippers. If the charge here sought to be collected were a terminal charge, it could not be collected because never published (*Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 155, 165, 32 Sup. Ct. 648, 56 L. Ed. 1033), and the shipper is as positively prohibited from receiving as the carrier is from paying it. In said section 6 is the following:

"And it shall be unlawful for any person, persons or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to Regulate Commerce and the acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to Regulate Commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced."

[4] The 20 cents per ton sought to be recovered is a part of the published through rate paid for the transportation service. I understand that the defendant urges that the wording of section 15, "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein," etc., includes this service in question; that the service for which the owner may receive compensation from the carrier under this provision need not be a part of the transportation itself, but only connected with it. I conclude, however, that the expression "connected with" is a synonym of "a part of"; it does not mean something, in addition to transportation, that touches, or is attached to, transportation. A common carrier of property cannot include in its charge for transportation an item which is not a part of transportation, and it was not intended by said provision to require the carrier to pay for a service which it was not bound as a carrier of property to render and for which it could not charge. The railroad company owns a right of way, but it is held under a duty to transport for hire, to serve the public. It is a highway dedicated to a public use and may be acquired by condemnation. The carrier may charge for the services it renders over its right of way within the purposes of its franchise; that is, for transportation. *Int. Com. Comm. v. D.*, etc., *R. Co.*, 167 U. S. 643, 644, 646, 17 Sup. Ct. 986, 42 L. Ed. 306. Also under the act it may make such charges only as are contained in its published tariffs. Unless, therefore, the 20 cents per ton has been paid to plaintiff as a part of the through published rate, it cannot be repaid without violating the provisions of this act, the great purpose of which "was to secure equality of rates as to all and to destroy favoritism; these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination." *New York, New Haven R. R. v. Int. Com. Comm.*, 200 U. S. 361, 391, 392, 26 Sup. Ct. 272, 277 (50 L. Ed. 515). I not only find nothing in section 1 to induce a different conclusion, but much to uphold it. After this section states, among other things, that the term "railroad" includes all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all

switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the person or property designated, and that the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities for shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, etc., it adds:

"And it shall be the duty of every carrier, subject to the provisions of this act, to provide and furnish such transportation upon reasonable request therefor and to establish through rates and just and reasonable rates applicable thereto."

As broad as these terms seem to be, they are limited in their application to the common carrier and to those things within the power of the common carrier to provide and furnish; they are limited therefore to the common carrier's property (either owned by it or operated under a contract or lease) and its use. The "switches, spurs, tracks, and terminal facilities" must be upon its lands and do not include a private siding. The railroad, the carrier, cannot provide a private siding; it cannot procure one by condemnation, and it is not required to, by federal or state statute, nor can it provide and furnish services upon a private siding. The private siding and its use are entirely within the control of the private owner. The statute will not be construed to require a carrier to do that which it cannot do against the wish of the owner. By simple declaration the statute cannot give to the carrier private property or its use. The conclusion follows that transportation must be provided and furnished upon the property held by it for a public use or owned or operated by the carrier. For these and other reasons stated hereafter I cannot accept the argument of the defendant briefly stated as follows: Transportation includes delivery at an unloading point, as well as unloading. The unloading point must be the place where there are facilities for unloading. The only place where there are such facilities is at the platform where hoists and derricks furnished by defendant are available. That place is in its property, at its several buildings; and the defendant concludes that transportation by plaintiff includes delivery of cars at the several unloading points on plaintiff's property.

We may therefore consider that the 20 cents per ton is a payment back or rebate from the regular rate, and consequently, unless a reasonable charge for a part of the service rendered or an instrumentality, is in violation of said act. The charge here is not for the use of an instrumentality furnished by the defendant. I find that the 20 cents per ton is a reasonable charge for the work done and for which payment is claimed. The vital question, therefore, is whether or not this service is a part of the regular transportation service covered by the lawful, published freight rate. Is it a part of the service which the plaintiff is obliged to render as a common carrier of in and out freight? Is it service before delivery to the consignee and after acceptance from the consignor? If it is, the defendant's claim is lawful; if it is not, it is unlawful. *Int. Com. Comm. v. Diffenbaugh*, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83. In order to answer this question, it is necessary

to determine where transportation begins and ends, where the delivering and receiving point is; in this case particularly whether or not transportation includes service over the defendant's private siding in its yard, beyond the storage and delivery tracks.

When transportation was by stagecoach, the place of delivery was to the consignee at a residence or business place reached by a street or highway. When by water, it was at a dock or wharf on navigable waters. Now that it is by rail, it must be a point reached by rail; and, as the rate paid for water transportation did not include the transportation beyond the dock or wharf, so the rate for railroad transportation cannot include transportation beyond a point reached by a railroad. *I. C. C. v. D., etc., R. Co.*, 167 U. S. 643, 644, 646, 17 Sup. Ct. 986, 42 L. Ed. 306. At common law the rule generally was that delivery be made directly to the consignee, but the facility or mode of transportation has ever determined the place of delivery with some exactness. Within the limit of tracks the railroad has voluntarily accommodated to the extent it could, and from the completed delivery at its own freight house, or a convenient place in its yard, or upon the tracks of another, it has placed cars on private side tracks at the consignee's mill or platform. Such service could not be compelled at common law, though permissible. *Jones v. N. N. & M. V. Co.*, 65 Fed. 736, 13 C. C. A. 95.

[5] A contract, under which a private siding had been connected, no time being fixed for its continuance, will not be permanently enforced, but is terminable at the carrier's election, when the safety or welfare of the public demands. *Texas & Pacific R. R. Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385; *Jones v. N. N. & M. V. Co.*, supra, 65 Fed. 741, 13 C. C. A. 95. This rule is in harmony with the statute. The private siding is a siding on private lands outside the common carrier's property. The shipper cannot compel the common carrier to make and maintain a private siding, though switch connection with a constructed private siding may be compelled. The Act to Regulate Commerce, § 1, provides: Any common carrier "shall construct, maintain and operate upon reasonable terms a switch connection with any such * * * private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable," etc. The Public Service Commissions Law, § 27, provides:

"A railroad corporation, upon the application of any shipper tendering traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection * * * within a private side track owned, operated or controlled by such shipper; and shall, upon the application of any shipper, provide upon its own property a side track and switch connection with its line of road, whenever such side track and switch connection in reasonably practicable, can be put in with safety and the business thereon is sufficient to justify the same." Laws 1907, c. 429.

The meaning of these two sections is substantially the same. There is no requirement that the common carrier shall carry freight over the private siding, nor any requirement that it shall construct any part of the track off its own lands. In the state statute the carrier is required to construct and operate a switch and a side track upon its own lands to connect with a private side track owned, operated, or controlled by said shipper. It seems to me there can be no inference from this that

the common carrier is required to convey freight over the private side track any more than it is required to carry freight over another common carrier's line with which it is compelled to make connection, but the inference is that it must receive freight from the private side track and deliver freight to it and upon it. The private siding, off the carrier's property, is not a part of the main line, nor the property of the carrier. It may be a convenience for the carrier in its service to other shippers; it may save the carrier expense for larger yards or additional tracks therein, or in simplifying its switching. But none of these considerations affect the question here. That it is voluntarily done from prudence does not render it enforceable as a right and may be prejudicial to others; that is, directly in conflict with the statute. It is a safe rule (and I find no decision to the contrary) to hold transportation begins and ends where the carrier's, or connecting carrier's, line begins and ends. So far as an enforceable right exists under a freight rate, why should not the right begin and end at the line or on the property of the carrier? Such rule has many advantages. It is definite; it avoids temptation to, and facility for, preferences and favoritism; under it all rates for one class of freight would be practically uniform for the same locality or rate "zone"; and it is consistent with the strict responsibility resting upon carriers to safely transport and deliver. Terminal, or extra, charges may perhaps be made and published for valuable services over a private side track, but every shipper from Schenectady, or from the zone in which a Schenectady rate prevails, would be upon the same footing for a shipment in and out of that zone, as far as the carrier is concerned. To require a carrier to spot cars off its own tracks and on private sidings must often result in unequal rates and privileges, or at least be a constant temptation thereto. I know of no reason why a shipper, who has a private siding, should be deprived of this advantage. The law does not attempt to equalize location, opportunity, or foresight. He may have his car freight delivered and received on that side track, which necessarily means that the carrier may be permitted to convey the cars some distance on or over the side track. But, because the carrier is permitted, in one movement, to convey the cars 500 feet on a private siding, it is not to be concluded that it must convey them ten miles on such siding. There must be a line drawn, and, under the statute, that line is "undue and unreasonable advantage," "equality of rates as to all." Where the movement is so short, or the service is of so little cost, that it does not add an appreciable amount to the cost of transportation, as furnished to all shippers under the published rate charged to all shippers, it may be performed, otherwise it may not be.

So if, as claimed, Schenectady rates now include something in addition to the proper charge for transportation to a Schenectady point, because the carrier in some cases does work in the shipper's yard, that "something in addition" should be cut from the said rate rather than paid back to the shipper. The plaintiff is not justified in putting into its published through Schenectady rate an item for service to defendant in defendant's yard. If it may lawfully charge (the charge being in its published tariff) defendant for such service, and if defendant

may pay for it, it cannot add to the charge to shippers generally something for service to this defendant. The general freight rate from point to point may not include an element for spotting (where it occasions appreciable expense), as such actually results in an unjust charge to those for whom spotting is not done. If the plaintiff's rate charged to defendant is 20 cents per ton more than the just rate to and from a Schenectady point, because it covers spotting, that 20 cents should be cut from the rate. The antirebate law can be better enforced if no such contract as here in question be allowed, except where the shipper does work or furnishes instrumentalities on the carrier's lines and property, and when it separately states the charge in its published tariffs. When this plaintiff has delivered cars on defendant's storage and delivery tracks in defendant's yard, it has made delivery off its own line in the Schenectady zone at a place convenient to defendant and selected by it. If it then pays 20 cents per ton to the defendant for a service in transporting beyond that place, it has realized 20 cents per ton less than it realizes from any other shipper in said zone, who receives his own freight at the freight house or yard or on a siding on plaintiff's lines used by shippers, and defendant has been given a preference. This is forbidden. *Wight v. U. S.*, 167 U. S. 512, 517, 17 Sup. Ct. 822, 42 L. Ed. 258. Plaintiff must treat all shippers alike (*Armour Packing Co. v. United States*, 209 U. S. 72, 28 Sup. Ct. 428, 52 L. Ed. 681, cited in *Chicago & Alton R. Co. v. Kirby*, 225 U. S. 165, 32 Sup. Ct. 648, 56 L. Ed. 1033); it must charge the same rate to all and that the published rate (*Id.*). I find that the delivery on the storage tracks is a delivery to defendant; that the transportation begins and ends there; that plaintiff's published tariffs include no charge for service upon a "private siding"; that no transportation on a private siding further than to make clearance can be required from the carrier, though it may move cars thereon where the cost of such movement does not add appreciably to the cost of transportation as furnished to all shippers; that to perform the service here demanded by defendant, under the conditions disclosed in defendant's yard, would add substantially to the cost of transporting defendant's freight. The contract is illegal. This in substance is the holding of the Interstate Commerce Commission (14 Interst. Com. Com'n R. 361), and which it has never modified. Reference will now be made to some of the decisions most strongly urged by defendant.

In *Int. Com. Comm. v. Diffenbaugh*, 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83, the decision is confined to "grain in transit" from one carrier to another and to grain that had been "treated, weighed, inspected, or mixed," and it was held that payment for elevation and transferring of such grain so in transit may be allowed, even though the owner of the grain owned the elevator and reaped an advantage from the opportunity to treat, clean, clip, and mix the grain during elevation. The law does not attempt to equalize fortune and opportunity.

"If the carrier receives services from the owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them."

There is nothing to prevent a carrier from hiring an instrumentality used in transportation, if he does not own such. This case leaves the

question as to where transportation ends and where delivery is made entirely open. The decision specifically does not cover grain which "did not go on." 222 U. S. 48, 32 Sup. Ct. 22, 56 L. Ed. 83, and dissenting opinion of Mr. Justice McKenna, concurred in by Mr. Justice Hughes, 222 U. S. 50, 32 Sup. Ct. 22, 56 L. Ed. 83.

Authorities are cited to show that the carrier's contract covers the loading and unloading of freight. It has long been the rule that it was the carrier's duty to load and unload many kinds of freight. In *London & L. F. I. Co. v. Rome, W. & O. R. R. Co.*, 144 N. Y. 200, 205, 39 N. E. 79 (43 Am. St. Rep. 752), the court said:

"There is no doubt that it is the duty, generally, of a railroad company to load the freight delivered to it for transportation into its cars. * * * But we know from our own observation that as to hay, lumber, sawlogs, live animals and other bulky freight, the shipper usually loads the freight into the cars."

But this rule of duty is not made applicable to a case where the cars are not to be loaded or unloaded at the station or upon the lands and tracks of the common carrier. It is nowhere held that, where cars are delivered upon a private siding, off the lands of the common carrier, the carrier must follow the car and unload it.

Authorities are also cited to establish that the carrier's contract includes, not only conveying the property, but its delivery to the consignee. I think this proposition will not be disputed. But there always remains the question: Where is the delivery to be made? In some cases delivery is made properly at the carrier's station or warehouse. In other cases it is made properly at the yard or upon a side track upon the lands of the carrier at a place convenient to the consignee for unloading. In no case has the carrier's contract made by a railroad company been held to include a delivery beyond its lines further than on the line of a connecting carrier, or upon a private side track. If this defendant had no side track, undoubtedly delivery of its car load freight would be complete when the plaintiff had delivered its cars at a place as convenient as possible in the yards or upon the side track upon the plaintiff's property, had notified the defendant of the arrival and placing of the car, and defendant had had a reasonable time in working hours to remove the same. The fact that the defendant company has a private siding, which it owns and controls, in its own yards, and the statute above quoted, do not change the place of delivery further than to fix the delivery point upon the private side track off the defendant's right of way. The movement to the defendant's storage and delivery tracks is the substantial equivalent of the "one movement" in "spotting" on ordinary sidetracks.

Cases are cited holding that a general custom forms the law of contracts, though at variance with their terms, and reference is then made to the evidence, which shows that the custom of spotting cars is very common, practically universal. But custom cannot modify a statute or its plain meaning. One plain purpose of the statute was to prevent discrimination by rendering a voluntary service without compensation to one shipper and not to all.

I have examined many of the opinions of the Interstate Commerce Commission. One of its decisions (*Merchants' C. P. & S. Co. v. I. C.*

R. R. Co., 17 Interst. Com. Com'n R. 98) is strongly urged by the defendant. It seems to me the facts in that case distinguish it from the case at bar. At Memphis, for more than 25 years, it has been customary for the railroad companies to give rates upon "flat cotton"; and the railroad company has undertaken to compress all cotton shipped. The warehouses are some distance from the railroad track, and it has been also the custom for the railroad company to pay the cost of draying. The published tariffs have shown that the charges for these two elements are included in the published freight rate to and from Memphis, although the particular amount charged for each of such services is not published separately. At South Memphis, the Memphis Warehouse Company provides tracks leading from the railroad yards to compress plants and to the warehouses of cotton dealers for switching and conveying cars of cotton from the railroad storage tracks to the compress plants and the warehouses. The railroad company pays the warehouse company 10 cents per bale for this service and 50 cents for compressing. These charges are also included in the published tariffs. The complaint in the case was against the allowances to the warehouse company for compressing and for switching and transferring to the warehouses of the consignees. The published rate is a special rate for cotton. It is alike for all dealers and for all shippers. In each case the published tariff covers the allowance made; and, whether or not it is strictly a service within transportation, it is a service covered by the freight rate published and charged, of which every shipper has notice. The payment of the allowance therefor causes no discrimination and gives no undue or unreasonable preference or advantage to any particular person. The practice does not offend against either section 2 or section 3 of the Act to Regulate Commerce. If the holding is based on a principle in conflict with that stated in the General Electric Case, I think that the former is the better decision. I do not understand that the General Electric Case turned on whether or not the allowance goes to "the owner." The shipper is usually the owner, and the allowance is by statute available to the shipper only.

The letter of March 24, 1894, indicates that the allowance was not looked upon as a payment for a service to be rendered or an instrumentality to be furnished in transportation, but as a concession because, under the arrangement, plaintiff would be relieved of considerable expense and labor. The letter states a reason why the arrangement was for the benefit of the parties, but it does not indicate (as perhaps it naturally would not, since the statute was later passed) that the parties intended to provide for payment of only that part of a transportation service which the defendant contemplated rendering.

[6] The plaintiff maintains that this matter has once been determined by the Interstate Commerce Commission, and that that determination is conclusive upon the claim in question. In 1906, after the plaintiff had ceased to make payments under the contract of 1894, the Act to Regulate Commerce was amended and contains the following in section 15:

"If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no

more than is just and reasonable, and the Commission may, after a hearing on a complaint, * * * determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

This defendant filed its complaint with the Interstate Commerce Commission under that section, and this plaintiff came in and answered. Upon the same facts as appear in this case at bar, the Commission made its decision and entered an order dismissing the complaint. This order does not recite the grounds on which the complaint was dismissed, but those grounds are disclosed in the opinion (14 Interst. Com. Com'n R. 238). On page 242 of 14 Interst. Com. Com'n R. it says:

"The real question before us is whether the complainant, under the amended Act to Regulate Commerce, may lawfully make any charge and demand any compensation from the defendants upon the facts shown of record. Is the service performed by it a carrier's service? Is it a part of the transportation undertaken by the carrier?"

On page 245 of 14 Interst. Com. Com'n R.:

"In our judgment the complainant does nothing within its plant which it can lawfully call upon the defendants to do for it and therefore nothing for which it may lawfully demand compensation."

The opinion is filed with the order.

Under this section of the statute the Commission is given authority to pass upon two questions: (1) If (whether or not) the owner of property transported under this act directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein; and (2) what is the reasonable charge therefor? By act of Congress the Interstate Commerce Commission was given authority to determine these two questions. It was therefore a court or tribunal of competent jurisdiction. The parties were the same as the parties herein. The well-settled general rule of estoppel is that the estoppel in a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, are comprehended and involved in the thing expressly stated and decided, whether they were or were not actually litigated or considered. It is not necessary to the conclusiveness of a former judgment that issue should have been taken upon the precise point controverted in the second action. Whatever is necessarily implied in the former decision is, for the purpose of the estoppel, deemed to have been actually decided. *Thorn v. De Breteuil*, 179 N. Y. 82, 71 N. E. 470. The Commission did determine that the service, for which claim is made here, was not a transportation service. There has been no review or modification in any form of the said decision of the Interstate Commerce Commission. In *People ex rel. Loughran v. Railroad Com'rs*, 158 N. Y. 428, 53 N. E. 165, the court said, in speaking of a decision by the Railroad Commission:

"In consenting to the discontinuance of the station in question, we think the Board of Railroad Commissioners acted judicially. As was said in *People v. N. Y., L. E. & W. R. R. Co.*, 104 N. Y. 58, 65, 9 N. E. 856, 859 (58 Am. Rep. 484): 'By creating, the statute recognizes the necessity for, such a tribunal to

adjust conflicting interests and controversies between the people and the corporation. It has clothed it with judicial powers to hear and determine, upon notice, questions arising between these parties.' The action of the board clearly was not legislative. * * * *People ex rel. Harris v. Commissioners*, 149 N. Y. 26 [43 N. E. 418]. It was, however, judicial, because the law impliedly required them to decide a question of fact and to exercise their judgment upon evidence in determining whether the consent should be given or not."

"Where a matter has been submitted to an authorized judicial tribunal, its decision is final between the parties until it has been reversed, set aside, or rejected; and the rule of *res adjudicata* applies to all judicial determinations, whether made in actions, or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination." *People ex rel. McCabe v. Matthies*, 179 N. Y. 242, 248, 72 N. E. 103, 104.

In that opinion (179 N. Y. 250, 72 N. E. 105), the court says:

"It was its [the town board's] duty to determine the legality of the claim and whether it was a proper charge upon the town. 'The statute has created a board of town auditors to examine and decide upon claims made and presented against a town. * * * Such board is a statutory tribunal or court to hear and to allow or reject any claim presented against the town. The examination of the account is the trial and its allowance or disallowance is the judgment of this tribunal,' and the determination of the board, like the determination of all courts, is conclusive until reversed or modified under proceedings * * * instituted for its review."

See, also, *Van Wormer v. Mayor*, 15 Wend. 262; *People ex rel. Hatzell v. Hall*, 80 N. Y. 117; *People ex rel. McCullough v. Snyder*, 106 App. Div. 28, 94 N. Y. Supp. 541. It is probably true that the Commission did not have jurisdiction of the contract here in question, but it did have jurisdiction of, and did decide between these parties, the identical controlling question which must be decided in determining this case.

While, under the decision upon the merits above made, it is not necessary to pass upon this question, it would seem that, where the identical question has been tried before a competent tribunal authorized to try that question, where the records show that the facts are the same in the two cases, and the records in the proceedings before the Interstate Commerce Commission show the determination made by that Commission, and where the party, who is here seeking to maintain the claim is the same party which selected its own tribunal, brought the matter before the Commission and secured a determination after a full hearing, the decision of the Commission ought to be conclusive upon the parties.

The plaintiff may prepare findings and decision in accordance with the markings of the requests to find and in accordance with this memorandum, submit the same to defendant, and, if the attorneys cannot agree upon the form of the decision, it may be settled before me on three days' notice.

Judgment accordingly.

In re WHITRIDGE et al.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

ATTORNEY AND CLIENT (§ 46*)—MISCONDUCT—PRESENTATION OF CHARGES.

It is as much the duty of this court to protect attorneys against unjustifiable and malicious attacks upon their integrity as it is to discipline attorneys guilty of misconduct, and it should not allow charges of professional misconduct to be used to enforce claims against attorneys, so that one considering that he has any grievance against attorneys not included in his action against them, or which he could not enforce in any civil action, was bound to present the facts to the court within a reasonable time after the alleged wrongful act was committed.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 71; Dec. Dig. § 46.*]

In the matter of charges of professional misconduct preferred against Frederick W. Whitridge and others by Robert Flaherty. Proceeding dismissed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Robert Flaherty, in pro. per.

William D. Guthrie, of New York City, for respondents.

INGRAHAM, P. J. The petitioner has presented to this court charges against the respondents of professional misconduct, in that in the year 1891 he employed as his counsel and attorneys at law the firm of which the defendants are the surviving members, to assist him in organizing a corporation to exploit and do the business of mortgage insurance on a plan devised and planned by the petitioner, and on which the petitioner had spent several years' labor, and that the said persons did willfully neglect, betray, and defraud the petitioner out of the fruit of his toil and skill, and they instead caused to be organized a corporation called the Lawyers' Mortgage Company, which is now and has been doing for many years the identical business planned by him, based wholly on the ideas and principles conceived by him, and said company has made profits of over \$10,000,000. The petition also charges that the respondents have made large sums in fees as counsel and attorneys of said company, and that the petitioner has received nothing for his skill and labor, solely through the fraud, deceit, malpractice, and treachery of the respondents, who appropriated his ideas and methods and employed them in the formation and for the benefit of said Lawyers' Mortgage Company. The respondents have answered, denying all these charges, and alleging that on September 8, 1894, the petitioner brought an action in the Supreme Court against the respondents and others, and that all and singular the matters of fact, claims, grievances, and professional conduct alleged in the petition herein were set forth in the pleadings, or involved in the issues in such action; that the defendants answered in that action, and the complaint was subsequently amended, copies of which are annexed to the answer; that this action was tried before one of the Justices of the Supreme

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Court and a jury in January, 1901; that the petitioner was examined as a witness and produced the documentary evidence which he submitted, and without cross-examination his complaint was dismissed, upon the ground that there was no cause of action against these respondents; that judgment was affirmed on appeal to this court (62 App. Div. 116, 70 N. Y. Supp. 951), and on an appeal to the Court of Appeals (174 N. Y. 550, 67 N. E. 1082). The respondents further deny that the firm of which they were members was at any time ever retained by the petitioner; that the Lawyers' Mortgage Insurance Company was organized or did business based on ideas and principles conceived by the petitioner, and deny that they ever made any large sums in fees as counsel and attorneys for said Lawyers' Mortgage Insurance Company, and deny that they ever received any fees or payments of any sort whatever in connection with the formation of said company. It is further alleged that the petitioner brought an action against the Title Guaranty & Trust Company to recover damages for services alleged to have been rendered by petitioner in the organization and development of a mortgage insurance company to carry on the same business as the Lawyers' Mortgage Insurance Company, which trial resulted in the dismissal of the complaint by direction of the court, on the ground that there had been a complete failure of proof to support the cause of action alleged in the complaint, and that the judgment was unanimously affirmed by this court in April, 1901, and the appeal dismissed by the Court of Appeals on November 18, 1902. It is also alleged that the petitioner had submitted similar charges to the Grievance Committee of the Bar Association of the City of New York, which the committee refused to entertain; that in December, 1913, a written communication was submitted to this court, containing similar charges, which this court sent to said Grievance Committee, which refused to entertain the charges.

The petitioner has submitted a reply to the respondents' answer, but it presents no new facts which require this court to take any further proceedings. Here are charges made against a reputable firm of attorneys, based upon the alleged misconduct of the attorneys more than 20 years ago. The petitioner sued the attorneys to recover damages for the alleged misconduct of the attorneys, and the action was decided against the petitioner over 10 years ago. This decision was affirmed by the highest court of the state. He has had ample opportunity to establish the truth of the charges that the respondents were guilty of fraud in the conduct of any business intrusted to them by him. He could have presented the facts in the action that he brought against them, and, if there was any foundation for the charges, he could have recovered any damages that he sustained in consequence of their failure to properly protect his interests. Having been defeated in his attempts to establish some misconduct on the part of the respondents, he now, more than 20 years after the acts complained of are alleged to have been committed, seeks to have the attorneys disciplined for conduct which the courts have held gave him no cause of action. If the petitioner considered that he had any grievance against these respondents which was not included in his action against them, or which he

could not enforce in any civil action, it was his duty to present the facts to the court within a reasonable time after he alleged that the wrongful acts were committed. It is as much the duty of this court to protect lawyers against unjustifiable and malicious attacks upon their integrity as it is to discipline attorneys who have been guilty of misconduct, and not to allow charges of professional misconduct to be used to enforce claims against members of the profession. A consideration of the petition, the answer, and the petitioner's reply, convinces us that there is absolutely no foundation for the charges against the respondents. While the petition and the reply are replete with general allegations of fraud, deceit, malpractice, and treachery, there are no facts stated which justify such characterization, and there is nothing presented on this application which would justify any further proceeding. The proceeding is therefore dismissed. All concur.

(84 Misc. Rep. 110)

YANZ v. GRAD.

(Supreme Court, Special Term, Erie County. January, 1914.)

APPEAL AND ERROR (§ 1008*)—REVIEW—FINDINGS OF COURT.

Where an action for an injury caused by plaintiff's motorcycle colliding with defendant's automobile was tried by the court without a jury, the granting of a nonsuit was in effect findings of fact that defendant was not negligent, or else that there was contributory negligence, and the fact that the court held "as a matter of law" that the nonsuit should be granted did not change the nature of the findings, since the law must be predicated upon the facts, and hence the court on appeal will not disturb the findings; the evidence not being so clearly against them as to preclude them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. § 1008.*]

Appeal from City Court of Buffalo.

Action by Harry Yanz, an infant, by guardian, etc., against John Grad. From a judgment for plaintiff, defendant appeals. Affirmed.

Clifford J. Chipman, of Buffalo, for appellant.

Edward T. Durand, of Buffalo, for respondent.

WHEELER, J. This action was brought to recover for personal injuries received in a collision between an automobile operated by the defendant, and a motorcycle ridden by the plaintiff. At the close of the plaintiff's case the court below granted the defendant's motion for a nonsuit, and an appeal is taken from the judgment entered on that ruling.

The evidence shows that the plaintiff was riding his motorcycle, and going over a viaduct in Bailey avenue near Broadway, in the city of Buffalo. The defendant driving an automobile was ahead and proceeding southerly. The plaintiff was following on his motorcycle about 28 or 30 feet behind. The plaintiff testified that the car, without any warning, slackened its speed and turned to the left; that the plaintiff then attempted to pass the car, and his cycle was crowded in to—

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

wards the curb; that he had no opportunity to pass, and ran into the running board of the car, was thrown to the ground, and received the injuries for which he sues.

The plaintiff testified that both he and the car were moving at the rate of about 8 or 10 miles an hour. Another witness called for the plaintiff testified they were running at a "*pretty high gait*." The force of the collision was such, in any event, as to turn up the running board of the car, break the forks of the motorcycle and smash the machine. It is not claimed the plaintiff gave warning to the driver of the automobile that he was behind or intended to pass. That, in outline, is the case presented to the trial court.

The trial court granted the defendant's motion for a nonsuit. The motion was made on the ground that the plaintiff was guilty of contributory negligence, and the plaintiff had failed to show negligence on the part of the defendant. In disposing of the motion, the judge said:

"I think, as a matter of law, I will have to grant the motion for a nonsuit."

It will be noted that the record does not disclose whether the court granted the motion on the ground of a failure to show negligence on the part of the defendant, or on the ground that it appeared to its satisfaction the plaintiff was guilty of contributory negligence.

In nearly every case of collision between vehicles on public streets, the questions of negligence and of contributory negligence resolve themselves into questions of fact, to be determined from the circumstances of the case. *Steel-Drake Baking Co. v. Piercy Contracting Co.*, 140 App. Div. 113, 124 N. Y. Supp. 1107; *Henning v. Rothschild*, 34 Misc. Rep. 773, 68 N. Y. Supp. 840; *Earle v. Pardington*, 116 N. Y. Supp. 675. The most that can be claimed for the case as made is that it presented questions of fact to be determined from the evidence, as to both the defendant's negligence and the plaintiff's contributory negligence. Very often the fact of negligence is one of inference to be drawn from undisputed evidence, and where a jury is sitting to pass on facts, the question must then be submitted to them for their decision.

In this case, had there been a jury impaneled to try the case, doubtless it would have been the duty of the presiding judge to have submitted to the jury, as questions of fact for their determination, whether, upon the evidence given, the defendant was negligent, and the plaintiff free from negligence. In this case, however, there was no jury called. The decisions of all questions of fact, as well as of law, rested with the trial judge. He has held the plaintiff failed to make out a case, and nonsuited him. He must therefore have found from the evidence either that defendant was free from negligence, or that the plaintiff was guilty of contributory negligence, either of which would preclude a recovery. The trial judge necessarily must have found the fact or facts on which he predicated his ruling from the evidence given. This court, on appeal, should not disturb the findings of the court below on the facts, unless the evidence is of such a clear and decisive character as to preclude the findings made. We are unable to so hold on the evidence presented by this record.

It is urged that the return shows that the court held "*as a matter of law*" the nonsuit should be granted. But the law must be predicated

on the facts; and, where the trial judge sits without a jury, it must be presumed he found the necessary facts as the basis of his law, and the fact that he uses the expression quoted does not change the nature or effect of his determination. *Miller v. International Ry. Co.*, 52 Misc. Rep. 347, 102 N. Y. Supp. 254, and cases there cited, to wit: *Elwell v. McQueen*, 10 Wend. 520; *Hess v. Beekman*, 11 Johns. 457; *Smith v. McMillan*, 90 Hun, 542, 36 N. Y. Supp. 24.

The judgment appealed from should be affirmed, with costs of appeal.

So ordered.

(161 App. Div. 286)

GIBNEY v. RODGERS & HAGERTY, Inc., et al.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

MASTER AND SERVANT (§ 125*)—MASTER'S LIABILITY—PLACE FOR WORK.

Defendant contracted with the city to fill in cellars after the buildings had been razed. Neither the party removing the buildings nor the city inspector had discovered anything not appearing to be solid earth and the bottom of the cellar some ten feet below the street level. *Held*, that defendant might rely on their observation as to the nature of the ground, and, there being nothing intrinsically dangerous in the apparent conditions, was not liable for injuries to plaintiff's team, which was hauling dirt to fill the cellar but fell through into an undiscovered subcellar.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 243-261; Dec. Dig. § 125.*]

Appeal from Trial Term, New York County.

Action by James Gibney against Rodgers & Hagerty, Incorporated, impleaded, etc. From a judgment entered upon a verdict of a jury, and from an order denying a motion for a new trial, Rodgers & Hagerty, Incorporated, appeal. Reversed, and complaint dismissed.

The action was for damages to plaintiff's horses and truck. The city of New York had acquired certain premises for the approach to the Manhattan Bridge, and the appellant had contracted to fill in the cellars after the buildings had been razed. Plaintiff had hired himself and his trucking outfit to a firm of public truckmen who were carting dirt for the filling work. Prior to the accident, a city inspector had inspected the premises and had discovered nothing more than what appeared to be a solid earth floor some ten feet below the street level, with no evidence of any subcellar. This inspector was on the premises daily during the work of demolishing. Cappel, who demolished the buildings and removed their material, discovered no subcellar; the city engineers, who were in and about the premises in the course of their work, were equally ignorant of its existence; and the defendants knew nothing about it. Plaintiff had been drawing dirt to the premises for some three weeks before the accident. He testified that when he began there appeared to be a cellar about ten feet deep, with an apparently solid bottom. In pursuing the work of filling, the earth was dumped from the street side, and, as it came up level with the sidewalk, planks were laid on the surface and the trucks backed in upon these planks. On the day in question, plaintiff backed his truck in until the rear wheels came in contact with a timber known as a chock, which served to arrest the trucks at the point where their loads were to be dumped. As he was about dumping his truck, the earth beneath the truck and horses subsided, carrying down the plaintiff and his outfit and causing the injuries complained of. It was then for the first time discovered that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

what had appeared to be the bottom of the cellar was a flooring which served as a roof to a subcellar, which roof had given away.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

Frank V. Johnson, of New York City, for appellant.

Cornelius J. Earley, of New York City, for respondent.

HOTCHKISS, J. It seems to me clear that defendants were not liable. They had the right to rely on the prudence and observation, in the course of the work, of those whose relations thereto preceded theirs, and which relations necessarily called for a reasonable degree of care. *Young v. Mason Stable Co.*, 193 N. Y. 188, 86 N. E. 15, 21 L. R. A. (N. S.) 592, 127 Am. St. Rep. 939. There was nothing intrinsically dangerous in the apparent conditions, nor anything to suggest the necessity of extraordinary care. They were not called upon to drill for a solid bottom, or to make any further investigation concerning the safety of the situation into which they called plaintiff to pursue his labors, than such as was involved in observing the conditions which apparently existed. As was said by Earl, J., in *Burke v. Witherbee*, 98 N. Y. 562, 568:

"Were they bound to know more than every one else? Ought they to have perceived danger that was not visible to any one else? * * *"

The judgment and order should be reversed, with costs, and the complaint dismissed, with costs. All concur.

(161 App. Div. 199) .

HAMMERSTEIN OPERA CO. v. BELASCO et al.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. LANDLORD AND TENANT (§ 134*)—LEASE—WAIVER OF PROVISIONS.

An acceptance by the lessor of a theater of rent accruing after the lessee had commenced to use the theater for exhibiting moving pictures was not a consent to such use, if lessor then and afterwards insisted that lessee was so using the theater in violation of the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 482-485; Dec. Dig. § 134.*]

2. INJUNCTION (§ 136*)—INJUNCTION PENDENTE LITE.

Plaintiff sued to enjoin defendant from giving moving picture exhibitions in a theater which plaintiff had leased to defendant, under a lease providing that the premises should be used as a "first-class theater," and prohibiting their use for any business deemed extrahazardous because of fire. Defendant originally used the theater for producing high-class plays, for which tickets were sold from 50 cents to \$2, but is now using it for exhibiting moving pictures, for which an admission of 25 cents to \$1 is charged. Plaintiff's affidavits show that the theater is not now being used for first-class exhibitions, and that its present use will diminish the value of the property; and it is not disputed that the present use is extrahazardous on account of fire, though defendant claims to have complied with all of the municipal fire requirements. *Held*, that an injunction pendente lite should be granted.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, New York County.

Action by the Hammerstein Opera Company against David Belasco and another. From an order denying a motion for an injunction pendente lite, plaintiff appeals. Reversed, and motion granted.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Gerald B. Rosenheim, of New York City, for appellant.

M. Angelo Elias, of New York City, for respondents.

McLAUGHLIN, J. This action was brought to enjoin the defendants from giving exhibitions of moving pictures in the Republic Theater in the city of New York, as being contrary to the terms of a lease under which the theater was occupied. After the action was commenced, the plaintiff made a motion for an injunction pendente lite. The motion was denied, and it appeals.

The plaintiff's assignor leased to the defendant Belasco the theater in question for a period of ten years, commencing May 1, 1902, at an annual rental of \$30,000, plus a certain percentage of the gross receipts. The lease has since been renewed for an additional period of five years. It expressly provided that the premises were "to be used and occupied by said tenant as a first-class theater," and that the tenant would not use them, or permit them to be used, "for any business purpose deemed disreputable or extrahazardous on account of fire under penalty of damages and forfeiture."

From the papers used upon the motion it appears that up to December 6, 1913, Belasco used the theater only for the purpose of producing high-class plays, for which admission tickets were sold from 50 cents to \$2; that on the day mentioned, however, he made an agreement with the Universal Film Company, whereby the latter was given a license to exhibit in the theater moving pictures entitled "Traffic in Souls"; and that under this license the Film Company since that time has been and now is exhibiting the pictures, for which an admission is charged at the rate of 25 cents to \$1.

The complaint alleges that the moving pictures which are being exhibited are neither a first-class nor any other kind of a play, and for that reason the theater is being used for a purpose other than that stipulated in the lease, and in addition thereto that the exhibition of such pictures also violates the other clause in the lease above quoted, which renders the premises "extrahazardous on account of fire." These allegations are supported by affidavits which were used upon the motion.

In passing upon the question presented by the appeal, it is unnecessary to determine whether the premises are being occupied for a purpose other than a first-class theater. That must be determined upon the trial of the issues. It is sufficient to say that there is a great conflict in the papers upon that subject. If the facts set out in the affidavits presented by the plaintiff are true, then the premises are not being used as a first-class theater, and if such use is continued the value of the property will be greatly diminished.

Our attention is called to the fact that plaintiff believes such will be the result, since he has offered to cancel the lease rather than to have

the theater so occupied. Not only this, but the fact is not disputed but what the use to which the theater is now being put is extrahazardous on account of fire. In answer to this the defendants state they have complied with all the requirements of the municipal authorities; but, if so, the present use of the theater would seem to be a violation of the clause with reference to an increased hazard on account of fire.

[1] While it appears that the plaintiff has accepted rent which has accrued since the new use of the premises commenced, it did not thereby consent to such use, because it then, and since has, insisted that the plaintiff was using the theater in violation of the lease.

[2] Without expressing any opinion upon the merits of the controversy, we think a proper case was presented in which an injunction should have been granted pending the action.

The order appealed from is reversed, with \$10 costs and disbursements, and the motion for an injunction granted, with \$10 costs. All concur.

(161 App. Div. 288)

EMMET V. SANITARY WATER STILL CO.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

INDEMNITY (§ 9*)—CONTRACTS—CONSTRUCTION.

Defendant agreed to save a surety company harmless from any and all liability the company should sustain by reason of bonds given in defendant's behalf, and to defend at its own expense any action brought on any such bond or undertaking, and, upon demand, to pay all damages, charges, and expenses for which the surety company should become liable. The surety company executed a bond in favor of the federal government to secure the defendant's performance of a government contract. Under a claim that defendant had failed to perform its contract, the government deducted a sum of money from the amount due the surety company on other transactions. *Held*, that the action of the government constituted a liability or a loss within the meaning of the agreement, regardless of whether the appropriation was justifiable.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 16, 17; Dec. Dig. § 9.*]

Laughlin and Clarke, JJ., dissenting.

Appeal from Special Term, New York County.

Action by William T. Emmet, Superintendent of Insurance, as receiver, against the Sanitary Water Still Company. From an order denying motion for judgment on the pleadings, plaintiff appeals. Order reversed, with leave to defendant to withdraw demurrer and to answer.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Albert Reese, of New York City, for appellant.
E. Ormonde Power, for respondent.

HOTCHKISS, J. By the instrument on which this action is brought, the defendant agreed "to save harmless and indemnify" the surety company, of which plaintiff is the receiver, from "any and all * * * liabilities, losses, * * * of whatsoever kind, name, na-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ture, or description," which the surety company "shall or may for any cause at any time sustain or incur by reason of" any bond or undertaking given by the surety company in defendant's behalf; also that the defendant would at its own expense defend the surety company from any action brought on any such bond or undertaking, and would pay "upon demand any and all damages, charges, and expenses" for which the surety company "should become responsible."

Under a claim that the defendant had failed to perform its contract with the United States government in the manner agreed, to the damage of the government in the sum of \$1,600, being the amount for which the surety company had executed its bond to the government for the faithful performance by defendant of the contract in question, the government authorities refused to pay and deducted said sum from moneys due by it to the surety company on account of other transactions. This act of the government in thus appropriating the money of the surety company under a claim of right constituted a liability, if not a loss, within the meaning of the agreement. Not only was it a liability, but it was one which had been actually enforced. Whether such appropriation was or was not justifiable is of no importance. If the government had paid over the money without prejudice, and had then brought an action against the surety company on its bond, that company would certainly have been compelled to defend the action at its own cost, and to pay the amount of any recovery. The situation cannot be different where the government has assumed to be its own paymaster and without bringing suit has exercised the right possessed by any creditor to determine for himself and at his own risk whether or not one is indebted to him, and whether in payment of such indebtedness he shall appropriate moneys of the debtor in his hands and leave the debtor to sue.

The order appealed from should be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs, with leave to defendant to withdraw the demurrer and to answer on payment of said costs.

INGRAHAM, P. J., and SCOTT, J., concur.

LAUGHLIN, J. (dissenting). The surety company, of which the plaintiff is the receiver, agreed to become surety for defendant on proposals and contracts, and became surety for its performance of a contract with the government of the United States. In addition to paying the premium for the insurance, the defendant agreed in writing "to save harmless and indemnify" the surety company from "any and all * * * liabilities, losses, * * * of whatsoever kind, name, nature, or description," which it should "for any cause at any time sustain or incur by reason of" any bond or undertaking given by it in behalf of defendant, and that the defendant would at its own expense defend the surety company against any action brought on any such bond or undertaking, and pay "upon demand any and all damages, charges and expenses" for which the surety company "should become responsible." The government claimed that the defendant failed to perform the contract for the performance of which the insol-

vent company represented by the plaintiff became surety. It appears that at that time the government was, or thereafter became, indebted to the surety company on account of transactions in no manner connected with its contract with the defendant, and the government appropriated from the moneys due from it to the surety company the sum of \$1,600, under the claim that it was entitled to do so on account of the defendant's failure to perform its contract for which the surety company was surety.

The receiver of the surety company brings this action, alleging merely these facts, and the question presented by the motion for judgment on the pleadings was whether the amended complaint, to which a demurrer on the ground of insufficiency of facts was interposed, states a cause of action. I am of opinion that it does not. The liability of the defendant cannot be affected by the fact that the government happened to owe the surety company and asserted a right to withhold part of the moneys thus owing on account of its claim that the defendant failed to perform the contract. There is no allegation in the complaint to the effect that the defendant failed to perform its contract with the government; nor is there any allegation from which such failure may legitimately be inferred. The contract between the surety company and the defendant was not made in the light of a situation by which the government might have it in its power to withhold funds due from it to the surety company. It was merely contemplated that the surety company might be called upon to respond in damages for a breach of contract on the part of its principal, and that it should be reimbursed by the defendant for any liability established against it in an action, suit, or other proceeding, including "counsel fees and expenses of whatsoever kind, name, nature, or description," and for any valid claim of liability asserted against it as surety for the defendant which it settled without litigation.

The decision about to be made by this court proceeds upon the theory that the surety company was at liberty to settle any claim asserted against it, whether valid or not, and to recover of the defendant the amount thus paid. To that doctrine I cannot subscribe. The amended complaint, in my opinion, is fatally defective, in that it fails to allege any facts tending to show that the United States government had a just or valid claim against the surety company as surety for the defendant.

I therefore vote for affirmance.

CLARKE, J., concurs.

(160 App. Div. 864)

FULLER v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

1. WITNESSES (§ 143*)—TESTIMONY OF PARTIES INTERESTED AGAINST EXECUTRIX OF DECEASED.

Under Code Civ. Proc. § 829, prohibiting any person interested from testifying against the executor, etc., of deceased, concerning any transaction or communication with deceased, the court, in an action by an executrix to recover stock certificates, where defendant claimed under a gift to its

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

assignor from deceased, improperly permitted the assignor to testify that testator's signature was upon the certificates before his death.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 619-624; Dec. Dig. § 143.*]

2. WITNESSES (§ 181*)—TESTIMONY OF PARTIES INTERESTED AGAINST EXECUTRIX OF DECEASED—WAIVER OF OBJECTIONS.

Where, under Code Civ. Proc. § 829, prohibiting any person interested from testifying against the executor, etc., of any deceased, concerning any transaction or communication with deceased, the court improperly permitted a witness to testify as to a transaction with deceased, the adverse party could fairly cross-examine the witness upon such testimony without waiving the benefit of the statute.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 727, 728; Dec. Dig. § 181.*]

3. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR.

Where, in an action to recover stock certificates by an executrix, defendant claimed under a gift to his assignor from testator, and plaintiff's contention was that testator's signature was forged, it not being in his handwriting, error, if any, in refusing to permit defendant's assignor to testify as to what testator said about the signatures was not prejudicial, as she had already testified that the signatures were on them before testator's death.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.*]

Appeal from Trial Term, Schenectady County.

Action by Jane Hellen Fuller, executrix of James Fuller, against the New York Central & Hudson River Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Visscher, Whalen & Austin, of Albany, for appellant.

Alonzo P. Strong, of Schenectady, for respondent.

SMITH, P. J. [1, 2] This is an action to recover possession of certain stock certificates in the defendant road, claimed to belong to the plaintiff's testator in his lifetime, and to be wrongfully withheld by the defendant. The defendant derives its title through one Annie Becker, whom it appears was living with the plaintiff's testator in his lifetime as his wife, though not lawfully married to him, and who claimed the said certificates by gift from him. There are a number of questions raised upon the validity of this judgment which we do not deem necessary to discuss. A serious question is raised, however, upon the ruling of the court in refusing to allow this Annie Becker to testify as to what the plaintiff's testator said as to the signature upon the back of these certificates when they were given to her. This signature of the plaintiff's testator is admittedly not in his own handwriting. The plaintiff's counsel had examined the witness Becker as to certain transactions with the deceased which bore upon the deliveries claimed by her to have been made of these certificates. Defendant contends that by this examination the door was opened, so that the benefit of section 829 of the Code of Civil Procedure was waived. It

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

appears, however, that the examination of the plaintiff's counsel was legitimate cross-examination of matter which had been brought out by the court itself, where the court had asked the witness whether the name of the plaintiff's testator was upon those certificates before the death of said testator. This was objected to by the plaintiff's counsel as not proper under section 829 of the Code. I am inclined to think the objection was well taken, and that the court erred in admitting this testimony. After the testimony had been admitted, however, it would seem that the plaintiff's counsel might fairly be allowed to cross-examine the witness upon the subject without being held to have opened the door to allow the defendant's counsel to show personal transactions between the defendant's assignor and the deceased, which were otherwise prohibited by law. The ruling, therefore, excluding the evidence of this personal transaction, was, we think, properly made.

[3] If such evidence should have been admitted, we are of opinion that the error in excluding the same was harmless. The witness had already sworn that the signature of plaintiff's testator was upon those certificates prior to his death. Upon the Sunday before his death she had sworn that they were taken out of the safe and examined. If those signatures were upon the certificates before his death, even though the signatures were not in the handwriting of the plaintiff's testator, they were approved by him, and it is a matter of small moment as to the person who actually signed the name, or as to how it came to be so signed. Again: The plaintiff's contention that those signatures were forged and the certificates stolen has the support of strong corroborated evidence in the case. The testimony of Annie Becker herself, and of her principal witness, Mrs. Pauline Looschan, present inconsistencies which are difficult to reconcile. The witness Looschan swears that the certificates were given to Annie Becker upon a certain night as a surprise, while the witness Becker swears that they were given to her at different times, some of them even before they were issued. The dividends were paid regularly to plaintiff's testator, and after his death for six months or more to the plaintiff, without any claim of ownership on the part of Annie Becker or her assignees. Without further discussing the evidence, and in view of the testimony of Annie Becker that the certificates were delivered to her, we are satisfied that if she had been allowed to swear as to any reason assigned by the plaintiff's testator why the signatures were not in his handwriting, the result of the trial would not have been different. For these reasons we are of opinion that the judgment and order should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

(161 App. Div. 427)

CASEY v. CASEY et al.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

1. TRUSTS (§ 35*)—GIFTS—CONDITIONS.

One who accepts a gift upon promise to make certain disposition after the donor's death is deemed to hold such property in trust for the purpose of making such disposition.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 45-50; Dec. Dig. § 35.*]

2. PERPETUITIES (§ 6*)—SUSPENSION OF POWER OF ALIENATION.

A trust of property to be held for the benefit of children of the maker of the trust who were sick, there being five children in addition to the trustee, is illegal as suspending the power of alienation for more than two lives.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-47, 49-53, 56; Dec. Dig. § 6.*]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 3*)—TRUSTS—FUTURE DEBTS.

A gift of property in trust for the payment of funeral expenses and debts due at the death of the donor is not an assignment for the benefit of creditors, but is a valid trust.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 1, 9, 12, 13; Dec. Dig. § 8.*]

4. EXECUTORS AND ADMINISTRATORS (§ 45*)—WHAT ARE ASSETS?

A gift of property in trust for certain purposes after the donor's death, although part of it is illegal, is not property of which the donor dies possessed, and the administrator is not entitled thereto.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 296, 307; Dec. Dig. § 45.*]

5. TRUSTS (§ 65*)—DEFECTS IN CREATION—IMPLIED TRUSTS—FRAUD.

If there be any defect in the manner of the creation of a trust, one will be implied for the purpose of preventing fraud.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 94; Dec. Dig. § 65.*]

6. TRUSTS (§ 68*)—ILLEGAL TRUSTS—REVERSION—IMPLIED TRUSTS.

Where a donor made a gift of property on the promise that it was to be used for a certain purpose after his death which was illegal, title reverts to the heirs of the donor, and there is an implied trust for the payment of the money to such heirs.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 94; Dec. Dig. § 68.*]

Appeal from Trial Term, Albany County.

Action by Thomas J. Casey against William H. Casey and others. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

H. C. Grupe, of Schenectady, for appellant.

William L. Visscher, of Albany, for respondents.

SMITH, P. J. Upon January 26, 1911, John B. Casey died in the city of Albany. He left surviving as his heirs at law and next of kin a son, William H. Casey; a daughter, Nellie L. Casey; plaintiff, Thomas J. Casey; and three other children. Prior to his death, while he was in his last sickness, he gave to his son, William H. Casey, a sum of money amounting to about \$1,300 or \$1,400, under an agreement that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the said William H. Casey, after paying all the debts and funeral expenses of the said John B. Casey, would pay to the daughter, Nellie Casey, the sum of \$500, and the balance he was to hold for any one of the children who should be sick. This plaintiff brought this action, alleging that the said moneys were given to the defendant to pay to Nellie Casey the sum of \$500, and the balance to the next of kin, including the plaintiff. Upon the trial the complaint was dismissed, and from the judgment entered this appeal has been taken.

[1-5] It is settled law that one who accepts from a party a gift before death, upon promise to make certain disposition thereafter, is deemed to hold such property in trust for the purpose of making such disposition after the death of the testator. *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067. As far, therefore, as these trusts created were valid trusts, defendant is under obligation to execute them. The trust as to the sick benefits, that the defendant was to hold the balance of the property for the benefit of those of the children who were sick, is an illegal trust, as not depending upon lives. It would operate to suspend the power of alienation of the fund beyond the lives of two persons in being, contrary to the statute. The trust for the payment of debts and funeral expenses is not an assignment for the benefit of creditors. It does not appear that there were any debts at the time the assignment was made. The debts which were to be paid were not those then existing, but those that should exist after the death of the assignor. This was not property of which the deceased died possessed, and therefore the administrator was not entitled thereto. No reason is suggested why such a trust cannot be created, and if there be any defect in the manner of its creation the court will imply a trust for the purpose of preventing fraud, as was held in the *Goldsmith Case*, above cited. The trust for the payment to Nellie of \$500 seems to be unquestioned.

[6] With the trust for the payment to the daughter established, and with the trust for the payment of debts and funeral expenses held valid, and the trust for the sick benefit held illegal, there should be found an implied trust for the payment of the balance to the next of kin of the assignor. This property was never intended to be given to the defendant for his personal use, and the invalidity of part of the trust for which it was given him will not operate to make effectual a gift which was never intended. To that extent the gift will be deemed to have failed, and the title revert to the assignor or to his next of kin, who are his representatives. No administration is necessary, because a valid trust has been created to accomplish all the purposes of administration. This action therefore is properly brought by one of the next of kin for the purpose of declaring the trust, as far as the same may be valid, and for an accounting and payment of the balance to the next of kin. The dismissal of the complaint was therefore erroneous, and the judgment must be reversed. Inasmuch, however, as the defendants have not presented their evidence, a new trial should be ordered.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

(161 App. Div. 54)

SIGEL v. AMERICAN SEATING CO.

(Supreme Court, Appellate Division, Fourth Department. March 4, 1914.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In a personal injury action by a servant who had three fingers cut off in a planing machine, evidence of the master's negligence in failing to properly guard the machine *held* sufficient to go to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. TRIAL (§ 140*)—CREDIBILITY OF WITNESSES—JURY QUESTION.

The credibility of the witnesses is a question for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

3. MASTER AND SERVANT (§ 209*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

An employé who shaped boards, at a machine consisting of a wheel set with knives, assumes only those risks which remain after full performance by his employer of all obligations to safeguard the machine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 552, 553; Dec. Dig. § 209.*]

4. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—ACTIONS—BURDEN OF PROOF.

In a personal injury action by a servant, the master has the burden of proving contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

5. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—ACTIONS—JURY QUESTION.

In a personal injury action by a servant hurt while using a planing machine, the question of his contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

6. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY OF EVIDENCE.

An instruction based on a hypothesis which has no basis in the evidence is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Robson and Merrell, JJ., dissenting.

Appeal from Trial Term, Erie County.

Action by Henry Sigel against the American Seating Company. From a judgment for plaintiff and an order denying its motion for a new trial, defendant appeals. Affirmed.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

Clinton B. Gibbs, of Buffalo, for appellant.

Dana L. Spring, of Buffalo, for respondent.

LAMBERT, J. The action is in negligence, and the plaintiff has had a verdict. He was injured while working upon a "shaper" in the defendant's factory, suffering the loss of three fingers of his right

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

hand. His regular work was not upon this machine, but, upon a few occasions, he had been there put to work by his foreman.

The "shaper" consists of a flat table, at the back edge of which is set, vertically, a revolving shaft, in which are inserted several small knives. Along the back edge of the table is a guide strip, slightly raised above the table top.

The work in hand, at the time of this accident, required the operator to hold the board, being trimmed, flatly upon the table top, and against the guide, and then to shove same along the guide and upon the table top until the work came into contact with the revolving knives. The work was held in place and moved forward by the hands of the operator held flatly upon it.

As a means of protection to the operator, a circular wooden guard was arranged, completely covering the knives, except that sufficient space was left between the bottom of the guard and the top of the table to permit the passing of the work underneath the guard and against the knives. With such a guard in proper adjustment, the operator could not possibly get his hands upon the knives, providing he held the work flatly upon the table and closely against the guide.

The negligence of the defendant is sought to be predicated upon three theories; i. e., insufficient guarding, inadequate instruction to plaintiff, and a defective condition of the machine itself. Each of these grounds of negligence was submitted to the jury, and hence this appeal involves the sufficiency of the evidence to sustain the verdict of the jury upon each.

[1, 2] As to the guarding, it is conceded that, if the guard produced upon the machine, at the trial, is the one thereon at the time of the accident and had the same adjustment, then plaintiff could not have been injured, if he held the work in proper position. There would not then have been sufficient room between the top of the work and the bottom of the guard to admit his fingers to the knives. He and several of his witnesses testify that plaintiff did hold the work in proper position, flatly on the table and against the guide, and it is conceded that he did get his hand against the knives. Then, too, the witness Haas testifies that he was present and at once, following the accident, measured the distance between the top of the table and the bottom of the guard; that he found such measurement sufficiently large to admit both the work and plaintiff's fingers at the same time. In such testimony he is supported by the witness Bogarke, who testifies to having witnessed the measurement as taken. If the guard (assuming it to be the same one produced at the trial) was adjusted as this testimony indicates, then it cannot be seriously urged that it was sufficient as a guard. So far from affording any protection, it actually increased the danger to the operator. It was effective only in concealing the knives from view, and afforded no protection whatever.

It is true that many witnesses identify the guard produced upon the trial as the one on the machine at the time of the accident and testify that its adjustment is the same, but it is apparent that such testimony rests largely in a general recollection of appearances rather than in specific identification. The credibility of all the witnesses, including

Haas and Bogarke, was for the jury, and, if they believed those two witnesses, then they were justified in finding either that the guard upon the machine at the time of the accident was not that produced upon the trial or that, if the same, it was then differently adjusted. Either conclusion is sufficient to sustain the jury verdict, and clearly a jury question was presented.

As to the instructions given, it appears that "Polish Frank," the foreman, told plaintiff to stand at the side of the table, so as to push the work away from his person, past the knives. In this connection, the witness Rohlf, called as an expert, testified that such was an improper position, as it brought the hands of the operator into closer proximity to the knives than would a position in front of the table. Quite obviously this is true, and there was no error, therefore, in the submission of the question of instructions.

As to the defective condition of the machine, Haas testified that the babbitting of the boxes upon the shaft was so worn that the shaft ran loosely and "rattled." Several other witnesses also testify that it did rattle, when in operation, and that it would not, if in good condition. It also appeared, without objection, that shortly after the accident it was repaired. It is quite apparent that, if this shaft was revolving loosely in its boxes, the result would be an uneven and jerky movement of the knives and attendant and resulting difficulty in holding the work in place. This question presents no difficulty.

[3] We are urged to hold that plaintiff assumed the risk, of such an accident as this, from the nature of his employment, and to reverse the judgment and order for that reason. It is now well established that under such circumstances, as here present, a servant assumes those risks, and those only, which remain attendant upon the employment after full performance by his employer of all his obligations to safeguard his employé. *Fitzwater v. Warren*, 206 N. Y. 355, 99 N. E. 1042, 42 L. R. A. (N. S.) 1229. Thus it is made plain that the question of assumed risk is here dependent upon the question of fact as to sufficient guarding, and, the jury having found favorably to plaintiff, no question of assumed risk remains.

[4, 5] Defendant further argues that the evidence shows plaintiff guilty of negligence contributing to the accident. Such contention is based upon the claim that the plaintiff permitted the work to slip off the table, thus leaving space for his fingers to reach the knives, under the guard, with the guard in proper adjustment. In this connection, the frequent statement of plaintiff that he did not know how the accident happened is seized upon by defendant. Of course it is true that, upon the question of defendant's negligence, plaintiff must point out the manner in which the accident happened. But this statement by plaintiff is not to be given the sweeping effect claimed by the defendant. Plaintiff evidently did know, for he testified that he held the work in proper place, and from that evidence, supported by the other testimony in the case, the jury might find such to be the fact. And, even though plaintiff was unable to recall the rapid sequence of events and to trace cause and effect to the resulting injury, that failure of recollection should not, of itself, prevent his recovery. It is a fair

inference that the injury to plaintiff occurred at practically the same moment that the board upon which he was working went off the table, and it was a fair question for the jury, in the light of all the proof, to determine the sequence of events and what was the cause and which the effect. The burden of showing plaintiff's contributing negligence was upon the defendant. Here, as in all negligence cases, the plaintiff's proof of the accident involves, to some extent, the basis for the charge of contributory negligence. But with all the proof in the case, if an inference is justifiable therefrom; which exculpates the plaintiff from the charge of negligence, then a question of fact is presented for the jury. It cannot be said that the evidence in this case so clearly meets the burden imposed by law upon the defendant, in that particular, that we can hold plaintiff negligent, as a matter of law, or that the verdict reached is contrary to the weight of the evidence.

[8] The record presents a single exception requiring mention. The court was asked to charge that if the jury found that plaintiff met with the injury by getting his hand under the guard and into the knives at a time when the board was not upon the table, the verdict must be no cause of action. This request has no foundation in the facts. But one witness, besides plaintiff, saw the accident. This witness Swartz, sworn by the defendant, testified that he saw plaintiff's hand drop onto the knives and the board went onto the floor. This witness says:

"He slipped onto the knives, and the top dropped, and, while he slipped, it seems he caught the knives, and he dropped the top with his left hand, and his hands went into the knives."

It is apparent from this and other testimony from this witness that the dropping of the board from the table, and the injury to plaintiff's right hand, were practically simultaneous occurrences, resulting from the same producing cause. There is no evidence in the case that plaintiff's hand slipped into the machine after the board had fallen to the floor. The court was therefore justified in declining to instruct the jury as requested.

The judgment and order should be affirmed, with costs. All concur except ROBSON and MERRELL, JJ., who dissent.

(161 App. Div. 177)

MEAD v. HERDMAN et al.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 221*)—SERVICES TO DECEDENT—ACTION FOR COMPENSATION—EVIDENCE—SUFFICIENCY.

In an action for compensation for services rendered and supplies advanced to defendants' testatrix, under an agreement that at her death plaintiff should receive her property, evidence held to warrant a finding for plaintiff.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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2. WITNESSES (§ 202*)—COMPETENCY.

Code Civ. Proc. § 835, provides that attorneys shall not disclose communications made by their clients, while section 836 declares that that provision shall not disqualify an attorney on the probate of a will from becoming a witness as to its preparation and execution in case he is one of the subscribing witnesses thereto. A testatrix had the attorney who prepared her will sign as one of the subscribing witnesses, but she subsequently revoked the will. *Held*, that the revocation revoked the right of the attorney to testify to the facts concerning the execution and preparation of the will.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 756, 757; Dec. Dig. § 202.*]

3. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR.

In an action for compensation for plaintiff's care of deceased during her declining years, the admission of incompetent evidence that she made a will in plaintiff's favor, which she revoked, was harmless, where the contract was abundantly proven by competent evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

Appeal from Trial Term, Otsego County.

Action by James H. Mead against Nellie C. Herdman and another, as executors, etc., of the estate of Mary A. Mead, deceased. From a judgment for plaintiff, for \$2,000 for services and \$479.20 for supplies furnished, defendants appeal. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Louis E. Walrath, of Cooperstown, for appellants.

Franklin C. Keyes, of Laurens (W. H. Johnson, of Oneonta, of counsel), for respondent.

JOHN M. KELLOGG, J. [1] The defendants' testatrix and her husband were, in their old age, living alone at the village of Laurens, in a house owned by her, of the value, as appears by the appellant's brief, of \$1,250, and at the time of her death, February 21, 1911, she had personal property of the value of \$517.83. The plaintiff, a nephew of the husband, quit his employment as clerk in a grocery store at Oneonta, where he was earning \$10 a week, returned to Laurens August 24, 1903, and entered the family of the testatrix for the purpose of nursing her husband and assisting them, and continued in that service until March 3, 1904, when the husband died, and on March 31, 1904, he received \$143 as compensation for those services. After the husband's death he continued to reside with her until the time of her death, managing the place and taking care of her. The evidence of many credible witnesses show that she stated that she was to pay him therefor, and that he was to have all her property if he remained with her. It appears by competent evidence that about March 1, 1910, she made a will. In the year 1910 she stated that she had made a will and willed her property to the plaintiff for coming there and taking care of her; that she had made Estelle Bissell (one of the principal devisees) the same offer that she made to the plaintiff—that if she stayed with her during the time she lived and took care of her she would have her property—and she would not do it, and she made plaintiff the same offer

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and when she got through he was to have her property. From the fact that the plaintiff entered the household in the first instance as an employé, and from the entire evidence in the case, it is clear that it was the understanding that he was to be paid for the services he rendered her, and was to have her property for taking care of her. During the time he earned some money working for others, which was used for the support of himself and the testatrix and for maintaining the house. January 12, 1911, Estelle Bissell, a niece, came to the house and remained there, and on the 16th day of February, 1911, the testatrix made the will, giving her property principally to her nieces, with a legacy of \$100 to the plaintiff. The judgment upon all the facts is just, and should be sustained.

[2, 3] There is some trouble with reference to the evidence of the witness Keyes, the attorney who drew the will in 1910 and was a subscribing witness thereto. He swore to the execution of a will which gave to the plaintiff the house and lot and furniture, reciting that it was in payment of services rendered by him to the time of her death, and he testified to the directions given by her as to the execution of the will, which confirmed the plaintiff's claim that he was to have the property for taking care of her during her life. This testimony was objected to upon the ground that the witness was incompetent under sections 835 and 836 of the Code of Civil Procedure. There is other competent evidence as to the execution of a will at this time, but the particulars of it do not appear. This will was clearly revoked by the will made a few days before her death, and the evidence, therefore, was not offered in a proceeding for the probate of the will, but was offered for the purpose of showing an admission. Section 836 of the Code of Civil Procedure provides, among other things, that it shall not—"disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto."

There seems to be substantial reason for saying that the witness was incompetent to testify to the execution of the paper, or to statements made by the alleged testatrix at the time of its execution. If the testatrix waived the seal of confidence by requesting her attorney to witness her will, she annulled such waiver by revoking the will. The alleged admission was merely cumulative; the facts admitted had been so abundantly proved by other competent evidence that the evidence of the attorney could not have affected the result.

The judgment is therefore affirmed, with costs. All concur.

(160 App. Div. 866)

JOHNSON et al. v. ROSS et al.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

WILLS (§ 687*)—TRUSTS—CONSTRUCTION—REVERSION.

Where land is left by will in trust to turn the income over to the beneficiary and the principal only if the trustee should so see fit, with power to the beneficiary to dispose of the property by will, the heirs of the beneficiary took no title if the beneficiary died intestate and had not been given

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the land during his lifetime, and the land reverted back to the estate of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1638-1643; Dec. Dig. § 687.*]

Submission of controversy between Helen J. Johnson and another against Peter R. Ross and another. Judgment for defendants.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Mangan & Mangan, of Binghamton, for plaintiffs.

Deyo & Hitchcock, of Binghamton, for defendants.

SMITH, P. J. The plaintiffs seek to compel the defendants to execute a contract and accept a deed of certain premises heretofore contracted to be sold by the plaintiffs to the defendants. The defense is that the plaintiffs have not good title to the property and cannot convey. The plaintiffs are the children and sole heirs at law and next of kin of Charles B. Johnson. They claim their title through the will of Primrose S. Johnson, the mother of Charles B. Johnson. This will provides for the payment of debts and for certain legacies, and in the second subdivision of the second paragraph further provides:

That the trustee "shall set aside or hold the balance of said rest, residue and remainder of my estate and pay over and apply the use, interest and income therefrom to my son Charles B. Johnson for his support and that of his family during his lifetime. I hereby authorize and empower my said trustee at any time he shall see fit, my said son Charles B. concurring, to turn over to my said son Charles B. Johnson said principal, whereupon the same shall be his absolutely; and I hereby authorize and direct that the said Charles B. Johnson, whether the said principal shall be passed over to him by my said trustee or not, to dispose the same as he may please by any will or testament."

The property in question is comprised within this residue. It was never turned over to Charles B. Johnson during his lifetime, and Charles B. Johnson died without a will.

I am unable to see how the plaintiffs have full title to this property. If the property had passed to Charles B. Johnson in his lifetime, they would of course inherit. If he had named them by a will, they would take. The provision is made for the rents and profits to be paid to the son Charles B. Johnson for his support and that of his family during his lifetime, with the right to will it at his death. There seems to be no provision that the property shall go to his family after his death in case he shall make no such provision by will. The property would seem to me to revert to the estate of Primrose S. Johnson upon the death of Charles B. Johnson without a will, and to remain the property of that estate undisposed of. If this conclusion be right, the plaintiffs have no title which they can give to this property to the defendants. The defendants are therefore entitled to a judgment against the plaintiffs dismissing the claim and for costs.

Judgment directed for the defendants, with costs. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(161 App. Div. 292)

CITY OF NEW YORK v. LINCH.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. STREET RAILROADS (§ 57*)—REPAVING STREETS—LIABILITY.

Under Railroad Law (Consol. Laws, c. 49) § 178, providing that every street surface railroad company, while it uses any of its tracks in any street, shall keep in repair that portion of the street between its tracks, the rails, and two feet in width outside of the tracks, whenever required by the authorities so to do, and that on neglect to make repairs, after 30 days' notice to do so, the local authorities may make them at the corporation's expense, the liability arises from the conjunction of use, disrepair, and service of notice, and the roads which are in fact or as matter of law using the street when repairs become necessary and notice to repair is given are liable, without regard to the length of the prior use or their equities as between each other; and hence the receiver of such corporation may be held liable at law, and it is not necessary to proceed by petition in order that the equities between him and the railroad company, as determined by their respective periods of use, can be determined.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 136-143; Dec. Dig. § 57.*]

2. STREET RAILROADS (§ 58*)—REPAVING STREETS—LIABILITY.

Under Railroad Law (Consol. Laws, c. 49) § 178, where, though a street railroad company, down to the time of its receivership, asserted ownership of, or rights over, certain tracks, the receiver never took possession thereof, used them, exercised any control thereover, leased the right to use them to others, or received any rental for their use, he could not be held liable for the expense of repaving.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

3. STREET RAILROADS (§ 38*)—REPAVING STREETS—LIABILITY.

Under Railroad Law (Consol. Laws, c. 49) § 178, the city may require the repaving of the portion of the street for which the company is responsible with any kind of material necessary to make the new paving conform to the paving of the remainder of the street.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 99-111; Dec. Dig. § 38.*]

Appeal from Trial Term, New York County.

Action by the City of New York against George W. Linch as receiver. From a judgment after a trial by the court without a jury, defendant appeals. Modified.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Julien T. Davies, of New York City, for appellant.

Terence Farley, of New York City, for respondent.

HOTCHKISS, J. Plaintiff seeks to recover the cost of certain repaving adjacent to tracks of the Second Avenue Railroad Company. The action is brought under former section 98 (now section 178) of the General Railroad Law, which reads as follows:

"Every street surface railroad corporation so long as it shall continue to use any of its tracks in any street, avenue or public place in any city or village, shall have and keep in permanent repair that portion of said street, * * * between its tracks, the rails of its tracks and two feet in width out-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

side of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe. In case of the neglect of any corporation to make payments or repairs after the expiration of thirty days' notice to do so, the local authorities may make the same at the expense of such corporation."

[1] The defendant, who was appointed by this court in an action to foreclose a mortgage covering the property and franchises of the railroad company, and who has operated the road in pursuance of such appointment, objects to any recovery on grounds going to the right of the city to maintain any action against him on account of the matters in controversy, and also objects to specific items on which recovery has been had because of insufficiency of proof. The objection to any recovery rests principally upon the form of the action—the defendant claiming that he is not liable in an action at law, but that the proper procedure is by way of petition, in which proceeding the equities between him and the railroad company, as determined by their respective periods of "use" of the tracks, can be determined; that to permit the present action to be maintained "is virtually to compel the receiver to pay compensation for the use of the streets by the railroad company prior to his appointment as receiver."

I think this argument is based on an erroneous construction of the statute. True, liability arises because of "use" of the tracks; but it may be enforced only after notice and failure to repair. Although a company which has leased its road may continue to be liable on the theory of a "beneficial use" (see Special Term opinion, Bischoff, J., *City of New York v. Central Park, N. & E. R. R. Co.*, 149 App. Div. 944, 134 N. Y. Supp. 1128, affirmed 208 N. Y. 548, 101 N. E. 1097), the lessee is similarly liable if the tracks are in use by it (*Id.*; *Penn. Steel Co. v. N. Y. City Ry. Co.* [C. C.] 191 Fed. 216). But if the lease has expired when the occasion for serving the notice arrives, and the lessee is not then in possession or use of the tracks, no valid notice to repair could be given to it, and the lessor in such case would be solely liable. If the statute is to have a practical construction, it must be that liability arises from the conjunction of use, disrepair, and service of notice, and that the length of the prior use is immaterial. The road or roads which are, in fact or as matter of law, found to be using the road when repairs become necessary and notice to repair is given, are liable without regard for any so-called equities between each other. So construed, the statute creates, what it was clearly intended to create, a liability at law, which in the case of this receiver can be determined in this action as well as in any other form of proceeding. If any question should hereafter arise in the foreclosure action as to the rank to be given to the judgment in the adjustment of claims, it can then be disposed of.

The specific items to which defendant objects are numbered 2, 5, 6, 16, and 18. As to items 2, 5, and 6, it is claimed that there was no proof of use by the receiver, and that the proof of service of notice to repair was deficient.

[2] Items 2 and 5 affect First avenue from Fourteenth to Twenty-Third street, and the facts are as follows:

The franchises of the railroad as originally acquired in 1852 included

the right to operate a single track on First avenue between the above streets. The railroad company constructed and operated a single track in the center of the avenue until some time in 1872, when it entered into an agreement with the Dry Dock, East Broadway & Battery Railroad Company, which had a franchise for a double-track road on First avenue, by which it was provided that the Dry Dock Company might remove the tracks of the Second Avenue Company from the center of First avenue to a position in a line with the proposed westerly track of the Dry Dock Company, and that such track should thereafter be used jointly between the two companies; the Dry Dock Company agreeing to pay \$500 per year for such use on its part, and the Second Avenue Company agreeing to keep the tracks in repair. It was also agreed that, whenever the Second Avenue Company should be authorized to operate a double-track road through the part of the avenue in question, it might use the two lines of track without cost, and thereupon the Dry Dock Company's annual trackage payments should cease.

The receiver testified that he had never operated any cars over this stretch of track, had never leased to others the right so to do, had never received any rent for its use, and had never exercised any control whatever over it, but that the Dry Dock Company operated its cars over the line. It was conceded that the Second Avenue Company had itself continued to assert ownership of or rights over the several tracks.

Under these circumstances, I do not think the receiver is liable. Assuming that there may have been some form of "beneficial use" remaining to the Second Avenue Company in the stretch of track in question (see cases above cited), the fact that the receiver has never in any sense used the tracks or assumed dominion over them clearly relieves him from any obligation under the statute.

Item 6. This affects an area on Allen street at the intersection of Rivington. The Second Avenue Company originally had a franchise for a single track at this point, which track it constructed and for a time operated and continued to claim ownership of, down to the time of the receivership; but the receiver never assumed possession of or used the tracks in any way, and hence cannot be held liable. If recovery is denied on the above items for failure of proof of use, it is unnecessary to determine the sufficiency of the notice served.

[3] Items 16 and 18. The controversy with respect to these items brings up a question of performance. The testimony was conflicting, and, as there was sufficient evidence to sustain the findings of the trial court, they should not be disturbed. A further objection is raised as to these items with respect to the right of the city to compel defendant to repave with a particular kind of pavement; but in *City of N. Y. v. N. Y. City Ry. Co.*, 132 App. Div. 156, 116 N. Y. Supp. 939, it was held that the city might require a street to be repaved with any kind of material necessary to make the new paving conform to the paving in the remainder of the street.

For the reasons above given, the judgment should be modified, by reversing so much thereof as includes items 2, 5, and 6, and, as so modified, affirmed. Appropriate findings for the judgment to be entered hereon may be submitted on settlement of the order. All concur.

(161 App. Div. 439)

**DEGNAN v. GENERAL ACCIDENT, FIRE & LIFE ASSUR. CORPORATION,
LIMITED, OF PERTH, SCOTLAND.**

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. INSURANCE (§ 84*)—AGENT'S CONTRACT—RIGHT TO COMMISSION.

Defendant's general agents, having employed plaintiff to secure applications for insurance, agreed to pay him 25 per cent. of premiums received on applications which he secured. Plaintiff secured two applications for liability insurance, on which policies were issued, but before they expired, defendant's general agents were changed, and insured procured from the new agents cancellation of the policies and the issuance of new ones for the balance of the term, because they did not wish further dealings with plaintiff. *Held*, that plaintiff, having received commissions on the policies issued to the date of cancellation, was not entitled to recover commissions on the new policies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 126; Dec. Dig. § 84.*]

2. INSURANCE (§ 84*)—AGENCY CONTRACT—SUBAGENTS—COMMISSIONS.

Defendant, a foreign general insurance company, employed certain general agents to obtain insurance, agreeing to pay 35 per cent. of the premiums received. The agents employed plaintiff to solicit risks, agreeing to pay him 25 per cent. Plaintiff received certain liability applications, on which policies were issued by the agents, for which plaintiff received commissions accruing to the date of cancellation before the policies expired, prior to which the agency was changed and new agents appointed, who issued new policies for the balance of the term at the request of the insured. *Held*, that there was no contractual relation between plaintiff and defendant, and, defendant having paid the whole commission to its agents, plaintiff could not recover commissions on premiums received after cancellation of the original policies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 126; Dec. Dig. § 84.*]

Appeal from Trial Term, New York County.

Action by Joseph Degnan against the General Accident, Fire & Life Assurance Corporation, Limited, of Perth, Scotland. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed and dismissed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Stephen P. Anderton, of New York City, for appellant.

Lemuel E. Quigg, of New York City, for respondent.

McLAUGHLIN, J. The defendant is a foreign corporation, and in 1911 was represented in this country by Duer & Gillespie, as general agents of its liability insurance department. Duer & Gillespie entered into an arrangement with the plaintiff by which they agreed to pay to him 25 per cent. of premiums received for insurance issued upon his application. Subsequent to this agreement he produced two applications for liability insurance, one by the Degnon Contracting Company and the other by James Pilkington, to cover risks incurred in connection with certain work carried on by them. The policies were issued by Duer & Gillespie in the name of the defendant, one to the Con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tracting Company for a period of one year from October 31, 1911, and the other to Pilkington for one year from November 17, 1911. The premiums upon each policy were fixed at a certain percentage of the monthly pay rolls of the assured. After the policies were issued the John A. Kelly Company succeeded Duer & Gillespie as defendant's general agent. In February, 1912, the Contracting Company and Pilkington, by their representatives, requested the Kelly Company to cancel the policies theretofore issued by Duer & Gillespie and issue similar one for the balance of the term. The reason this change was requested was stated to be that each assured did not wish to have any further dealings or connection with the plaintiff, the one who had procured the insurance. The John A. Kelly Company at first declined to issue new policies to take the place of the old ones, but finally did, on being told if they did not do so the assured would insist upon a cancellation, and procure insurance from another company. The policies were canceled on the 1st of March, 1912, and new ones issued for the balance of the year, which were in all respects like the old, except a different person was mentioned as broker. The plaintiff has received his commission upon the policy issued to the Contracting Company to the date of cancellation. He brings this action to recover commissions alleged to have accrued on both policies after the cancellation, and also for commission on the Pilkington policy prior to that time. No proof was offered to the effect that the premium on the Pilkington policy was ever collected for the period prior to the cancellation. He had a recovery, and the defendant appeals.

[1] I am of the opinion that the judgment is erroneous. Plaintiff was not entitled to commissions upon premiums received after the cancellation. His only right to commissions was upon premiums paid upon policies written by Duer & Gillespie. These policies contained the usual clause, giving the right of cancellation to both the assured and the company. The fact is undisputed, and the court so instructed the jury, that if the assured exercised this right, and the Insurance Company in canceling the policies acted in good faith, then the plaintiff was not entitled to recover. Had the jury followed such instruction, then a verdict would have been rendered for the defendant, because the evidence is uncontradicted that the cancellation took place solely at the instance of the assured, and that the defendant acted entirely in good faith in finally acceding to the request to cancel. A finding to the contrary is without evidence to support it. As already stated, it at first declined to cancel, and only agreed to do so by the assured's saying that, unless it did, it would procure insurance elsewhere. The record is barren of any evidence tending to show that the Insurance Company acted in bad faith towards the plaintiff, or had any interest in the cancellation other than to preserve its own business.

[2] Not only this, but the proof established that the defendant never obligated itself to pay him any commissions whatever. His agreement was with Duer & Gillespie. It agreed to pay him 25 per cent. of the premiums received, and up to the cancellation of the policies that amount was received by him. Frederick G. Gillespie was sworn as a witness on behalf of the plaintiff, and testified that Duer & Gilles-

pie, as the general agents of the defendant, received a commission of 35 per cent., which "was all the company was to pay for getting the business"; that 35 per cent. was paid to Duer & Gillespie, and out of such payment it had to pay whatever commissions were paid for getting the business. The defendant has paid to Duer & Gillespie 35 per cent. of the premiums received prior to the cancellation. This is all that it ever agreed to pay to any one. Of this sum the plaintiff has received 25 per cent., all that Duer & Gillespie agreed to pay to him. He was not entitled to commissions upon premiums thereafter paid.

Attention is called to several alleged errors in the charge which would require serious consideration except for the conclusion reached.

The judgment and order appealed from are reversed, with costs, and the complaint dismissed, with costs.

INGRAHAM, P. J., and CLARKE and SCOTT, JJ., concur.
LAUGHLIN, J., concurs on first ground.

(161 App. Div. 30)

G. H. MCGILL CO. v. UNDERWOOD.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

1. PLEADING (§ 142*)—ANSWER—MATERIALITY.

In an action by plaintiff, a domestic corporation, to recover \$24.47 for goods sold to defendant, an answer alleging that defendant and certain others became members of a co-operative association to obtain supplies at cost, each paying \$25 for the privilege, with the right to withdraw and receive back such sum in money or trade from the association, that defendant and others traded with plaintiff company in the belief that the agreement was being and would be fulfilled, but that plaintiff failed to fulfill its contract, and it refused to offset for the amounts traded the amount of the deposit, failing, however, to allege that plaintiff was any party to the agreement, was insufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 290, 291, 297, 300; Dec. Dig. § 142.*]

2. CORPORATIONS (§ 376*)—POWERS—PURCHASE OF OWN STOCK.

A domestic corporation may not purchase its own stock except out of surplus earnings.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530; Dec. Dig. § 376.*]

3. CORPORATIONS (§ 67*)—POWERS—REDUCTION OF STOCK.

Stock Corporation Law (Consol. Laws, c. 59) § 28, provides that the directors of a stock corporation shall not make dividends except from surplus profits arising from the business, nor divide, withdraw, or in any way pay to stockholders any part of the capital of the corporation or reduce its capital stock except as provided by law. *Held*, that an agreement between a domestic stock corporation and its stockholders, operating a co-operative association, to furnish its stockholders with supplies at cost, that in consideration of their contributing \$25 to the stock of the corporation they might withdraw at any time and receive back the amount so paid either in cash or supplies from the corporation, was invalid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 181-183, 449; Dec. Dig. § 67.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Ref. Indexes

Appeal from Rensselaer County Court.

Action by the G. H. McGill Company against Orrin F. Underwood. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Ernest L. Boothby, of Rensselaer, for appellant.

Thomas F. McDermott, of Albany, for respondent.

WOODWARD, J. The plaintiff, a domestic stock corporation, brought this action to recover the amount of a claim for groceries, meats, etc., sold and delivered to the defendant. The answer denied the claim, and, for "a second, separate, and further answer and defense, defendant alleges that the defendant and several other residents of the city of Rensselaer agreed to become members of a co-operative association through which they were to obtain domestic supplies at cost and expense of management of the association, each agreeing to and did pay for such privilege the sum of \$25, with the further understanding that said subscribers, or any of them, whenever they desired to, might withdraw from said association and receive back the \$25, or trade out the same with said association. That under said agreement defendant and the other members of the association traded with the said McGill Company in the belief that the said agreement was being and would be fulfilled," and that the defendant "further alleges that said McGill Company has failed to fulfill its contract and agreement, and has refused and declined to cancel or offset for the amounts traded the amount so deposited," and demands judgment dismissing the complaint.

Upon the trial before the city court it was admitted that the plaintiff was a domestic corporation, and that the goods, wares, and merchandise were delivered to the defendant to the value of \$24.47, and that no money had been paid on the account, but judgment was given for the defendant dismissing the complaint, and this judgment has been affirmed upon appeal to the County Court.

[1] Just how the facts alleged in the answer could, in any manner, constitute a defense to this cause of action it is difficult to understand. The complaint alleged that the plaintiff was a domestic corporation, and that the defendant owed a certain sum of money for goods purchased of the corporation, and both of these facts were admitted, but because it was alleged and, we may assume, proved that the "defendant and several other residents of the city of Rensselaer agreed to become members of a co-operative association," and that each agreed "to and did pay for such privilege the sum of \$25, with the further understanding that said subscribers, or any of them, whenever they desired to, might withdraw from such association and receive back the \$25, or trade out same with said association," clearly has no relation to the plaintiff as a stock corporation of the state of New York. Nor is the case helped by the further allegation that "under said agreement defendant and the other members of the association traded with the said McGill Company in the belief that the said agreement was being and would be fulfilled." There is no allegation that the G.

H. McGill Company made any agreement of the kind set up in the answer; the allegation is that "the defendant and several other residents of the city of Rensselaer agreed to become members," not of the G. H. McGill Company, but of a "co-operative association," and that they did so, paying \$25 for the privilege. But the answer continues that defendant "further alleges that said McGill Company has failed to fulfill its contract and agreement, and has refused and declined to cancel or offset for the amounts traded the amount so deposited." No allegation is made that the G. H. McGill Company ever made any contract with the defendant, or with any one else, by which it was to permit its stockholders to withdraw their capital from the corporation; and section 28 of the Stock Corporation Law clearly forbids the presumption that any such contract was ever attempted on the part of the corporation.

[2] The section cited provides that "directors of a stock corporation shall not make dividends, except from the surplus profits arising from the business of such corporation, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital of such corporation, or reduce its capital stock, except as authorized by law"; and no law of this state can be found which authorizes the purchase of its own capital stock by a corporation except in the event of such purchase being made out of surplus earnings, which is simply reducing the nominal capital stock by increasing the value of the actual capital stock in a like amount.

[3] In other words, the whole policy of the law is to maintain unimpaired the capital stock of a business corporation as the fund to which creditors may look for the discharge of their claims, and the law will not presume that the directors, who are charged with the duty of managing the affairs of the corporation, have been guilty of a violation of this duty. The evidence in this case shows that the defendant is the owner of one share of the capital stock of the plaintiff corporation, and it is the theory of the defense that this corporation is the "co-operative association" alleged in the answer, and that it was not the purpose to earn dividends but to reduce to the holders of this stock the cost of living. There are no proper allegations in the answer to raise this issue, and the defendant in any event would not be entitled to the relief, for the reason that the corporation has no right under its charter to make the alleged agreement, and persons dealing with a corporation are bound to know the limitations upon its authority.

Whatever understanding certain citizens of Rensselaer may have had with the organizers of the corporation, they have not shown themselves to have had any valid contract with the plaintiff corporation, and the judgments and order appealed from should be reversed, with costs to the appellant in all courts. All concur.

SCHENK v. INTERNATIONAL RY. CO.

(Supreme Court, Special Term, Erie County. February, 1914.)

1. CARRIERS (§ 20*) — CARRIAGE OF PASSENGERS — TRANSFERS TO CONNECTING LINES.

Public Service Commissions Law (Consol. Laws, c. 48) § 49, subd. 7, requires every street railroad corporation contracting with another such corporation, as provided in Railroad Law, § 78, to carry or permit any other party to such contract to carry between any points on the railroads or portions thereof embraced in such contract, any passenger desiring to make one continuous trip between such points for a single fare, and to give to each passenger paying a single fare a transfer entitling him to a continuous trip to any point or portion of any railroad embraced in such contract, and provides a penalty of \$50 for every refusal to comply with the requirements of that subdivision. Railroad Law, § 78, provides that subject to the permission and approval of the Public Service Commission any railroad corporation owning or operating any railroad may contract with any other such corporation for the use of their respective roads, or any part thereof, and thereafter use them in such manner and for such time as may be prescribed in the contract. *Held*, that an agreement between two street railroad corporations, by which each agreed to accept and honor transfers issued by the other to its passengers, is not a contract for the use of their respective roads within section 78, and the refusal to honor such a transfer does not make the company so refusing liable to the statutory penalty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 33-49, 133, 927; Dec. Dig. § 20.*]

2. CARRIERS (§ 20*) — CARRIAGE OF PASSENGERS — TRANSFERS TO CONNECTING LINES.

Where defendant, a street railway company, agreed with the B. Company that the B. Company might use defendant's track for a few blocks on one street, the only portion of defendant's road "embraced in such contract" within section 49 was such few blocks, and a refusal to accept and honor a transfer of the B. Company for a ride over a different portion of defendant's road did not subject it to the statutory penalty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 33-49, 133, 927; Dec. Dig. § 20.*]

3. APPEAL AND ERROR (§ 1177*)—INFERIOR COURTS—APPEAL—RENDERING FINAL JUDGMENT.

Upon reversal of a judgment of a city court in favor of the plaintiff, where it did not appear that a case could be made upon a new trial, a new trial would not be directed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. § 1177.*]

Appeal from City Court of Buffalo.

Action by William Schenk against the International Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and complaint dismissed.

R. C. Vaughan, of Buffalo, for appellant.

Seymour C. Pinch, of Buffalo, for respondent.

WHEELER, J. This action was brought to recover a penalty for a failure to honor a transfer issued by the Buffalo & Lake Erie Traction Company to the plaintiff, purporting to give the plaintiff the right to ride upon it over certain lines of the defendant to his destination.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is claimed this refusal was in violation of the provisions of subdivision 7 of section 49 of the Public Service Commissions Law (Consol. Laws, c. 48) and subjected the defendant to the penalty of \$50 sought to be recovered, because the defendant and the Buffalo & Lackawanna Traction Company, the predecessor in interest of the Buffalo & Lake Erie Traction Company, had entered into an arrangement pursuant to the provisions of section 78 of the Railroad Law of the state (Laws 1890, c. 565).

The contract or agreement between the parties was put in evidence on the trial of this action in the court below. By the recitals of this agreement and the proof in this case, it appears that the Buffalo & Lackawanna Traction Company proposed to construct and operate a line of street cars from the City Line of Buffalo, over and through certain streets of said city to Lafayette Square near the center of the city. This line has a length approximately of six or seven miles. Part of its route, for a few blocks, was through and over Swan street, in which the defendant, or the Crosstown Street Railway Company, had a single track and a franchise to operate it. This agreement provided that the single track should be changed and relocated, so as to permit the Lackawanna Company to lay an additional track beside it, so that there should be operated a double track, but that the cost and expenses of such changes should be borne by the Lackawanna Company; that the track of the defendant so changed should remain the property of the defendant, but the Lackawanna Company might operate over this short stretch of track. Among other things, this agreement further provided that all transfers issued by the Lackawanna Company, or its successors, to its passengers for passage over any of the lines of the International Railway Company or the Crosstown Company within the city, would be accepted and honored by the International Company, and vice versa those issued by the International or Crosstown Companies to the Lackawanna Company. All transfers issued by these respective companies were to be issued subject to the terms and conditions of the so-called Milburn agreement. So much for the terms of the agreement in question.

On the 21st day of January, 1912, the plaintiff became a passenger on one of the cars of the Buffalo & Lake Erie Traction Company at Louisiana and Elk streets in the city of Buffalo for a continuous trip to the intersection of Sycamore street and Miller avenue, which point is beyond the line of said traction company, and on the line of the defendant's street railroad. He was given a transfer by the traction company to his desired destination, and rode over the line of the traction company to its terminus at the corner of Washington and Clinton streets. This took him over and beyond the short stretch of track in Swan street referred to above. At the corner of Washington and Clinton streets the plaintiff boarded one of the Sycamore street cars of the defendant, but the conductor refused to honor the transfer given, and forced the plaintiff to leave the car, and he was compelled to pay a second fare in order to reach his destination. The reason for the rejection was the objection that the transfer slip was improperly punched. The plaintiff contends that, notwithstanding, it entitled

him to ride, and was improperly refused, and that the defendant has incurred the penalty provided by the statute.

[1] We held in the case of *Catalano v. Crosstown Railway Co.* (Sup.) 137 N. Y. Supp. 118, that under the provision of the so-called Milburn agreement, which provides for the transfer of passengers from the lines of one street car company to the lines of another company for one fare, such a contract does not fall within the provisions of the act here relied upon, and that while a refusal to honor such a transfer might confer a right of action for damages, it did not subject the street railway company refusing the transfer to a *penalty* under the provisions of section 49 of the Public Service Commissions Law. In that case, we held that such an arrangement for the mutual transfer of passengers was not a contract for the use of their respective *roads or routes* within the meaning of section 78 of the Railroad Law. When the same case came before us on a second appeal, we said we had no occasion to modify the views expressed in our first opinion on that point. *Catalano v. International Ry. Co.* (Sup.) 145 N. Y. Supp. 1005. Following these decisions, we hold here that the clause in the agreement between the defendant and the Lackawanna Traction Company for mutual transfers of passengers does not justify a recovery of the penalty awarded in the court below. If any recovery is to be had, it must be by virtue of some other provision of that agreement.

[2] It is claimed that the clause providing for the use of the short stretch of trackage in Swan street, above referred to, supplies the basis of a recovery in this action. Can the judgment of the court below be sustained on that ground? We think not. Subdivision 7 of section 49 of the Public Service Commissions Law provides that any street railroad corporation entering into a contract as provided in section 78 of the Railroad Law "shall carry or permit any other party thereto to carry *between any two points on the railroads or portions thereof embraced in such contract*, any passenger desiring to make a continuous trip between such points for a single fare." It further provides a penalty of \$50 to any aggrieved party for every refusal to comply with the above requirements. The portion of the road "*embraced in such contract*" is for the use of the small piece of trackage in Swan street, and nothing more. If the defendant had refused to permit the transportation of the plaintiff over this portion of its tracks, or had exacted an extra fare for so doing, then it would have violated the statute. We cannot discover how or upon what theory it can be claimed that a penalty is given for a refusal to honor a transfer upon lines or routes not "*embraced in such contract*." The traction company, by the agreement in question, is given no right to the use of a foot of any of the roads or routes of the defendant, except the short strip of track in Swan street—none for the Sycamore street line of the International Railroad Company. The agreement to accept a transfer of passengers from one line to the other is in no sense an agreement "for the use of their respective roads or routes," as specified in section 78 of the Railroad Law.

[3] We can reach no conclusion other than that the plaintiff has wholly failed to make out a case. No case, so far as we are able to

discover, can be made upon a new trial. The case should therefore be disposed of on this appeal, without a direction for a new trial.

The judgment is therefore reversed, and the complaint dismissed, with costs.

So ordered.

(84 Misc. Rep. 114)

WHITE v. WHITE et al.

(Supreme Court, Special Term, Erie County. January, 1914.)

1. WILLS (§ 431*)—REVOCATION OF PROBATE—EFFECT.

Under Code Civ. Proc. § 2653a, authorizing an action to determine the validity or invalidity of the probate of a will to be commenced within two years after probate, but providing that persons within the age of minority may bring such action two years after the disability is removed, a daughter of a testator would enjoy and share the benefit of a judgment setting aside the probate of the will in a suit by a son, though her time to bring such a suit expired before the son's action was commenced.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 920-922; Dec. Dig. § 431.*]

2. APPEARANCE (§ 2*)—RIGHT OF DEFENDANT TO APPEAR.

A person named as a party defendant in an action, and against whom a personal judgment is demanded, has a right to voluntarily appear, though not served with process.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 2-8; Dec. Dig. § 2.*]

3. WILLS (§ 307*)—ACTION TO REVOKE PROBATE—VOLUNTARY DISCONTINUANCE—RIGHT OF DEFENDANT TO OBJECT.

Under the rule that plaintiff has an absolute right to discontinue an action on his own motion, unless there are some peculiar equities or rights of the defendant, such as a counterclaim, making an order of discontinuance improper, in an action to set aside the probate of a will, an order of discontinuance entered on the stipulation of the attorneys for plaintiff and the only defendant who had appeared would not be vacated on motion of a defendant, against whom no personal judgment was demanded, whose time for bringing a similar action for the same relief expired long before the action was commenced, and who was not served with process, though she attempted to voluntarily appear after plaintiff had arranged to discontinue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 734; Dec. Dig. § 307.*]

4. WILLS (§ 307*)—VOLUNTARY DISCONTINUANCE—APPLICATION—NOTICE.

Assuming that a defendant, who had not been served with process, had a right to notice of a motion by plaintiff to discontinue, a motion to vacate the order of discontinuance by her would be denied, where it appeared that, had she been given notice, a discontinuance would have been granted even against her opposition; the hearing on the motion to vacate being treated as her day in court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 734; Dec. Dig. § 307.*]

Action by Washington White against Mary White, individually and as administratrix, and others. On motion by defendant Densy Hare to vacate an order discontinuing the action. Motion denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Robert J. Cooper, of Dunkirk, and Theodore B. Green, of Cleveland, Ohio, for the motion.

Richard Hall, of Cherry Creek, and Nelson J. Palmer, of Dunkirk, opposed.

WHEELER, J. John White died in March, 1901, leaving a last will and testament, which was admitted to probate May 17, 1901. The defendant Densy Hare was a daughter of the testator and of the age of 18 years at the time of her father's death. She was duly cited on the probate proceedings, a special guardian appointed for her, and the will duly admitted to probate. Another of the children and heirs at law of the testator was Washington White, the plaintiff in this action.

On the 13th of May, 1912, said Washington White began this action to set aside the probate of the will under the provisions of section 2653a of the Code of Civil Procedure, on the alleged ground that the testator was incompetent to make the will in question.

It will be noted that, by the provisions of section 2653a, an action under this section shall be commenced "within two years after the will or codicil has been admitted to probate, but persons within the age of minority, of unsound mind, imprisoned, or absent from the state, may bring such action within two years after such disability has been removed." Consequently Washington White was entitled to bring this action within two years after he reached his majority.

[1] It will also be noted that the defendant Densy Hare became of age in November, 1904, and her time in which to bring an action to set aside the probate of her father's will expired in November, 1906. She could not now maintain an independent action of her own for that purpose. She, however, was a necessary party defendant to this action, and was named as such in the summons and complaint. Beyond question, had this action proceeded, and had the plaintiff succeeded in having the will declared null and void, the defendant Densy Hare would have enjoyed and shared the benefit of such a judgment. At the time of the commencement of this action, the defendant Densy Hare was a resident of the state of Ohio. No effort was made by the plaintiff to obtain jurisdiction of her by the service of process upon her. On the 22d day of October, 1913, however, the defendant Densy Hare voluntarily appeared by serving on the plaintiff's attorney a formal notice of appearance through her attorney Robert J. Cooper. On the same day the notice of appearance was returned as not served within time.

The only other appearance by any of the defendants was made by Nelson J. Palmer, as attorney for the defendant Peter White. On October 23, 1913, the plaintiff's attorneys and Mr. Palmer, as attorney for the defendant Peter White, signed a stipulation for a discontinuance of the action; and, upon the presentation of that stipulation, an order of the Special Term of this court was entered dismissing the action. The defendant Densy Hare now moves to vacate said order, and contends that she has the right to insist that the action proceed, and was entitled to notice of the motion for an order of discontinuance.

[2] We need not discuss at this time the question as to whether the defendant Densy Hare had the right to voluntarily appear in this action without being summoned to do so by the plaintiff. If a personal judgment had been demanded against the defendant Densy Hare, then, under the cases, she would have had the right to have voluntarily appeared, having been named as a party defendant. *McLoughlin v. Bieber*, 26 Misc. Rep. 144, 56 N. Y. Supp. 805; *Duer v. Fox*, 27 Misc. Rep. 677, 59 N. Y. Supp. 426; *Higgins v. Rockwell*, 9 N. Y. Super. Ct. 650; *Wellington v. Claason*, 9 Abb. Prac. 175. Here, however, no personal judgment was asked.

[3] The affidavits disclose that, for a long time prior to her appearance, it had been arranged between the plaintiff and the only other party who had appeared that this action should be discontinued.

It would be going a long way to hold that a party named in an action as defendant, and not served, can compel the plaintiff to proceed and litigate questions where he had determined not to proceed further in the action. He would thus be rendering himself liable for expenses incident to its prosecution against his wishes, and in many cases against his interest. We know of no case going to that extent where no personal demand is made against a party. It is clearly against the repeated decisions of the courts of this state holding that the plaintiff has the right to discontinue actions upon his own motion, and this is an absolute right, unless there are some peculiar equities or rights of the defendant which would render such an order of discontinuance improper. *Petition of Butler*, 101 N. Y. 307, 4 N. E. 518; *Janssen v. Whitlock*, 58 App. Div. 367, 68 N. Y. Supp. 1086; *Schlegel v. Roman Catholic Ch.*, 124 App. Div. 502, 108 N. Y. Supp. 955; *Telephonine Co. v. Douthitt*, 115 App. Div. 362, 100 N. Y. Supp. 781; *Walsh v. Walsh*, 33 App. Div. 579, 53 N. Y. Supp. 881.

A motion to discontinue is sometimes denied when the defendant has interposed some defense by way of counterclaim, as in actions for divorce, when the defendant seeks affirmative relief by countercharges. *Campbell v. Campbell*, 12 Hun, 636; *Winans v. Winans*, 124 N. Y. 140, 26 N. E. 293; *Jermyn v. Searing*, 139 App. Div. 116, 123 N. Y. Supp. 832.

In this case, while the defendant Densy Hare would reap the benefit of a successful prosecution of this action to set aside the probate of her father's will, she is in no position to ask on her own behalf affirmatively that the probate be vacated. Her time to bring such an action, or to ask for any such relief, expired more than seven years prior to the commencement of this action. She stands in no position to demand that the action be prosecuted for her benefit. The fact that the plaintiff acts within the statutory time in his own case cannot operate to revive or restore the statutory time in her case. We can conceive of no principle of law or equity which can be invoked to compel the plaintiff to litigate for the benefit of this defendant, when she herself has slept on her rights until the statutory time in which she might seek relief on her own account has long since expired.

[4] Assuming, however, she had the right to appear and to be heard on the motion to discontinue, we may treat this motion for all pur-

poses as giving her her day in court, and, if satisfied that the plaintiff was entitled to discontinue, may make such order as the rights and equities of the parties require. I am satisfied that, if the application on which the order asked to be vacated had been upon notice to the attorneys for the defendant Densy Hare, the court would have granted it even against their opposition.

For these reasons we see no reason for vacating said order at this time. The motion is therefore denied, without costs.

So ordered.

(161 App. Div. 180)

INTERNATIONAL PAPER CO. v. ROCKEFELLER.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

1. SALES (§ 418*)—SELLER'S CONTRACT—BREACH—DAMAGES.

The measure of damages for a seller's breach of a contract to deliver spruce wood for the making of paper pulp was the difference between the contract price and the price at which wood could be purchased or procured at the place of delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

2. SALES (§ 416*)—CONTRACT—BREACH BY SELLER—EVIDENCE.

In an action for breach of a contract to sell spruce timber from a specified tract of land, defendant was entitled to show his understanding at the time he executed the contract of the amount of green spruce on the tract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 416.*]

3. SALES (§ 172*) — CONTRACT — BREACH BY SELLER — CONSTRUCTION OF CONTRACT.

Where a contract for the sale of green spruce timber for the manufacture of paper contemplated a delivery of timber from a specified tract of land, the contract was conditional on the continued existence of such timber on the land, and, the same having been destroyed by fire without the seller's fault, he was relieved from liability for further performance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 425-430; Dec. Dig. § 172.*]

Appeal from Trial Term, Saratoga County.

Action by the International Paper Company against William Rockefeller. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial on the minutes, and from an order granting plaintiff an additional allowance of costs, defendant appeals. Reversed. New trial granted.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Kellas & Genaway, of Malone (John P. Kellas, of Malone, of counsel), for appellant.

Frank L. Bell, of Glens Falls (Edgar T. Brackett, of Saratoga Springs, of counsel), for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

JOHN M. KELLOGG, J. The action is brought to recover damages on account of the failure of the defendant to deliver pulp wood as agreed. The agreement between the parties, dated July 5, 1899—

"Witnesseth: Whereas, William G. Rockefeller has entered into a contract with the Kingsley Lumber Company, dated June 9, 1899, for the purchase of certain timber lands and property in Franklin county, New York, therein more particularly described, and has assigned the same to the party of the first part.

"And whereas, the party of the second part is desirous of purchasing wood now on the said lands from the party of the first part, which the latter is willing to sell if he acquires the title to the said lands under the said contract:

"Now, therefore, the parties hereto, in consideration of the premises, and of the sum of one dollar by each to the other in hand paid," etc.

It then provides that if the defendant acquires the land he agrees to sell and deliver on the cars, at the mills of the plaintiff at Cadyville, during the year 1899, 6,000 cords of wood, and during each of the next five years from January 1, 1900, to January 1, 1905, not less than 10,000 cords of wood per year, with the right to the plaintiff to require an additional amount in any year, not to exceed 2,000 cords, by giving the notice required. The wood was to be cut from live spruce trees. Deliveries for the year 1899 were to commence not earlier than October 1st, and continue on an average of about 1,000 cords a month "after connection has been established by the Chateaugay Railroad Company." In the successive five years deliveries were to be on the average about 800 to 1,000 cords of wood a month, commencing January 1, 1900. The plaintiff agreed "to purchase and accept the said wood, as herein before provided, and pay for the same" \$5.50 per cord.

The defendant did not in any year deliver the amount of wood stated. In 1899 no wood was delivered. In 1900 there was a deficiency of 4,956.75 cords; in 1901 of 5,679.86 cords; in 1902 of 5,597.75 cords; in 1903 of 7,999.01 cords; in 1904, giving credit for the deliveries after that year, the deficiency was 3,511.87. The defendant has in fact delivered not quite one-half the amount of wood required. In the year 1903, the particular time of year not appearing, more than one-half of the lands referred to in the contract, the part not cut, was burned over, and substantially all the spruce killed by fire. Aside from the wood delivered to the plaintiff, there remains about 550 cords upon the top of the high mountain which could have been cut and furnished as pulp wood; but the expense of obtaining and delivering it would have been about \$20 a cord.

[1, 2] The contract having been executed under seal, the plaintiff's remedy is not barred by the statute of limitations. The defendant having defaulted in delivering the wood at Cadyville, the measure of damages was the difference between the contract price and the price at which wood could be purchased or procured at Cadyville. It is evident that there was no market at or near Cadyville at which the large quantities of wood required to fulfill the contract could be bought, and it became necessary to purchase a part of it in Canada, which apparently was the next most favorable market. The charge placed the matter of damages before the jury in a manner not prejudicial to the defendant. The defendant was entitled to show his understanding at

the time he executed the contract of the amount of green spruce upon the tract. This might have a bearing upon the interpretation of the contract, and might explain the fact that some spruce from the tract, during the continuance of the contract, was sold to others.

The difficulty arises with reference to the contention of the defendant that the destruction of the green spruce by fire excused him from making deliveries thereafter. Clearly he is liable for all deficiencies occurring prior to the fire. The contract was made under the following circumstances: In 1899 the De Bar Mountain tract, containing about 16,000 acres, belonging to the Kingsley Lumber Company, was for sale. It was woodland, with a large quantity of growing spruce. It was connected by a spur with the New York Central Railroad, a broad-gauge road, and near the Central Railroad at that point was the Chateaugay Railroad, a narrow-gauge road. From the lands to the Cadyville mill by the Central road was a long and circuitous route; by the Chateaugay road it was substantially a direct line. The accessibility of woodland to a railroad connection, and the freight charges, are an important element in furnishing pulp wood to a given mill. The defendant owned other spruce lands in Franklin county, upon which no lumbering was being done except the cutting and marketing of wood which had been killed by fires. These lands were about 30 miles away in an air line, about 100 miles by rail, and lumbering from them for the Cadyville mill would make necessary the transfer of pulp wood from a broad-gauge to a narrow-gauge car in order to use the Chateaugay road; otherwise it would be necessary to carry it a much greater distance.

One Hibbard applied to the plaintiff in 1889, informing it that he was contemplating purchasing the Kingsley lands, and proposed a pulp wood contract. Negotiations proceeded between them which finally resulted in the contract in question, which was prepared by Hibbard, and was executed by the defendant and the plaintiff. The defendant had nothing to do with the plaintiff in the making of the contract, and had made no examination of the property. Hibbard was supposed to have an interest in the De Bar Mountain tract, and was to take charge of the management of it and the getting out of the pulp wood. He was to receive one-third of the profit, and the defendant two-thirds in addition to interest upon his investment. It does not appear that Hibbard and the defendant had any other relations except with reference to these lands, or that Hibbard was interested in any other pulp wood or pulp wood lands. The lands upon which green spruce was growing in the territory fairly tributary to Cadyville were owned principally by the state as a part of the Forest Preserve, by the plaintiff, and by parties with whom the plaintiff had outstanding contracts. Apparently, aside from the Kingsley lands, there were no other lands from which the large quantity of pulp wood agreed to be furnished by the contract could be supplied by defendant in the territory naturally tributary to the Cadyville mill by the Chateaugay Railroad.

The contract by its terms is conditional upon the defendant's acquiring the Kingsley lands; but the plaintiff contends it is a reasonable inference that if the plaintiff acquired the Kingsley lands he was then

willing to contract absolutely for the delivery of the wood, and that the contract does not show that the wood was to be taken from those lands.

[3] While not free from doubt, it seems to me that it was contemplated that the wood to be furnished was to be cut on the Kingsley lands. The statement that the plaintiff was desirous of purchasing the wood now on the lands, and that the defendant was willing to sell it if he acquired the lands, the fact that the contract was conditional upon the purchase, and that the first deliveries in 1899 were dependent upon the connection with the Chateaugay road, which came within a very short distance but would not immediately serve any other wood lands, and the fact that Hibbard was the moving spirit in the matter, was understood to be the party getting out the wood, and apparently had no other relations with the defendant than in lumbering this tract, indicate that the parties had in mind, in making the contract, the lumbering of this tract. We need not say that the defendant could not have furnished live wood of equal quality from other lands; but the contract, read in connection with the known facts, shows the source from which the parties contemplated the wood should be furnished. and when the source is destroyed the defendant is excused from further performance. The defendant did not contract to deliver the wood unless he acquired the Kingsley lands. If all the wood upon the Kingsley lands had been destroyed by fire immediately after the contract was executed, the parties would have been in substantially the same position they would have occupied if the defendant had not acquired the lands. The real reason which induced the contract, and upon which it depended, would have failed.

In an undated letter from Hibbard to the defendant, which was apparent received about December 26, 1899, he refers to the contract as one "for wood on the De Bar Mountain tract for the Cadyville mill." On October 22, 1901, the plaintiff wrote to the defendant complaining that some spruce logs had been sold from the lands, and continued: "We entered into the agreement with Mr. Hibbard with the understanding that we were to have all the spruce wood on this land, although it was not specifically stated that he should not take a small quantity of same for lumber purposes. To the best of my judgment you will not have on this land any more spruce than the contract calls for. I simply call this matter to your attention, for possibly you do not really understand the conditions of the contract as they are being carried out by your representatives."

Under all the circumstances it must be considered that the deliveries of the pulp wood from time to time were conditional upon the continued existence of the green spruce upon the lands not cut over. *Buffalo & L. Land Co. v. Bellevue L. & L. Co.*, 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167; *Herter v. Mullen*, 159 N. Y. 28, 53 N. E. 700, 44 L. R. A. 703, 70 Am. St. Rep. 517.

We do not know what time in 1903 the fire occurred, nor what the jury determined the damages per cord were during the respective years. We cannot, therefore, modify the judgment by apportioning the dam-

ages, and excusing the defendant for a failure to deliver wood after the fire. The defendant is not excused from delivering the live spruce suitable for pulp wood which survived the fire by the mere fact that its location upon the tract is such that it would be very expensive for him to deliver it.

The judgment and orders are reversed upon the law and the facts, and a new trial granted, with costs to the appellant to abide the event.

The findings that the defendant agreed unconditionally to deliver all the pulp wood mentioned in the contract, and that the plaintiff has suffered damages in the amount of \$48,000, are reversed as against the evidence, and the findings are made that, considering the circumstances under which the contract was made, the deliveries of wood from time to time were conditional upon the continued existence of the green spruce upon the Kingsley lands not cut over, and that in 1903 the spruce growing upon said lands was substantially destroyed by fire, and that the evidence does not show that the destruction of said spruce was caused by the negligence or fault of the defendant. All concur.

(161 App. Div. 360)

CONNER v. CHELLIS et al.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

ACCOUNT, ACTION ON (§ 2*)—DEMAND.

While no demand is necessary to the maintenance of an action upon a liquidated demand, no action can be maintained for the balance due upon a mutual account between the parties without previous demand, where the defendants have acted as bankers for plaintiff, accepting orders for cash drawn upon them.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 1, 2; Dec. Dig. § 2.*]

Kellogg and Lyon, JJ., dissenting.

Appeal from Clinton County Court.

Action by Hiram Conner against Albert Chellis and another, begun in Justice Court. From a judgment of the County Court in favor of plaintiff and reversing the judgment of the Justice's Court, defendants appeal. Reversed, and judgment of the justice affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Egbert C. Everest, of Plattsburg, for appellants.

Barnard & Barnard, of Plattsburg (H. E. Barnard, of Plattsburg, of counsel), for respondent.

HOWARD, J. From the meager record presented to us, it is not possible for this court to tell which of the parties was indebted to the other; and, the county judge having written no opinion, neither is it possible for us to determine by what process of computation he arrived at the conclusion that the defendants were indebted to the plaintiff in the sum of \$7.68, with interest. From the defendants' book account,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as disclosed by their bill of particulars, a small balance seems to have been due the plaintiff; but, assuming this to be so, the question then arises: Can the plaintiff recover?

The plaintiff was a farmer. The defendants were country merchants; they also conducted a creamery. The plaintiff bought goods from the defendants. The defendants purchased farm products and milk from the plaintiff. The plaintiff also drew orders on the defendants for cash. The defendants kept a book account of these transactions, such as is ordinarily kept in country stores. The plaintiff made no demand upon the defendants for a settlement of this account and no demand for the payment of any balance which he may have believed to be due him. Under these circumstances, can the plaintiff recover?

There is a rule of law well established which has been stated as follows:

"It is the settled law of this state, announced in many decisions, that when a specific sum of money is made payable by the agreement of the parties, upon demand, or at a specified time, at a particular place, as against the original debtor, no demand at the time or place, prior to the commencement of the suit, is necessary." *First National Bank v. Story*, 200 N. Y. 346, 93 N. E. 940, 34 L. R. A. (N. S.) 154, 21 Ann. Cas. 542.

It was upon the strength of this rule, as we gather from the briefs of counsel, that the county judge concluded that the plaintiff herein could maintain his suit without having first made a demand. But we do not think this rule can be held to apply to the circumstances here. No specific sum of money was made payable by the agreement of the parties; neither was it made payable at a specified time, nor at a particular place. In fact, the apparent understanding between the parties, the course of business between them, and the custom of the neighborhood all indicate that a settlement of the account and the striking of a balance was contemplated before either became obligated to the other. There having been no specific agreement between the parties, we can only spell out the terms of the contract from the nature of the transactions. It cannot be supposed in this case that the defendants had tacitly or otherwise agreed to become instantly liable without any demand for each item of product or milk purchased from this plaintiff in this running account. The defendants acted in some respects as bankers for the plaintiff; he drew on them for cash. The rule governing transactions with banks is therefore more nearly applicable here. That rule has been stated in these words:

"Under the terms of the contract implied in the transaction of receiving money on deposit, a bank is not under the obligation of a common debtor to go after his customer and return the deposit whenever he may be found, but its implied engagement with the depositor is to pay whenever payment shall be demanded." *Amer. & Eng. Enc. of Law*, vol. 9, p. 200.

The amount in dispute is insignificant compared to the cost of the litigation, and no great principle is involved. However, the matter having come here for determination, we think the judgment of the County Court should be reversed, and the judgment of the Justice's Court affirmed, with costs to the appellant in this court and in the County Court. All concur, except KELLOGG and LYON, JJ., who dissent.

JOHN M. KELLOGG, J. (dissenting). A man who for petty spite sues his neighbor for a few dollars' balance of an open account, without a demand of payment, is not entitled to great consideration; nevertheless the plain rules of law cannot be ignored in order to beat him.

The defendants' bill of particulars shows that they owed the plaintiff \$4.80. A part of the account, \$3.81, however, was for milk delivered from the plaintiff's farm to the defendants' factory in September, 1911, and, according to the agreement of the parties, milk was not to be credited until the end of the month. Omitting this item, the plaintiff was clearly entitled to a judgment of \$99.

By section 386 of the Code of Civil Procedure, entitled "When action accrues on current account," it is provided that, in an action brought to recover a balance upon such an account, a cause of action is deemed to have accrued from the time of the last item proved in the account on either side. This announces the rule as it has always been understood. The account in this case was for merchandise sold. The only possible question about a term of credit is as to the milk which was to be credited at the end of each month. At the time the action was brought, upon the theory most favorable to the defendants, there was \$99 due to the plaintiff. Their bill of particulars having credited the \$3.81 for September milk, that may properly be added.

The judgment should be modified by reducing the recovery of the plaintiff to \$4.80, and, as so modified, affirmed, without costs.

LYON, J., concurs.

(161 App. Div. 161)

HEAPHY v. UNITED STATES WOOD PRESERVING CO. et al.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. MUNICIPAL CORPORATIONS (§ 805*)—INJURIES IN STREETS—CONTRIBUTORY NEGLIGENCE.

Plaintiff was injured by tripping and falling over a street railway rail at a point where the asphalt had been entirely removed in repairing the street. Plaintiff knew that the repairs were being made, and had frequently crossed the street at that point, and had previously noticed the rail over which he tripped; but on the night he was injured it was raining and blowing, and he had an umbrella held low before his face, though the place was well lighted. *Held*, that plaintiff was guilty of contributory negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1677, 1688; Dec. Dig. § 805.*]

2. MUNICIPAL CORPORATIONS (§ 819*)—INJURIES IN STREETS—ACTIONS—SUFFICIENCY OF EVIDENCE—NEGLECT.

In an action against a city and others for injuries from tripping over a street car rail at a place where the asphalt had been removed for repairing the street, evidence *held* not to show negligence by the city or company making the repairs for it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1739-1743; Dec. Dig. § 819.*]

3. MUNICIPAL CORPORATIONS (§ 763*)—REPAIR OF STREETS.

A city has a right to remove the asphalt in the streets for the purpose of making repairs, and was not liable for injuries to persons tripping on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a street car rail exposed by the removal of the paving, if it took all reasonable precautions to make the place safe.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.*]

Appeal from Trial Term, New York County.

Action by Timothy Heaphy against the United States Wood Preserving Company and others. From a judgment dismissing the complaint as to one defendant, and an order denying a motion for a new trial, plaintiff appeals; and the defendant named appeals from a judgment for plaintiff against it and an order denying its motion for a new trial. Affirmed on plaintiff's appeal, and reversed and complaint dismissed on appeal by defendant company.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

John C. Robinson, of New York City, for plaintiff.

Theodore H. Lord, of New York City, for Franklin Contracting Co.

James J. Mahoney, of New York City (Adolph F. Bruenner, of Brooklyn, of counsel), for defendant United States Wood Preserving Co.

McLAUGHLIN, J. The city of New York entered into a contract with the United States Wood Preserving Company to make certain changes or repairs in Thirty-Fourth street, where the same intersects Broadway. The contract contained a provision that the Wood Preserving Company would give its personal attention to the faithful prosecution of the work, would place proper guards and lights to prevent accidents, and would observe the law and all ordinances of the city in relation to obstructing the street, keeping open the passageways, and protecting the same; also that it would not assign the contract without the written consent of the city. The Wood Preserving Company sublet the contract, or some part of it, to the Franklin Contracting Company. Whether or not the city consented does not appear. The Contracting Company, for upwards of six weeks prior to the 6th of November, 1911, had been engaged in doing the work called for by the contract. The asphalt and pavement in the street had been entirely removed. There is a street surface railway extending along Thirty-Fourth street, and at the point where such street intersects Broadway the removal of the asphalt and pavement left the rails from six to ten inches above the earth, and the same were supported by planks or blocks.

The plaintiff, about 8 o'clock in the evening of the day named, started to cross from the northwest to the southwest corner of Thirty-Fourth street, and in doing so tripped and fell over the northerly rail, receiving personal injuries. He brought this action to recover the damages sustained, on the ground that the same were due to the negligence of all the defendants. At the trial the jury rendered a verdict for a substantial amount against the Wood Preserving Company and of no cause of action against the other two defendants. The plaintiff appeals from the judgment entered on verdict dismissing complaint

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as to the Franklin Contracting Company, and the Wood Preserving Company appeals from the judgment against it.

[1] The plaintiff, according to his own testimony, was not entitled to recover against any of the defendants. He testified that he knew the changes which had been and were being made in the street at the place where the accident occurred; that he had frequently crossed the street at this point, and had, previous to the night in question, noticed the rail over which he tripped and fell; that this was the only night he had not seen it; that it was raining, and the wind blowing hard at the time, and he had an umbrella pulled quite low.

The place was well lighted, and had plaintiff exercised any care whatever he could not have helped but see the rail. Planks had been placed from the sidewalk down to the bed of the street, so his attention was called to the condition of the street when he left the sidewalk. After leaving the planks he had to travel on the dirt six or eight feet, and that he realized this is evident from his testimony, because he says he went through the mud before he reached the rail. His own testimony best describes the situation. He said:

"I was not thinking about the rail on the night of the accident. I did not have the rail in my mind as I walked along there on the night of the accident. I did not look for the rail. I did not try to see it; it never ran in my mind. I had my head down, away down. I know the rail was there; but I could not tell how far away it was from me, for I did not look for it. I suppose I tried to see. I must have tried to see it, because I would have to step up. I did not think about it at the time. I suppose I tried to see it, but I did not bother about it, sir; it did not come into my head. * * * I knew that the rail had been in the same condition as it was on that night for about a week. * * * When I stepped down from the north side of Thirty-Fourth street, I first stepped on planking. After that I stepped on dirt or mud. The dirt had been there before the accident, maybe a week or six weeks. I do not remember exactly, but during at least a week, and perhaps for six weeks, before the accident, whenever I saw that crossing, I saw the dirt and I saw this raised rail, and the only time that I did not see it was the night of the accident."

[2, 3] The plaintiff was not only guilty of contributory negligence, but he failed to establish any negligence on the part of the defendants. The city had a right to change and repair the street, and there is nothing to show that any further precautions could have been taken to prevent an accident of this character. The contractors could not barricade the street. The place was well lighted. It is difficult to imagine what further could be done, unless some one stood on the street to escort each person across, and I take it no one would contend, under such circumstances, such obligation rested upon the city or its contractors.

The judgment and order appealed from by the plaintiff are affirmed, with costs to the defendant Franklin Contracting Company, and the judgment and order appealed from by the United States Wood Preserving Company are reversed, with costs to said defendant, and the complaint dismissed, with costs. All concur.

(161 App. Div. 262)

LARKIN CO. v. TERMINAL WAREHOUSE CO.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. INDEMNITY (§ 13*)—DEFECTIVE PREMISES—LIABILITY OF LANDLORD.

Plaintiff, defendant's lessee, sues to recover the amount it was compelled to pay for the death of its employé while using an elevator by the elevator suddenly dropping and stopping so as to knock a box off of the truck, which struck the employé and knocked him into an adjoining light shaft which was not partitioned from the elevator shaft. Both plaintiff and defendant knew of the danger from such sources; the elevator having always been operated practically in the same manner. *Held*, that plaintiff and defendant were in *pari delicto*, both with respect to such negligent conditions and to the violation of ordinances by not partitioning the elevator and light shafts, so that plaintiff could not recover from defendant the amount it was compelled to pay for the death of its employé.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29-35; Dec. Dig. § 13.*]

2. LANDLORD AND TENANT (§ 152*)—ALTERATIONS—CONSIDERATION.

A promise by the landlord, made after the lease was executed, to make certain changes in the elevator shaft, was not supported by a consideration; the lease not being executed in reliance upon the performance of such promise.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 152, 538-543, 545-549, 551-557; Dec. Dig. § 152.*]

Clarke, J., dissenting.

Appeal from Special Term, New York County.

Action by the Larkin Company against the Terminal Warehouse Company. From an order setting aside a verdict for plaintiff and from a judgment of dismissal, plaintiff appeals. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Paul Armitage, of New York City (H. D. Donnelly, of New York City, on the brief), for appellant.

B. L. Pettigrew, of New York City (Walter L. Glenney, of New York City, on the brief), for respondent.

LAUGHLIN, J. This is an action by a tenant to recover of its landlord the amount which it was obliged to pay in settlement of an action brought for the death of one of its employés; it being claimed by the plaintiff that as between it and the defendant the latter was primarily responsible.

The plaintiff is a corporation organized under the laws of West Virginia having its principal office and place of business in the city of Buffalo, N. Y., and is engaged in manufacturing and selling soaps, perfumes, and pure foods. The defendant is a domestic corporation and owns certain stores at the foot of West Twenty-Seventh and Twenty-Eighth streets in the borough of Manhattan, New York, part of which it uses for storage warehouse purposes and part of which it sublets.

On the 26th day of May, 1909, the plaintiff leased the fourth floor of defendant's seven-story terminal store No. 21, on the north side of Twenty-Seventh street between Eleventh and Twelfth avenues, for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the period of 10½ months from the 15th day of June of that year "for the storage, packing and shipping of their products and premiums." The building was constructed in the year 1891, and at that time a freight elevator was erected and installed therein. The plaintiff at the time in question occupied the seventh floor of the same store under a yearly renewal of a lease first made on the 16th day of April, 1906, for storing new furniture only, and the sixth floor for the same purpose under a like renewal of a lease commencing on the 5th day of January, 1907, and the westerly half of the first floor for like purpose under a like renewal of a lease commencing on the 1st day of August, 1907. The basement and second floors were used by the defendant for storage warehouse purposes, and the rest of the building was used by other tenants for storage purposes.

The right to use the elevator was not given by the lease in express terms to the plaintiff, but, after describing the part of the building leased, the lease contains the usual phrase "with the appurtenances." The elevator was originally operated by steam power, but this was changed to electricity in 1902. The defendant maintained the elevator and furnished the power to operate it, but not an operator. The elevator was operated by a hand cable within reach of the door opening into the elevator shaft on each floor of the building. It was not equipped with any device for locking it when in or out of use, and could therefore be operated by pulling the cable at any part of the building no matter where the elevator was at the time. The tenants with the knowledge and acquiescence of the defendant, were accustomed to use the elevator for carrying freight to and from the different lofts; and the employes of the different tenants were accustomed to ride on it instead of attempting to ascend or descend by a stairway which was poorly lighted and more or less obstructed, adjacent to the elevator.

On the 3d day of February, 1910, one William Grosser, an employé of the plaintiff, while engaged in its business in using the elevator, met with an accident which resulted in his death. An action was brought by his administratrix against the plaintiff to recover the pecuniary loss sustained by his death. The complaint in that action, as finally amended, charged, in two counts, liability for negligence at common law, and under the statute for defects in the condition of the ways, works, and machinery. The plaintiff duly notified the defendant of the commencement of the action and demanded that it defend the same, but it failed so to do. The action was settled without trial, and on the failure of the defendant to reimburse the plaintiff this action was brought. The case was submitted to the jury, and a verdict was rendered for the amount for which the plaintiff settled the action against it and \$500 counsel fees. The reasonableness of the settlement as to the amount was not questioned. At the close of the evidence a motion was duly made to dismiss the complaint. The court reserved decision pending the submission of the general issue and specific questions to the jury, and after the rendition of the verdict the motion was granted, evidently on the theory that the plaintiff and defendant were joint tort-feasors.

The dimensions of the platform of the elevator were 7 feet 1 inch by 7 feet 11 inches, and it had no railing. It was operated in a shaft

much larger than its dimensions, leaving a light shaft between it and the Twenty-Seventh street wall of the building of the width of $3\frac{1}{2}$ feet at the first floor, and, owing to the tapering of the outer wall, 4 feet and 4 inches at the fourth floor, and at each floor there was a window in the outer wall. The part of the shaft in which the elevator ran was only separated from the light shaft by an angle iron about 6 inches above each floor and evidently a few inches in width vertically, to which just above each floor a small plate was fastened to afford access to the window. At the time of the accident, decedent and a fellow employé were engaged in moving boxes of salt and starch from the ground floor to the fourth floor. They piled 25 boxes in tiers, one above the other, extending somewhat higher than a man's head, on a low platform truck with no railing and pushed it onto the platform of the elevator, and both of them rode on the elevator, the decedent's fellow workman operating it, to the fourth floor. There, while both of them were standing on the platform in the act of pushing the truck off, the elevator suddenly dropped about three feet and stopped, and a box fell from the top of the pile on the truck and struck the decedent and precipitated him backward into the light shaft, and he fell to the bottom, sustaining injuries from which he died. The evidence shows that some one must have pulled the cable to thus start and stop the elevator; that it was not pulled by the decedent or his fellow employé who was working with him; and that just before the elevator moved a signal was given from another part of the building, not definitely located, and by some one, not identified, indicating an intention to move the elevator, by calling out: "Look out above!" "All right."

[1] The construction and operation of the elevator, with the exception of the change in motive power, remained the same from the time it was originally installed. Prior to the time the plaintiff took a lease of the fourth floor, both the plaintiff and the defendant were aware of the fact that at times the elevator when in use at one floor was moved by pulling the cable at another floor, and that property had been damaged thereby; and were equally aware of the facts from which danger was to be apprehended to employé's working on the platform of the elevator, which was thus unprotected on the side of the open light shaft, should the elevator be suddenly moved without warning, and such dangers had frequently been a matter of discussion between their representatives. It is manifest, therefore, that both plaintiff and defendant were negligent, and, I think, in quite the same manner. The defendant was negligent in furnishing its tenants with a dangerous elevator, and the plaintiff was negligent in furnishing the same elevator for the use of its employé's. In this view of the case it is manifest that the plaintiff and defendant are in *pari delicto*.

It is contended by the learned counsel for the plaintiff that his client was not equally at fault with the defendant for the reason that as between them the duty of maintaining the elevator rested on the defendant, and that the plaintiff was not at liberty to change it. It may well be that the plaintiff was not authorized to construct a partition between the light shaft and the elevator shaft proper; but the plaintiff was fully aware of all danger when it leased the fourth floor. It could then

have exacted any condition it saw fit or have refused to lease the premises. It could have insisted upon an agreement on the part of the defendant to make such changes either in the manner of operating the elevator, or in the construction of the shaft, as would remove the dangers incident to the operation of the elevator in its then condition. If it had done this and the defendant had failed to perform its contract obligation, there would doubtless have been a right of recovery over. *Prescott v. Le Conte*, 83 App. Div. 482, 82 N. Y. Supp. 411, affirmed 178 N. Y. 585, 70 N. E. 1108; *Mowbray v. Meriweather*, 1895, 2 Q. B. D. 640; *The Steamship Lewis Luckenbach*, 207 Fed. 66, 124 C. C. A. 626.

[2] This, however, the plaintiff failed to do. The evidence shows, it is true, that the plaintiff's representatives on the premises at different times complained with respect to the dangerous condition of the elevator, and at one time, shortly before the lease of the fourth floor was made, the plaintiff's New York branch manager, who subsequently represented the plaintiff in making the lease, spoke to the defendant's assistant secretary about it and suggested that some changes should be made to render the elevator more safe, and the assistant secretary replied, "We will get to that some day, or something like that, just a casual talk about the general conditions," and it appears that about the time the lease was made, or shortly thereafter, plaintiff's warehouse foreman complained to the defendant's superintendent and asked why some signal was not provided to prevent accidents, and the defendant's superintendent replied that "he would attend to it." If the defendant could be held liable to make changes and alterations on parol promise collateral to the lease, this evidence is insufficient to show any consideration for the promise, for it does not show any such promise at or before the execution of the lease or that the lease was executed in reliance upon the fulfillment thereof.

The learned counsel for the appellant further contends that the elevator was not constructed or maintained as required by regulations prescribed by the Bureau of Buildings pursuant to authority delegated and conferred by section 101 of the ordinances of the board of aldermen. The regulations so made, if duly served on the defendant—as to which there is no evidence—would, doubtless, have required the inclosure by itself of that part of the elevator and light shaft in which the elevator ran. If that had been done, the decedent might have suffered contusions; but it is highly improbable that he would have been killed by the box falling. It is claimed, but as already indicated it has not been shown, that this elevator was constructed or maintained in violation of law. But if the law required a wall or other partition between the elevator and the light shaft, the plaintiff was fully aware that it had not been complied with when it made the lease, and if, notwithstanding defendant did not undertake to make it a lawful structure, the plaintiff took the lease and directed the decedent to use the elevator, it was in *pari delicto* and is neither entitled to recover over nor to contribution. The plaintiff showed that there are simple well-known and practical safety devices that may be readily attached to the platform of such an elevator to grip the operating cable and thus render it impossible to

move or to draw the cable through the floor of the elevator, which is essential to start the elevator. The plaintiff, at least, owed as great a duty to decedent as defendant owed to it.

It follows therefore that the order and judgment should be affirmed, with costs.

INGRAHAM, P. J., and McLAUGHLIN and SCOTT, JJ., concur. CLARKE, J., dissents.

(161 App. Div. 219)

DUFFY v. LINCH.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. MASTER AND SERVANT (§ 236*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff was employed by defendant as night watchman during the making of certain repairs to the track of defendant's street railroad, his duty being to set out red lanterns on each side of the track to warn travelers. Plaintiff, in placing one of the lanterns, took a position next to the track, and as he was straightening up was struck from behind by the step of a northbound car, which passed without stopping. He testified that he neither saw nor heard the car until he was struck, and that, when he procured a stone to set the lantern on, he looked and saw no car for at least a block, but did not look again. If he had taken a position away from the track, as he could have done, he would not have been struck. *Held*, that he was negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 723-742; Dec. Dig. § 236.*]

2. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—DEFENDANT'S INSTRUMENTALITY.

In an action for injuries to a street railroad track watchman by being struck by a car approaching him from the rear, it appeared that cars belonging to two different companies were operated on the track, and that those of defendant were painted blue, and those of the other company were green, and the only evidence as to which company's car hit plaintiff was the testimony of one witness, who testified that the car was green and had a Second Avenue sign on it. There was no evidence that defendant's cars had such a sign. *Held*, insufficient to show that plaintiff was struck by defendant's car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

Appeal from Trial Term, New York County.

Action by Anthony Duffy against George W. Linch, as receiver of the Second Avenue Railroad Company. From a verdict for plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles E. Chalmers, of New York City, for appellant.

McLAUGHLIN, J. [1] On the 20th of March, 1911, the defendant, as receiver, was operating a surface railroad in Second avenue,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

New York City. At that time certain repairs were being made to the track, and for that purpose paving stones had been removed from between and along the side of the tracks and piled around the elevated railroad pillars, beside the tracks. The plaintiff, on the day mentioned, was employed as night watchman, and went to work about 5 o'clock in the afternoon. His duties, in part, at least, were to set out, and keep lighted during the night, ten red lanterns on each side of the track, to warn passers-by of the repairs which were being made. These lanterns had been properly placed and lighted, but for some reason, between 7 and 8 o'clock, he changed the location of one of them by placing it in a clear space between two piles of stones, and at a point about two feet east of the northbound track. He testified that he first placed a paving stone on the ground at the point selected, then put another one on top of it, and then placed the lantern on top of that, and was straightening up when he was struck from behind by the step of a northbound car, which passed on without stopping, that he neither saw nor heard the car until he was struck, and that when he procured the first stone he looked, but for at least a block no car was in sight. There is no proof that he thereafter looked, or took any precautions whatever for his own safety, notwithstanding the proof shows that upwards of 60 cars passed each hour. Where cars were passing as frequently as that, the plaintiff had to exercise great care for his own safety. He was not only negligent in this respect, but also in placing himself where he could be hit by a passing car. There was no necessity for his standing so near the track. He could have placed the lantern just as well by standing on the other side of the stones, and had he done so would have been in a place of safety, and could not have been injured, even though he had not seen the approaching car.

[2] The judgment cannot be sustained for another reason. The evidence is insufficient to establish that it was defendant's car which struck the plaintiff. At the place where the accident occurred two separate and distinct lines of cars were operated over the same tracks, those of defendant, which were painted blue, and those of the Metropolitan Street Railway Company, which were painted green. The only evidence as to which company's car hit plaintiff was the testimony of one witness, who stated that the car was painted green and had a Second Avenue sign on it. Whether or not the cars of the Metropolitan Street Railway Company, which ran over this line, had a Second Avenue sign on them, does not appear; but, if the car which hit the plaintiff were painted green, then the fact is undisputed that it was a car which did not belong to the defendant.

Upon both grounds, therefore, I think the motion to dismiss the complaint at the close of plaintiff's case, and for the direction of a verdict in favor of the defendant at the close of the whole case, should have been granted.

The judgment and order appealed from is therefore reversed, with costs, and the complaint dismissed, with costs. All concur.

(161 App. Div. 191)

STANDARD BITULITHIC CO. v. CARLISLE, State Commissioner of Highways.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

1. CERTIORARI (§ 24*)—APPLICABILITY OF REMEDY.

A contractor for state paving, whose contract has been suspended by the Highway Commissioner as not advantageous to the state, cannot review the cancellation of his contract by certiorari, which would amount to obtaining specific performance of the contract by certiorari, for no person can be compelled by any process of law to prosecute any enterprise undertaken for purposes of his own beyond the point at which he sees fit to discontinue the undertaking, but the breach of contract merely gives rise to an action for damages.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 37; Dec. Dig. § 24.*]

2. HIGHWAYS (§ 113*)—STATE HIGHWAYS—POWER OF HIGHWAY COMMISSIONER.

The State Highway Commissioner is the sole representative of the state, and, his authority in determining the plans and in changing the plans of state highways being practically unlimited, his determination that the public good requires that a road under contract shall not be built is conclusive upon the contractor, regardless of Highway Law (Consol. Laws, c. 25) § 132, providing for the cancellation and reletting of contracts, although the Commissioner's determination that the contract is not for the best interest of the public cannot deprive the contractor of his right of action for breach of contract.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-352, 355; Dec. Dig. § 113.*]

Smith, P. J., dissenting.

Appeal from Special Term, Albany County.

Application by the Standard Bitulithic Company for certiorari to review the action of John N. Carlisle, State Commissioner of Highways, in canceling the relator's contract. From an order directing the issuance of the writ, respondent appeals. Order reversed, and proceeding dismissed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Thomas Carmody, Atty. Gen. (James A. Parsons and Claude T. Dawes, Deputy Attys. Gen., of counsel), for appellant.

Niles & Johnson, of New York City, for respondent.

JOHN M. KELLOGG, J. In October, 1912, the Standard Bitulithic Company and the state of New York, acting through the then existing Commission of Highways, entered into a contract for the construction by said company of a section, about 11½ miles in length, of a state highway, route No. 35 on Long Island, known as the Smithtown-Port Jefferson road. Soon after the making of said contract said company made preparations for building the road, and on April 8, 1913, as soon as the grade lines had been given, commenced work on the grading and culverts. On May 31, 1913, the State Commissioner of Highways, who, pursuant to chapter 80 of the Laws of 1913, which became effective May 15, 1913, succeeded the State Com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mission of Highways and the State Superintendent of Highways made the order complained of, as follows:

"May 31, 1912."

"Whereas, a contract was entered into October 30, 1912, between the Standard Bitulithic Company of New York City, party of the first part, and the people of the state of New York, party of the second part, for the construction of the Smithtown-Port Jefferson State Highway, No. 5232, county of Suffolk, having a length of 11.59 miles; the specifications calling for a 4" bottom course of cementitious Hudson river gravel, with top course of Warrenite pavement, the estimated cost of the improvement to be \$222,734.80; and whereas, the performance of such contract would be against public policy and would be irreparable damage to the state for the reason that if the highway is improved according to specifications it will not provide a proper highway to construct in said locality; and whereas, after a careful investigation of the conditions in the locality through which this highway was to be constructed and a study of the plans and specifications, the committee of advisory engineers has recommended the cancellation of said contract: It is ordered, that the contract for the improvement of the Smithtown-Port Jefferson State Highway No. 5232, county of Suffolk, be and is hereby canceled.

"[Signed] R. K. Fuller, Secretary."

"[Signed] J. N. Carlisle, Commissioner."

[1] The contractor is not satisfied with that determination, and wants it reviewed by certiorari. The officer charged with the responsibility of performing the contract believes that the road as planned would not be for the interest of the state. The contractor thinks otherwise, and desires the court to pass judgment between them. This is in effect an attempt to compel the specific performance of a contract by certiorari, which is not a recognized remedy for that purpose.

In *People ex rel. Ryan v. Aldridge*, 83 Hun, 279, 31 N. Y. Supp. 920, it is stated:

"No person can be compelled, by any process of law, to prosecute any enterprise undertaken for purposes of his own beyond the point at which he sees fit to discontinue the undertaking; and if he has contracted with another person to do the work for him, and afterwards refuses to have it done, the contractee does not relieve himself from the obligation of the contract, but the remedy of the contractor is confined to his action of damages for the breach. The contract is not abrogated, but, in the nature of things, neither party can compel its specific performance by the other. The rule applies as well to bodies corporate and politic as to individuals, and even to the state," etc.

[2] The Commissioner is the sole representative of the state and the responsibility as to the state highways rests upon him. By section 132 of the Highway Law the performance of the contract is under his supervision and control. His authority in determining the plan and changing the plan of a state highway is practically unlimited. His determination that the public good requires that a road under contract shall not be built is conclusive upon the contractor, irrespective of section 132. The Commissioner cannot, however, destroy the effect of a valid contract and deprive a contractor not in default of the benefits he would derive from performance. If the Commissioner stops work upon a contract without cause, the state is responsible to the contractor for the loss of his contract. In my judgment section 132 of the Highway Law has no application to the question under consideration. That section contemplates a suspension of the contract,

or a stopping of the work, growing out of the fact that the work is not being performed according to the contract or for the best interest of the state. It contemplates a default or a failure to properly perform by the contractor.

But if that section applied to the case, it is not controlling here. The fact that the work has actually been stopped by the Commissioner must be recognized by the contractor. A determination by the Commissioner that work is stopped because of the default of the contractor does not establish the default or prejudice the contractor if he is not at fault. The section contemplates no notice to the contractor, or hearing on the merits. The determination, therefore, that the contractor is at fault is not binding upon him, and for that reason is not reviewable by certiorari. *Matter of Keystone State Construction Co. v. Williams*, 152 App. Div. 575, 137 N. Y. Supp. 405. But the Commissioner has not suggested that the contractor is at fault. The state has stopped the work solely because of defects in the plan of the work itself. The work is therefore at an end, and the contractor must pursue his remedies in the court provided for that purpose. The order appealed from should be reversed, and the proceeding dismissed, with costs to the relator.

Order reversed, with \$10 costs and disbursements, and motion for writ denied and the writ quashed. All concur; LYON, J., in result; SMITH, P. J., dissenting in memorandum.

SMITH, P. J. (dissenting). It is by forced construction only that section 132 of the Highway Law can be held applicable to this case. The plain intent of that section is to authorize an annulment of the contract through the fault of the contractor, in which case the contractor is made liable for any excess paid upon a reletting of the contract. Under section 15 of the Highway Law the Highway Commissioner is given authority to determine the method of construction of the highways. It would seem as a necessary incident to that power, in case it should be found that a method determined upon proved inadequate, that the Highway Commissioner should have authority to change the method of construction if necessary by the annulment of a contract made. The contractor, however, under his contract has a vested right to the profits of his contract. Those cannot be taken away from him without his fault. It cannot matter to him, however, whether the contract be annulled and his profits paid to him, or whether he be allowed to fulfill the contract and thus acquire the right to his profits. If the contract be annulled without his fault he has full remedy before the Court of Claims to recover the same if the state refuse to pay voluntarily. Under these circumstances he is not a party aggrieved by the determination under section 2127 of the Code of Civil Procedure.

Again: A writ of certiorari requires the respondent to certify a record. In the case at bar there is no record because there has been no trial. The Highway Commissioner would simply certify that he had been advised by his advisory board that the specifications were inadequate to a substantial highway. Upon that return the Special

Term could make no determination. The act of the Commissioner in revoking this contract is to my mind purely an administrative act, not in any sense judicial; and, even if the contractor were an aggrieved party, it is difficult to see how he could obtain any remedy in the proceedings he has taken.

The order granting the writ should be reversed with \$10 costs and disbursements, and the motion for the writ denied and the writ quashed.

(161 App. Div. 25)

PEOPLE ex rel. FROST et al. v. WOODBURY et al.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

TAXATION (§ 598*)—MORTGAGE RECORDING TAX—PAYMENT UNDER PROTEST—EXPENSES OF DEFENDING.

LAWS 1906, c. 582, imposing a recording tax of one-half per cent. on the filing of a real estate mortgage, being a revenue measure for the state, and not a county law, the recording officer in each county being merely made use of to collect it, and Tax Law (Consol. Laws, c. 60) § 262, providing he shall be entitled to receive all his necessary expenses for the purposes of this article (Tax on Mortgages) being first approved and allowed by the State Board of Tax Commissioners, to be retained by him out of the moneys coming into his hands, the claim of the county attorney's firm for defending an action brought against the recording officer to recover such a tax, paid him under protest, should be allowed as an expense of the performance of the collector's duty; he having turned over the papers in the action to the county attorney, and his firm having called the attention of the Attorney General to the matter, and with the latter's knowledge and consent defended the action.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1220; Dec. Dig. § 598.*]

Kellogg, J., dissenting.

Certiorari on the relation of J. Sheldon Frost and others against Egbert E. Woodbury and others, composing the State Board of Tax Commissioners, and Thomas Carmody, Attorney General of the State, to review a determination on the claim of relators. Determination annulled, and claim allowed.

Certiorari issued out of the Supreme Court, and attested on the 26th day of June, 1911, directed to Egbert E. Woodbury and others, composing the State Board of Tax Commissioners, commanding them to certify and return to the office of the clerk of the county of Albany all and singular their proceedings had in relation to the disallowance of the claim of the relators for professional services rendered in defense of an action brought in the Supreme Court by the Hygienic Ice & Refrigerating Company against John Franey, as clerk of the county of Albany, for the recovery of a portion of the moneys paid by said company as a tax on a certain trust mortgage claimed by it to be in part a supplemental mortgage within the meaning of the Tax Law, and also directed to the Attorney General of the state of New York commanding him to certify and return likewise all letters, writings, and memoranda relating to such claim.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of Frost, Daring & Warner, of Albany (J. S. Frost, of Albany, of counsel), for relators.

Thomas Carmody, Atty. Gen. (August Merrill, Deputy Atty. Gen., of counsel), for respondents.

WOODWARD, J. On the 8th day of February, 1909, a mortgage of the Hygienic Ice & Refrigerating Company was presented to the clerk of Albany county for recording. The corporation claimed an exemption from a portion of the mortgage tax, which claim the county clerk refused to recognize, and the full amount of the tax was paid and the mortgage duly recorded, though the sum of \$540 was paid under protest. On the 20th day of February, 1909, the mortgagor filed with the State Board of Tax Commissioners a petition to review the action of the county clerk, and while such proceeding was pending undetermined, and on the 23d day of February, an action was brought in the Supreme Court by said mortgagor against John Franey, as clerk of the county of Albany, as sole defendant, to recover the amount so paid under protest and asking that the defendant be restrained during the pendency of the action from paying over or distributing the said \$540. Luther C. Warner was at the time county attorney of Albany county, and the summons and complaint, with other moving papers, were delivered to him by John Franey, evidently upon the theory that the duty belonged to him to defend the action, and Mr. Warner's firm of Frost, Daring & Warner appeared in the action and successfully defended the same. They subsequently submitted a bill for services to the clerk of Albany county, who in turn referred it to the State Board of Tax Commissioners for their approval and allowance, and this body, upon the opinion of the Attorney General, disallowed the claim, and the matter is brought here by a writ of certiorari for review.

The learned Attorney General, in his return to the writ, denied that he had any notice of the appearance of the relators in the action mentioned until the 11th day of May, 1910, and that the relators' letter of March 8, 1909, informing him that the appearance was not made by Mr. Warner, as county attorney, was never received by his office, but upon the hearing it was stipulated that such letter was received, so that it appears that the Attorney General, whose duty it would probably have been to take care of the action out of which this claim arose, had notice early in the litigation of the fact that Mr. Warner did not appear in the case as county attorney, and that the litigation was being conducted by the relators.

The Mortgage Tax Law of 1905 (chapter 729) was strictly a revenue measure, providing for an annual tax of one-half of 1 per cent.; and, while the law was remodeled by chapter 532 of the Laws of 1906 and made merely a recording tax of one-half of 1 per cent. upon the filing of the mortgage, it has not changed in its essential aspect of a revenue measure for the state, with incidental concessions to the localities from whence the tax is collected for the purpose of meeting the local taxes or expenses. The statute is not, however, in any sense a county law; it merely makes use of the recording officer in each of the counties to

collect the revenue; and, sensible of its general character and of the impropriety of imposing any burden upon the counties as such, the Legislature in the original statute (chapter 729, Laws of 1905) provided that:

"Recording officers and county treasurers and the chamberlain of the city of New York, shall severally be entitled to receive, all their necessary expenses for the purposes of this act, including printing, advertising, costs of lists, hire of clerks and assistants, being first approved and allowed by the State Board of Tax Commissioners, which shall be retained by them out of the moneys coming into their hands." Section 311.

And this language is substantially the same in section 262 of the Tax Law as it exists to-day. The county clerk, in collecting the recording tax, is not acting for the county; he is the agent of the state. His duties as county clerk require him to record mortgages upon property within the county, but the state, for the purposes of a revenue, forbids that he shall discharge this duty until the mortgagor has paid a certain fee, and the statute provides that, in the discharge of this obligation to the state, he shall be "entitled to receive all" his "necessary expenses for the purposes of this article, including printing, hire of clerks and assistants." Obviously if John Franey was not acting as county clerk, but as agent of the state, in the transaction out of which the litigation grew, neither the county of Albany, nor its county attorney, had anything to do with the action, and the mere fact that John Franey thought this a proper matter to turn over to the county attorney did not in the least change the legal status of Mr. Warner: neither he nor his firm of lawyers was under any obligations to perform this service gratuitously for John Franey as the collecting agent of the state's tax upon the recording of a mortgage, for the statute itself had provided that in this capacity he was entitled to "receive all" his necessary expenses. He was bound to collect the tax prescribed by the state, and, if in doing this he was put to the expense of defending an action, it was not in connection with any matter pertaining to the county of Albany, and the latter could not be put to any expense in the matter, even to the extent of furnishing an attorney who was already receiving a salary for the duties prescribed by the conditions of his employment and which related strictly to the affairs of the county of Albany. See Resolution of Appointment, and section 210 of the County Law (Consol. Laws, c. 11).

Assuming that it was the duty of the Attorney General generally to look after a matter of this character, the action was brought against "John Franey, as clerk of the county of Albany," which would not suggest such a duty upon the part of the Attorney General upon its face, and, as soon as the real character of the action developed, the relators concededly called the attention of that officer to the matter, and the litigation appears to have been carried forward to a successful issue with the knowledge and consent of the Attorney General. The latter might have employed the relators originally for this purpose, and it would be rather technical, and inconsistent with the dignity of a great state, to hold that services performed in good faith, and resulting in advantage to the state, carried on with the full knowledge of the Attorney General, could not be compensated out of a fund

charged by the statute with "all * * * necessary expenses for the purposes of this article." As the record now stands, with the concession that the Attorney General had notice of the real facts immediately after the relators appeared in the case, and that the litigation was permitted to go forward with no objection on the part of any one, we are of the opinion that the relators have shown a right to be compensated out of the fund; that the defense of this litigation was one of the "necessary expenses for the purposes of this article"; and that John Franey might have employed other attorneys and properly charged the fund with such expense, and the situation is not changed, in so far as the rights of the relators are concerned, because he thought it was within the scope of the duties of Mr. Warner as county attorney. Mr. Warner never appeared as county attorney; the Attorney General had notice at the outset that he did not appear in any official capacity; and the rights of the relators cannot be prejudiced by what John Franey did not know of the duties and obligations of Mr. Warner.

Whatever we might think of the question as presented by the original record, as modified by the stipulation of the Attorney General, we are persuaded that the determination of the State Board of Tax Commissioners is not warranted, and that it should be overruled, and the claim of the relators should be allowed as a proper and necessary expense of performing his duties as collector of the recording tax in the matter in question.

The determination is annulled, and the claim of the relators allowed.

Determination annulled on law and facts, and the claim of relators allowed, with \$50 costs and disbursements. All concur, except KELLOGG, J., who dissents.

(161 App. Div. 135)

MOGHABGHAB v. SHERMAN & SONS CO.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

PLEADING (§ 8*)—COMPLAINT—SUFFICIENCY—MATTERS OF FACT OR CONCLUSIONS.

A complaint alleged that plaintiff's intestate was the owner and holder of a certificate for stock in a corporation; that a contract was entered into between the intestate and others on one part and defendant on the other, whereby defendant agreed to purchase the stock of the corporation for an amount equal to the book value of the shares; that pursuant to the terms of the contract the defendant determined the book value of the shares; that plaintiff's intestate duly delivered to a director and officer of the defendant his certificate of stock, which in turn was delivered to defendant; that prior to the commencement of the action the other persons in the contract delivered their stock to defendant, and received payment; and that plaintiff's intestate duly performed all conditions on his part, whereby he became entitled to payment of a certain sum. *Held*, that the complaint was good both under Code Civ. Proc. § 533, declaring that, in pleading the conditions precedent in a contract, it is not necessary to state all the facts, but the party may generally state that he, or the person whom he represents, duly performed all the conditions on his part, and as a detailed statement of the performance of all of the conditions precedent, and hence a demurrer cannot be sustained on the ground that

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

plaintiff, by alleging some of the facts of performance, waived the statute, thus rendering the complaint bad.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.*]

Appeal from Special Term, New York County.

Action by Rashid Moghabghab, as administrator of Shakir Moghabghab, deceased, against the Sherman & Sons Company. From an order sustaining a demurrer to the amended complaint, plaintiff appeals. Order reversed, and demurrer overruled.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Ferris, Dannenberg & Ansbacher, of New York City (Jacob Ansbacher, of New York City, of counsel), for appellant.

Henry G. Gennert, of New York City, for respondent.

CLARKE, J. Defendant demurs to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action.

The complaint alleges: That defendant is a domestic corporation, and that plaintiff is the administrator of Shakir Moghabghab, who died October 21, 1912, intestate. That prior to January 18, 1911, plaintiff's deceased was the owner and holder of a certificate for 20 shares of stock in the Levant Trading Company, Incorporated. That on or about the 18th day of January, 1911, a contract was entered into between plaintiff's deceased and others, on the one part, and the defendant, Sherman & Sons Company, on the other part, a copy of which was annexed, whereby the defendant agreed to buy the stock of the plaintiff's deceased in the Levant Trading Company, Incorporated, for an amount equal to the book valuation of said shares, as shown by the books of said Levant Trading Company, when closed, as of the date of January 15, 1911, and from the inventory and balance sheet to be prepared. That pursuant to the terms of said contract the defendant caused to be prepared an inventory and balance sheet, which is annexed. The said balance sheet showed the book value at that time of the shares of stock in said company held by the plaintiff's deceased.

That heretofore, and on or about the 3d day of April, 1911, at Beirut, Syria, plaintiff's deceased duly delivered to one George M. Chaffee his said certificate of stock for 20 shares in the Levant Trading Company, duly indorsed, and at the same time and place the said Chaffee duly delivered to plaintiff's deceased a receipt therefor, a copy of which is annexed. At the time of delivery of the said certificate of stock the said Chaffee was a director and officer of the defendant. The said Chaffee received the said certificate for and on behalf of the defendant, and as a director thereof. Thereafter, and prior to the commencement of this action, the said Chaffee duly delivered said certificate of stock to the defendant. Prior to the commencement of this action the other persons mentioned in said contract delivered their stock to the defendant, and received payment therefor. Prior to the commencement of this action the defendant became the holder of all

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the stock of the Levant Trading Company. That plaintiff's deceased duly performed all conditions on his part. By reason of the premises there became due and owing and payable by the defendant to the plaintiff's deceased the sum of \$2,137.60, payment of which has been demanded, but of which no part has been paid.

The demurrer was sustained by the learned Special Term, upon the ground that the plaintiff, while pleading performance generally pursuant to section 533 of the Code of Civil Procedure, failed to rely on the provisions of that section, and in addition thereto alleged the details of performance, and was therefore bound by such details, and that the allegations failed to show compliance with the terms of the agreement annexed to the complaint and made part of it. I am unable to agree with that conclusion. Not only does the complaint allege in the language of the statute that the plaintiff's deceased "duly performed all the conditions on his part," but the facts set forth to show performance support said allegation instead of destroying it. In addition it seems to me that independent of that allegation the facts set forth allege a complete cause of action. The complaint alleges that plaintiff's deceased delivered his shares duly indorsed to a director and an officer of the company who received said certificate of stock for and on behalf of the company, and the receipt is signed: "G. N. Chaffee, Director of Sherman & Sons Co."

It also avers that Chaffee duly delivered the certificate of stock to the defendant, and that the other persons mentioned in the contract delivered their stock to the defendant, and received payment therefor, and that the defendant became the holder of all the stock hereinbefore mentioned. *Corr v. Sun Printing & Publishing Co.*, 177 N. Y. 131, 69 N. E. 288, relied on by respondent, was an action for libel where the complaint alleged, under section 535 of the Code of Civil Procedure, that the libel was published of and concerning the plaintiff; but the court found from the facts set forth it was not so, and sustained a demurrer. In other words, that the detailed facts stated completely refuted the conclusion of fact alleged. So *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *People ex rel. Hart v. Goodrich*, 92 App. Div. 445, 87 N. Y. Supp. 114; *Burdick v. Chesebrough*, 94 App. Div. 532, 88 N. Y. Supp. 13. In each of these cases facts were set up inconsistent with and destructive of the general allegation. No such situation is here presented.

The complaint sets up a complete cause of action independent of the general allegation, and the facts so set up are not inconsistent therewith.

The order appealed from should be reversed, with \$10 costs and disbursements, and the demurrer overruled, with \$10 costs, and with leave to the respondent on payment thereof to withdraw the demurrer, and answer over.

All concur.

(161 App. Div. 187)

RIGNEY et al. v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

1. CONTRACTS (§ 187*)—CONSTRUCTION—THIRD PERSONS.

The defendant railroad company's tracks intersected a public street, passing under a bridge which it erected and maintained. The bridge becoming unfit for use, the municipality required that it be repaired or rebuilt, and the railroad company submitted plans for a new bridge with the same clearance, but longer. The municipality deeming a greater clearance necessary for the protection of the railroad employes, the company submitted plans raising the bridge accordingly, and the city permitted the construction of the lengthened and higher bridge, upon the company contracting that, in case of damages resulting from the reconstruction of the bridge to any person or property, it would pay the same, and save the city harmless from any actions brought on account of the bridge. *Held*, that as it was not for the interest of the city to have the bridge raised, but for the interest of the railroad company, the contract was for the benefit not only of the city, but property owners whose land was injured by the new bridge.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

2. CONTRACTS (§ 54*)—CONSIDERATION—SUFFICIENCY.

That a municipality allowed a railroad company, which was bound to maintain a bridge carrying a street over its tracks, to elevate the new bridge and increase its length, instead of requiring the tracks to be lowered, was sufficient consideration to support an agreement on the part of the railroad company to pay all damages accruing by reason of the reconstruction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 233-239, 242, 243, 251, 254, 255, 291-315; Dec. Dig. § 54.*]

3. CONTRACTS (§ 330*)—PARTIES ENTITLED TO SUE.

Where a railroad company, in consideration of the municipality allowing it to elevate a bridge over its tracks, agreed to pay all damages which might accrue, by reason of the elevation, property owners injured have sufficient interest to maintain an action upon the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1589, 1591-1594, 1596, 1597, 1602-1604; Dec. Dig. § 330.*]

Appeal from Trial Term, Rensselaer County.

Action by James J. Rigney and others against the New York Central & Hudson River Railroad Company. From a judgment dismissing the complaint with costs, plaintiffs appeal. Reversed and remanded.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Loucks & Loucks, of Albany (William Dewey Loucks, of Albany, of counsel), for appellants.

Visscher, Whalen & Austin, of Albany (Robert E. Whalen, of Albany, of counsel), for respondent.

JOHN M. KELLOGG, J. In the city of Rensselaer the defendant's railroad intersects Columbia street, passing under a bridge erected and maintained by the defendant as a continuation of the street. There was a clearance between the bridge and the rails in the tracks of about 16½ feet. The bridge and its approaches did not interfere materially

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with the plaintiffs' premises, or the easy access thereto, and had been maintained in substantially the same condition for about 38 years.

[1] The bridge became unsafe for use in connection with the public street, and the city authorities required that it be repaired or rebuilt. The defendant submitted plans for a new bridge with the same clearance but about 46 feet longer, thereby giving the defendant that much the more room for its tracks under the bridge. The city deemed it necessary, apparently for the protection of the men on the freight cars and perhaps others using the railroad, that there should be a clearance of at least 21 feet. The defendant submitted plans raising the bridge accordingly. The city permitted the construction of the lengthened and higher bridge, and passed the necessary ordinances for the work and its approaches upon the defendant executing a contract in which it "expressly covenants and agrees that in the event of any damages resulting from the work as it progresses, or thereafter, as a result, or in consequence thereof, or from any matter or thing connected therewith, arising therefrom, to any person or property including damage resulting from change of grade of street, being approaches to said bridge, it will pay and liquidate the same at its own expense and assume the liability therefor, and in the event of any action or actions, proceeding or proceedings of any kind or description being brought against the city of Rensselaer, by reason of, or on account of, or growing out of said work or its construction, or to prevent the performance thereof, or anything connected therewith, and the said party of the second part will at its own expense defend the same, and will pay any judgment or award recovered therein, and will in all respects fully indemnify and save harmless the said city, its officers, agents and representatives, from any and all costs, expenses, payment of judgment to be recovered or incurred in such action or actions, proceeding or proceedings."

It was not for the interest of the city to have the bridge raised above the street so that it would be necessary to build embankments in the street to make approaches to the bridge. The clearance required could have been made by the defendant by depressing its tracks, leaving the street in substantially its former condition. The requirement of the city did not mean that the bridge must be raised; it simply meant that the defendant should, in a proper way, provide for the necessary clearance. By raising the bridge it became necessary to build an embankment in the street extending out in front of the defendant's premises. By lengthening the approach it made the embankment in front of the plaintiffs' premises higher and extended it further. The defendant evidently felt that it was for its interest to raise the bridge rather than depress its tracks.

It would therefore seem that the embankment in the street and the obstruction to the plaintiffs' premises were caused in the interest of the defendant and not in the interest of the city, and there is reason for the claim, within *Reining v. N. Y., L. & W. R. Co.*, 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133, and *Smith v. Boston & Albany Ry. Co.*, 181 N. Y. 132, 73 N. E. 679, that, although the plaintiffs would have no remedy against the city for an ordinary change of grade in a pub-

lic street abutting upon their premises, yet where the grade is changed for the benefit of a railroad, and not the city, the plaintiffs are not without remedy.

The agreement executed by the defendant divides itself into two parts, by one of which it assumes and agrees to pay any damages arising from the work, or from any change of grade in the street, to any person or property, and by the other it agrees that it will defend any action or proceeding brought against the city on account of the work or its construction, or to prevent the performance thereof or anything connected therewith, and will pay any judgment recovered in such suit and save the city from any costs, expense, or damage on account of such judgment. Evidently it was better for the city that the tracks should be depressed than have an embankment built in the public street. If the tracks were depressed there would be no change of grade in the streets and no injury to the abutting property owners. Perhaps it was more economical for the defendant to assume and pay the damages which any person might sustain on account of the work, or of any change of grade, than to depress its tracks. It is inconceivable that the city, in order to save money for the defendant and to accommodate it by permitting it to build a longer bridge, would be willing to visit the damages caused thereby upon its citizens. It knew that if it were making a change of grade in a public street, in the public interest, an abutting owner could recover no damages on account thereof. It evidently did not intend to favor the company or to injure its citizens, but sought to treat all with fairness and to provide that if the defendant executed the work upon the plan proposed it must pay any damages coming to any one from a change of grade.

The contract should not therefore be construed as intending solely to indemnify the city against claims against it which were enforceable by action, but should be construed with reference to the facts as they actually existed and as fairness would seem to require. It was the duty of the city to require the tracks to be depressed so that its citizens should not be injured by a change of grade in the street, which would be necessary if the bridge were raised; or, if it permitted the defendant for its benefit to make the change in the grade of the public street, that it should make good to the abutting property owners the loss which they would sustain thereby.

The defendant was accorded rights by the city which it was not legally entitled to, and the city and the defendant knew that the exercise of those rights must necessarily injure the plaintiffs. It was therefore the right and the duty of the city, in granting the favor, to assure protection to the plaintiffs. They may therefore recover upon the contract. *Bernhard v. City of Rochester*, 127 App. Div. 875, 112 N. Y. Supp. 229; *Id.* 194 N. Y. 566, 88 N. E. 1114; *Wright v. Glen Telephone Co.*, 48 Misc. Rep. 192, 197, 95 N. Y. Supp. 101.

[2, 3] It is also proper to observe that, the change of grade being for the benefit of the defendant and not for the benefit of the city, there was at least some question whether an abutting owner might not have a remedy for an injury to his property resulting therefrom. The contract evidently intended to make that matter certain, and provided a

liability against the defendant. There was sufficient consideration for that contract, and the plaintiffs are sufficiently connected therewith to enable them to maintain the action.

The judgment is therefore reversed, and a new trial granted, with costs to the plaintiffs to abide the event. All concur.

(160 App. Div. 644)

PEOPLE v. KAYE.

(Supreme Court, Appellate Division, First Department. February 13, 1914.)

1. MUNICIPAL CORPORATIONS (§ 603*)—ORDINANCES—FIRE REGULATIONS—CONSTRUCTION.

An ordinance, requiring the owners of all manufactories, hotels, etc., to provide such fire hose, fire extinguishers, etc., and other means of preventing and extinguishing fires as said fire commissioner may direct, authorized the fire commissioner to order the installation of automatic sprinklers in a 12-story manufacturing building.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1334; Dec. Dig. § 603.*]

2. STATUTES (§ 195*)—CONSTRUCTION—RULE OF EJUSDEM GENERIS.

The rule of ejusdem generis is merely a rule of construction, and must yield to the apparent purpose of the Legislature.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 273; Dec. Dig. § 195.*]

3. MUNICIPAL CORPORATIONS (§ 630*)—FIRE REGULATIONS—OFFENSES.

Laws 1911, c. 899, amended Greater New York Charter (Laws 1901, c. 466) by adding to title 3, art. 15, a section numbered 775, which empowered the fire commissioner to require the installation, as prescribed by law or "ordinance," of automatic or other fire extinguishing equipment. Section 773, which was in existence when the amendment was enacted, provided that any person who should willfully violate or refuse to comply with any requirement of the title, or any regulation made thereunder, should be guilty of a misdemeanor. *Held*, that failure to comply with an order of the fire commissioner, ordering the installation of automatic fire extinguishers, made pursuant to an ordinance requiring owners to provide such fire extinguishers, etc., and other means of extinguishing fires as the fire commissioner might direct, was a misdemeanor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1385; Dec. Dig. § 630.*]

4. MUNICIPAL CORPORATIONS (§ 116*)—IMPLIED REPEAL.

Labor Law (Consol. Laws 1909, c. 31) § 83b, as added by Laws 1912, c. 332, requiring the owner of every factory building over seven stories high, in which more than 200 people are employed above the seventh floor, to install an automatic sprinkler system, did not impliedly repeal all other laws or ordinances requiring owners of various kinds of buildings, including factory and manufacturing buildings, to install such fire extinguishers as the fire commissioner might direct.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 263-271; Dec. Dig. § 116.*]

5. STATUTES (§ 162*)—IMPLIED REPEAL OF SPECIAL BY GENERAL ACT.

A general statute will repeal special or local acts without expressly naming them, if inconsistent therewith and it appears that the Legislature intended, by the general act, to establish a uniform rule and abolish

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

the special provisions, but the question of repeal is always one of intention.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 235-237; Dec. Dig. § 162.*]

Appeal from Court of Special Sessions of City of New York.

Charles Kaye was convicted of a misdemeanor, and appeals. Affirmed.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Carlisle Norwood, of New York City, for appellant.

Alexander C. MacNulty, of New York City, for the People.

SCOTT, J. The defendant was convicted by the Court of Special Sessions of a misdemeanor in that he refused to obey an order of the fire commissioner of the city of New York, requiring the installation of an automatic sprinkler system in a building owned by him and used and occupied for manufacturing purposes. The building is 12 stories high, a stone and brick, iron and steel, structure about 75 feet in width and 85 feet in depth. It was occupied by manufacturers of clothing and furriers. Several hundred people were employed in it, principally in the manufacturing operations carried on. The fire commissioner issued and served upon the defendant an order in writing, requiring the installation of a system of automatic sprinklers, with the necessary appurtenances and appliances. The defendant refused to comply with the order, and this prosecution followed.

The defendant urges several reasons why the conviction was illegal, their substance being that the fire commissioner has no authority to make such an order, and, assuming that he had authority, that the refusal to comply is not a misdemeanor. The authority to issue such an order is sought to be found in the ordinance adopted by the board of aldermen of the city of New York on December 19, 1911, to take the place of section 752 of the Greater New York Charter. Subdivision 3 of section 1620 of the Greater New York Charter, as revised and amended by chapter 466 of the Laws of 1901, provided that certain sections of said charter contained in a second schedule annexed to the act should be—

“continued in full force and effect until the board of aldermen as constituted by the foregoing provisions of this act shall pass ordinances regulating the matters provided for in the said several sections mentioned in said second schedule, all of which ordinances the said board of aldermen is hereby expressly empowered to pass. Upon the passing of any such ordinances regulating the matters provided for in any one of the said sections respectively, such section shall cease to have any force or effect, and the same is and shall be repealed.”

Among the sections of the charter mentioned in said second schedule, and thus brought within the purview of the foregoing subdivision, was section 762.

On December 19, 1911, the board of aldermen adopted an ordinance (hereafter mentioned as the ordinance of 1911) which regulated the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

matters provided for in said section 762 of the charter. The said section thereupon became automatically repealed, and the ordinance took its place and became the law so far as concerns the matters therein dealt with. The ordinance of 1911 differed from section 762 in some particulars and re-enacted so much of said section as is claimed to afford authority for the order issued in the present case by the fire commissioner. The provision was re-enacted in language identical with that in the charter, and reads as follows:

"The owners and proprietors of all manufactories, hotels, tenement houses, apartment houses, office buildings, boarding and lodging houses, warehouses, stores and offices, theaters and music halls, and the authorities or persons having charge of all hospitals and asylums, and of the public schools and other public buildings, churches and other places where large numbers of persons are congregated for purposes of worship, instruction or amusement, shall provide such means of communicating alarms of fire, accident or danger to the police and fire departments, respectively as the fire commissioner or police board may direct, and shall also provide such fire hose, fire extinguishers, buckets, axes, fire hooks, fire doors and other means of preventing and extinguishing fires as said fire commissioner may direct."

Section 762 of the charter did not, of itself, prescribe any penalty or punishment for its violation or for the refusal to obey an order issued under it, but section 773 provided, and still provides, as follows:

"Section 773. Any person, persons or corporation, for the violation of, or noncompliance with, any of the several provisions of the several sections of this title, when the penalty is not therein specially provided, shall severally forfeit and pay a fine or penalty in the sum of fifty dollars for each and every offense, or shall forfeit and pay the penalties respectively imposed under any of said sections, and shall also be severally liable for any costs or expenses that may be incurred by any violation of, or noncompliance with, any requirements under said sections, and shall also be severally liable for the payment of the further penalty of the sum of fifty dollars for any violation of, or noncompliance with, any regulation, order or special direction issued by said commissioner, or for failure to attend and testify as required by any subpoena issued, as authorized under this chapter. * * * *Any person who shall willfully violate, or neglect or refuse to comply with any provision or requirement of this title, or any regulation, order or special direction duly made thereunder, shall also be guilty of a misdemeanor.*"

The "title" referred to in the foregoing section was title 3 of chapter xv of the charter which included section 762. So long therefore as that section remained in force, a violation of it, or a refusal to obey an order issued by its authority, was a misdemeanor.

The ordinance of 1911 concluded with the following sentence:

"The penalties prescribed by section 773 of the Greater New York Charter shall apply to any violation of this Ordinance."

Upon these facts the appellant contends: First, that the ordinance of 1911 does not authorize the fire commissioner to order the installation of automatic sprinklers; second, that even if the fire commissioner has authority to make such an order, it is not a misdemeanor to refuse to obey it.

[1] The argument that the ordinance does not authorize the fire commissioner to order the installation of automatic sprinklers is based on the rule or doctrine of ejusdem generis.

[2] That rule of course is too well established and known to require reiteration here, but it is, after all, but a rule of construction, and must yield to the apparent purpose of the Legislature or other enacting body. If we read the whole ordinance of 1911, it will be seen that its obvious purpose is to provide so far as possible against fires, and especially against the rapid spread of fires in places wherein, owing to the manner of their use and occupation, a fire, unless quickly subdued, would be likely to result in great damage and loss of life. It would be unreasonable to attribute to the Legislature or the board of aldermen the purpose of committing to the fire commissioner the discretionary power to require slight and often ineffective precautions to be adopted, and to deny him the power to require the adoption of such other, and much more highly effective means of fire control, as might from time to time, be invented or adopted. The provision in substantially its present form dates back to 1892 (chapter 703), since which time it is highly probable that the art of fire prevention and control has made considerable progress. It would be highly unreasonable so to construe the ordinance as to curtail the power of the fire commissioner to order the use of any device of proven utility to effect the obvious purpose of the ordinance. At any rate the question of the sufficiency of the ordinance to justify the order of the fire commissioner has been settled so far as this court is concerned. The very question arose (under section 762 of the charter) in *Lantry v. Hoffman*, 55 Misc. Rep. 261, 105 N. Y. Supp. 353, affirmed 124 App. Div 937, 109 N. Y. Supp. 1135.

It is also suggested that the ordinance, if construed to vest authority in the fire commissioner to order the installation of automatic sprinklers, is to that extent invalid because it unreasonably allows him a discretion which may be used oppressively. That is an argument which, if sound, should be directed to the lawmaking power, and not to the courts. As has been pointed out, the ordinance in so far as it affects the case at bar is no new enactment, but is a mere re-enactment and continuation of an act of the Legislature. It is essential that the authority to compel proper precautions against fires and their spread should be confided to some one, and it is clearly a legislative, and not a judicial function, to determine in whom such discretion should be vested. We are therefore of the opinion that the ordinance of 1911 furnishes sufficient authority for the order which the appellant refused to obey.

[3] The next question is whether such refusal was a misdemeanor. It may be, as appellant argues that the board of aldermen has no power to create a misdemeanor out of a refusal to obey one of its ordinances; that the ordinance of 1911 did not attempt to re-enact, even by reference, that portion of section 773 of the charter which declared the refusal to obey an order of the fire commissioner, issued under section 762, to be a misdemeanor, and that the adoption of the ordinance of 1911 effectually repealed and wiped out section 762, so that no order thereafter could be made under that section. The Legislature, however, in October, 1911, passed an act (chapter 899) which amended the Greater New York Charter by adding a number of new

sections to title 3 of article 15. Among the sections so added was section 775, which reads in part as follows:

"Section 775. Powers of the Commissioner. The commissioner is empowered to . . .

"3. Require, in writing, the installation, as prescribed by any law or ordinance, in any building, structure or inclosure of automatic or other fire alarm system or fire extinguishing equipment and the maintenance and repair thereof, or the construction, as prescribed by any law or ordinance, of adequate and safe means of exit."

As soon as this section became a law section 773 became applicable to it, and it became a misdemeanor "to willfully violate, or neglect or refuse to comply" with any of its provisions "or any requirement, order or special direction duly made thereunder." Thus: (a) The ordinance of 1911 empowered the fire commissioner to order the installation of sprinklers. (b) Section 775 of the charter conferred upon him legislative authority to require the installation of the fire extinguishing equipment authorized by the ordinance. (c) Section 773 made it a misdemeanor to disobey such an order. We are therefore of the opinion that the defendant's refusal to comply with the order of the fire commissioner was a misdemeanor.

[4] It remains to consider one other objection made by the appellant. It is that all special provisions, whether of law or ordinance, which might be so construed as to provide for the installation of sprinklers in the city of New York were impliedly repealed by section 83b of the Labor Law which was enacted by chapter 332, Laws of 1912, subsequent to the adoption both by the fire prevention amendments to the charter in October, 1911, and the ordinance of December, 1911. The section referred to reads as follows:

"Sec. 83b. Automatic Sprinklers. In every factory building over seven stories or over ninety feet in height in which wooden flooring or wooden trim is used and more than two hundred people are regularly employed above the seventh floor or more than ninety feet above the ground level of such building, the owner of the building shall install an automatic sprinkler system approved as to form and manner in the city of New York by the fire commissioner of such city, and elsewhere, by the state fire marshal. Such installation shall be made within one year after this section takes effect, but the fire commissioner of the city of New York in such city and the state fire marshal elsewhere may, for good cause shown, extend such time for an additional year. A failure to comply with this section shall be a misdemeanor as provided by section twelve hundred and seventy-five of the Penal Law and the provisions hereof shall also be enforced in the city of New York by the fire commissioner of such city in the manner provided by title three of chapter fifteen of the Greater New York Charter, and elsewhere by the state fire marshal in the manner provided by article 10a of the insurance law."

[5] To support this contention defendant quotes from Black on Interpretation of Laws (section 153) the following rule, which is, of course, of general acceptance:

"A general statute will repeal special or local acts without expressly naming them, where they are inconsistent with it, and where it can be seen from the whole enactment that it was the intention of the Legislature to sweep away all local peculiarities thus sanctioned by special acts, and to establish one uniform system."

The question, however, is always one of intention (*People v. Dalton*, 158 N. Y. 175-184, 52 N. E. 1113), and, as stated above, it carries

with it its own limitation that the repeal of a special act by a general one will be implied only when they are inconsistent, and where it is apparent from the general law itself that it was intended to repeal and supersede all special laws. The amendment to the Labor Law does not respond to this test. It provides imperatively that automatic sprinklers *must* be installed in buildings answering a certain description. As to these no discretion is left to the fire commissioner, or any other administrative authority, except to approve the pattern of sprinklers to be used. But the act goes no further, and neither in terms or by proper inference does it provide that sprinklers shall be required *only* in buildings of the character described in the act. The effect of the act is simply this: Prior to its enactment the fire commissioner was given discretion to require sprinklers, or not to require them, in all buildings. By the act this discretion was taken away as to certain buildings, but was left unimpaired as to all others. We find no inconsistency here, and no indication that the Legislature, by prescribing that certain buildings must have sprinklers, meant to declare that none others should be required to have them.

It is further objected that it was an unreasonable exercise of discretion to order the installation of sprinklers in the particular building owned by the defendant. After a careful reading of the testimony we are unable to accede to this view. There was considerable evidence, much of which was contradictory. It did appear that one of the most dreadful disasters in the history of the city of New York had resulted from a fire in a building similar in type, size, and construction to defendant's building, and the testimony of practical firemen of large experience was to the effect that automatic sprinklers were a most efficient means for the control of fires and for the prevention of their spread. In the face of such testimony we cannot say judicially that the fire commissioner exercised his discretion arbitrarily or unreasonably.

The judgment of conviction must be affirmed. All concur.

(161 App. Div. 138)

PEOPLE *ex rel.* VAN BEUREN & NEW YORK BILL POSTING CO. *v.* MILLER, Superintendent of Buildings.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. MUNICIPAL CORPORATIONS (§ 76*)—BUILDING CODE—EFFECT AS STATUTE.

In view of the Building Code's adoption by the municipal assembly of the city of New York, pursuant to Greater New York Charter (Laws 1897, c. 378) § 647, and its ratification by the Legislature by Revised Charter (Laws 1901, c. 466) § 407, as amended by Laws 1904, cc. 602, 628, it should be given the same force within the corporate limits as a statute passed by the Legislature itself.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 181, 687; Dec. Dig. § 76.*]

2. MUNICIPAL CORPORATIONS (§ 625*)—POLICE POWER—PUBLIC SAFETY—BILL-BOARDS.

Greater New York Building Code, providing by section 2 that the Code is remedial and to be liberally construed, and requiring by section 4 the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

filing of plans and statements before the erection of any structure and the obtaining of approval and permit therefor, and by sections 143 and 144 prescribing fire limits within which no frame or wood structure should be built, and limiting the height of signs and billboards within such limits to 10 feet, and those constructed entirely of metal or of wood covered on all sides with sheet metal, including the uprights and braces, to 18 feet 6 inches high, such signs to be properly supported and braced so as not to be dangerous, is calculated to promote safety and prevent the destruction of property by fire, and is a valid and reasonable exercise of the police power.

[Ed. Nota.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1378, 1379; Dec. Dig. § 625.*]

Appeal from Special Term, New York County.

Mandamus by the People of the State of New York, on the relation of the Van Beuren & New York Bill Posting Company, against Rudolph Miller, as Superintendent of Buildings in the Borough of Manhattan, City of New York. Peremptory writ of mandamus granted, and defendant appeals. Reversed, and application denied upon the law and not in the exercise of discretion.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Frank L. Polk, Corp. Counsel, of New York City (John P. O'Brien, of New York City, of counsel, and Samuel J. Parmenter, of New York City, on the brief), for appellant.

Charles O. Maas, of New York City (Charles O. Sullivan, on the brief), for respondent.

CLARKE, J. Relator is a domestic corporation engaged in the business of constructing and maintaining advertising signs and billboards. On or about October 10, 1912, it filed, in the office of the superintendent of buildings, statement of specifications and plans for a proposed sign to be constructed of wood, the face thereof to be covered with galvanized iron, to be erected upon the vacant lot located on the southerly side of 215th street, between Broadway and Tenth avenue, in the borough of Manhattan, with the written consent of the owner of the property upon which said sign was to be erected. Said sign was to be erected 30 feet back from the building line, was to be 22 feet in height and 50 feet in length. The superintendent disapproved in writing the said application and refused to grant permission for the construction of said sign. Whereupon the petitioner brought this proceeding to obtain a peremptory writ of mandamus to compel him to approve the application and grant the permit.

[1] The Building Code was adopted by the municipal assembly of the city of New York October 24, 1899, pursuant to section 647 of the Greater New York Charter (chapter 378, Laws of 1897). It was ratified by the Legislature by section 407, Revised Charter (chapter 466, Laws of 1901), and by chapters 602 and 628 of the Laws of 1904, amending said section 407.

"In view of this ratification by the Legislature of the power to enact the Building Code, we fail to see why the Building Code should not be given the same force within the corporate limits as the statute passed by the Legisla-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ture itself." *City of New York v. Trustees of Sailors Snug Harbor*, 85 App. Div. 355, 83 N. Y. Supp. 442, affirmed on the opinion below 180 N. Y. 527, 72 N. E. 1140; *Post v. Kerwin*, 133 App. Div. 404, 117 N. Y. Supp. 761; *City of New York v. Foster*, 148 App. Div. 258, 133 N. Y. Supp. 152, affirmed 205 N. Y. 593, 98 N. E. 1100; *Racine v. Morris*, 136 App. Div. 467, 121 N. Y. Supp. 146, affirmed 201 N. Y. 240, 94 N. E. 864.

[2] The Building Code provides in section 4 thereof for the filing of plans and statements before the erection, construction, or alteration of any building or structure or part of any building or structure, and such proposed work shall not be commenced or proceeded with until said statements and plans shall have been so filed and approved. Section 143 thereof provides as follows:

"Fire Limits.—No frame or wood structure shall be built hereafter in the city of New York within the following limits: In the borough of Manhattan—within the following described lines."

It is conceded that the property upon which it was proposed to erect the said sign is situated within the fire limits of the borough of Manhattan, as described by said section.

Section 144 is as follows:

"Frame Structures Within the Fire Limits.—The provisions, in this section contained, shall apply to buildings and structures, whether temporary or permanent, within the fire limits, as the said fire limits now are or may hereafter be established. * * * Fences, signs or billboards shall not be at any point over ten feet above the adjoining ground; except that when any fence, sign or billboard shall be constructed entirely of metal or of wood covered on all sides with sheet metal, including the uprights, supports and braces for same, it shall not be at any point over eighteen feet six inches above the adjoining ground. * * * All fences, signs, billboards and sky signs shall be erected entirely within the building line, and be properly secured, supported and braced, and shall be so constructed as not to be or become dangerous. Before the erection of any fence, sign, billboard or sky sign shall have been commenced, a permit for the erection of the same shall be obtained from the superintendent of buildings having jurisdiction, as provided in part 2, section 4, of this Code."

It appears that the proposed billboard exceeds the dimensions as restricted by said section, and, in its petition, relator states that it is not proposed to cover the back, posts, and braces of said sign with metal, and that it is only proposed to cover the front of said sign with galvanized sheet iron in order to present a better surface for the pasting of advertising matter upon said sign.

The superintendent disapproved the application, specifications, and plan, and refused a permit, because the proposed sign was unlawful and in violation of the provisions of the Building Code as above set forth.

The respondent claims that the disapproval of the superintendent, in so far as the height of the sign is concerned, is unauthorized on the ground that it constitutes a deprivation of property. Second. That the provisions of the Building Code respecting the metal sheathing of all signs is an unreasonable exercise of police power, and therefore unconstitutional.

In *City of New York v. Wineburgh Advertising Co.*, 122 App. Div. 748, 107 N. Y. Supp. 478, the argument was advanced that, if such a

sign as the petitioner proposes to erect was held to be of the nature of a building, the board of aldermen was forbidden to adopt any ordinance regulating and restricting the height of buildings, except after a prescribed procedure which had not been followed. But this court held that such argument could not prevail. Mr. Justice Scott said:

"According to the generally accepted meaning of the terms, while a building is always a structure, yet many things may be termed structures which are not buildings (*Chaffee v. Union Dry Dock Co.*, 68 App. Div. 578 [73 N. Y. Supp. 908]; *Wingert v. Krakauer*, 76 App. Div. 34 [78 N. Y. Supp. 664]), and in numerous cases in the state the term 'structure' has been specifically applied to billboards. [Citing cases.] It needs but to read the expert description of defendant's sign, and to glance at its photograph, to conclude that it is essentially a 'structure.' It is equally apparent that this particular structure is not a building, within any sense of that word. * * * It is perfectly well settled that it is competent for the Legislature, or a municipality acting under its authorization, to regulate the construction and erection of billboards and signs, and to provide that they be not erected, even upon private property, except upon approved plans and after the issuance of a license or permit by the appropriate authority. * * * Under sections 4 and 144 of the New York City Building Code it was incumbent upon the defendant, before it could lawfully erect such a structure * * * to file plans and specifications therefor with the superintendent of buildings and obtain a permit for such erection. To this extent the ordinance is undoubtedly valid."

The ordinance is to be supported as one calculated to promote safety and to prevent destruction of property from fire. Fire limits are established, and no frame or wood structures shall be built within such limits, with special provision in respect to fences, signs, and billboards.

In *Fire Department v. Gilmour*, 149 N. Y. 453, 44 N. E. 177, 52 Am. St. Rep. 748, the court said:

"There can be no doubt of the power of the Legislature to enact regulations for the protection of cities or villages against the serious dangers from conflagrations. It is one of the subjects to which the police power of the state extends, and there is no one in the wide range of this power upon which the Legislature has more frequently acted. It may directly enact a code of regulations applicable to exposed localities, or, as is more commonly done, it may invest municipalities with the power to pass ordinances regulating the subject. The authority given in most charters of municipalities to the legislative body to fix fire limits, to prohibit the erection of buildings therein of wood or other combustible materials, * * * are among the familiar instances of the delegated power. Regulations on this subject are restrictions of personal freedom and the free use of property. But they are justified by public necessity and so are within the acknowledged power of the Legislature."

In *Health Department v. Rector, etc.*, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579, the court said:

"Any one in a crowded city who desires to erect a building is subject, at every turn, almost to the exactions of the law in regard to provisions for health, for safety from fire, and for other purposes. He is not permitted to build of certain materials within certain districts, because, though the materials may be inexpensive, they are inflammable, and he must build in a certain manner. * * * Although the owner in the one case is not compelled to build, yet he is limited in the use to which he may put his property by the provisions of the law. He cannot build as he wishes to, unless upon the condition of a compliance with the law."

In that case a law was upheld which required running water to be put into tenement houses, and it was held to apply to those existing

at the time of the passage of the act and those as well thereafter erected. The court further said:

"We think the act is valid as an exercise of the police power with respect to the public health, and also with respect to the public safety regarding fires and their extinguishment."

In *People ex rel. Duryea v. Wilber*, 198 N. Y. 1, 90 N. E. 1140, 27 L. R. A. (N. S.) 357, 19 Ann. Cas. 626, the court said:

"The laws, ordinances, rules, and provisions of the Building Code are compulsory. * * * The provisions of the Building Code are ample to enforce the physical safety of any place as against fire or collapse."

In *Griffin v. City of Gloversville*, 67 App. Div. 403, 73 N. Y. Supp. 684, the court had under consideration the ordinances of said city establishing fire limits and the character of a building or other structure erected within such limits. Mr. Justice Chase, after quoting from *Fire Department of N. Y. v. Gilmour*, supra, said:

"Where the Legislature or a municipality duly authorized enacts a general statute or ordinance prohibiting certain erections within a prescribed territory and declaring an erection in violation of such statute or ordinance a public nuisance, the reasonableness of the prohibition is not thereafter open to question."

Section 2 of the Building Code provides:

"This ordinance is hereby declared to be remedial, and is to be construed liberally to secure the beneficial interests and purposes thereof."

In *New York Fire Department v. Buhler*, 35 N. Y. 177, the court said:

"The act under consideration was passed for the more effectual prevention of fires in the city of New York, and, being a beneficial statute, it is to be liberally construed to attain the object intended."

In *Racine v. Morris*, 136 App. Div. 468, 121 N. Y. Supp. 146, a judgment in a death case was affirmed, where a policeman, entering a building in the nighttime in the performance of his duty, fell into an unguarded elevator shaft; the negligence of the defendant being predicated upon a failure to observe the provisions of section 95 of the Building Code requiring the installation of guards, gates, or trapdoors, and that they be kept closed at all times except when in actual use. The Court of Appeals affirmed in 201 N. Y. 240, 94 N. E. 864. After stating that the Building Code is to be given the same force as the statute, the court said:

"The federal and state Constitutions alone bound the freedom and power of the Legislature. Its authority, while not infracting their provisions, is plenary and unchecked, for it is that of the people of the state. * * * The section is in its nature and effect salutary and remedial. It was adopted in order that it might effect added and desired security and safety to lives and limbs."

In *City of New York v. Foster*, 148 App. Div. 258, 133 N. Y. Supp. 152, affirmed 205 N. Y. 593, 98 N. E. 1100, the question was whether section 97 of the Building Code, requiring dumb-waiter shafts to be fire-proofed, was applicable to buildings constructed before the Build-

ing Code was adopted. This court, in deciding that it did, said, by Mr. Presiding Justice Ingraham:

"It imposes an obligation upon the owner of buildings with dumb-waiter shafts, as section 95 imposed an obligation upon the owner of a building in which there is a hoistway or freight elevator; and this obligation the Court of Appeals in the Racine Case has held to apply to all buildings, whether constructed before or after the passage of the ordinance"—

citing *Tenement House Dept. v. Moeschén*, 179 N. Y. 325, 72 N. E. 231, 70 L. R. A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439, affirmed 203 U. S. 583, 27 Sup. Ct. 781, 51 L. Ed. 328, and *Health Department v. Rector*, etc., 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579.

I have no doubt that the restrictions upon the height, material, and manner of construction of fences, signs, or billboards are reasonable and valid. The relator places reliance upon *People ex rel. Wineburg Advertising Co. v. Murphy*, 129 App. Div. 260, 113 N. Y. Supp. 855, affirmed 195 N. Y. 126, 88 N. E. 17, 21 L. R. A. (N. S.) 735. No such question was there involved. The difficulty with the particular provision of the ordinance there condemned was that it was not directed to the structure, but to the use to which it was to be put. As pointed out both in this court and in the Court of Appeals, there were no limitations placed upon structures upon buildings unless they were used for the display of advertisements. There was also no question in that case of the material of which the so-called sky signs were composed. They were of metal, and not of wood. The distinction is clearly shown in the opinions.

In this court Mr. Justice Scott said:

"Other provisions of the section require all fences, signs, billboards, and sky signs to be erected wholly within the building line, and to be properly secured, supported, and braced, and further require that, before any such be erected, a permit be obtained therefor from the superintendent of buildings. No question is made by the appellant as to the right of the municipality, under proper legislative sanction, to regulate the erection of fences, billboards, and signs, and to prescribe reasonable conditions and restrictions upon such erection, and to require that a permit be obtained from the proper authority. * * * In considering whether the ordinance now under discussion falls within these rules, it is pertinent to note two features of it which serve to distinguish it from the ordinances sustained in other cases in this state. In the first place, it is not directed against structures generally placed upon the roofs of buildings, nor even against structures of a particular kind, or constructed in a particular manner, or of specified materials. The legality or illegality of a structure upon the roof of a building is not made dependent upon the nature of the structure itself, but upon the use to which it is to be put."

In the Court of Appeals (195 N. Y. 126; 88 N. E. 17, 21 L. R. A. [N. S.] 735) Judge Chase said:

"The police power, so difficult to define, but so frequently invoked, is confined to such reasonable restrictions and prohibitions as are necessary to guard public health, morals, and safety, and to conserve public peace, order, and the general welfare. Regulations and ordinances, within such general definition, are valid. The city may make and enforce such regulations and ordinances, although they interfere with and restrict the use of private property. Compensations for such interference with and restriction in the use of property is found in the share that the owner enjoys in the common benefit secured to

all. * * * This court in *City of Rochester v. West*, 164 N. Y. 510 [58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659], sustained an ordinance forbidding the erection of billboards more than six feet in height without the consent of the common council. The court, referring to the charter of the city, say: 'We think this statute conferred upon the common council of the city authority to regulate boards erected for the purpose of bill posting, so far, at least, as such regulation was necessary to the safety or welfare of the inhabitants of the city, or persons passing along its streets. * * * It is obvious that its purpose was to allow the common council to provide for the welfare and safety of the community in the municipality to which it applied. If the defendant's authority to erect billboards was wholly unlimited as to height and dimensions, they might readily become a constant and continuing danger to the lives and persons of those who should pass along the street in proximity to them.' * * * A municipality, in enacting ordinances relating to the safety of the public, may undoubtedly make reasonable classifications among structures with reference, to their location and the necessity or importance thereof without offending against the provisions of the fourteenth amendment of the federal Constitution. The classification, as well as the ordinance itself, must be based upon some necessity justifying the exercise of the police power. It has been said that the police power of a municipality is allied to the right of self-preservation in an individual. In exercising such power or right, the purpose thereof, and the limitations thereon, should not be forgotten. * * *

The concurring opinion of Judge Haight, with whom Judge Willard Bartlett concurred, said:

"The ordinances of the city of New York pertaining to the height and manner of construction of fences, signs, or billboards, whether upon the ground or housetops, are for the protection of the public from injury, and consequently, if reasonable, are valid under the police powers which the Legislature has delegated to the board of aldermen. * * * It would therefore be entirely proper and within the police powers of the municipality, through its board of aldermen, to enact an ordinance limiting the construction of fences, signs, or billboards, either upon the ground or the housetops, to those that are safe, and to also designate the material and manner in which they shall be constructed, and to limit the size or height thereof within reasonable bounds."

I think I have made it clear that the proposed sign, being intended to be constructed of wood and not of metal or sheathed in metal, comes within the prohibition of the ordinance as being erected within the fire limits, and that such provisions are reasonable. The provision in regard to limiting the height to 18 feet 6 inches is also reasonable and violates no constitutional provision.

In *People ex rel. Kemp v. D'Oench*, 111 N. Y. 359, 18 N. E. 862, Earl, J., said:

"It is provided in the act (chapter 454 of the Laws of 1885) that 'the height of all dwelling houses and of all houses used or intended to be used as dwellings for more than one family,' thereafter to be erected in the city of New York, shall not exceed 80 feet in streets and avenues exceeding 60 feet in width. We have no doubt of the competency of the Legislature in the exercise of the police power under the Constitution to pass such an act."

If the power exists to regulate the height of buildings, it certainly extends to such a structure as relator proposes to erect. The superintendent of buildings properly performed his duty in refusing to issue a permit upon the plans and specifications which admittedly did not conform to the provisions of the Building Code, which we hold reasonable and valid.

It follows, therefore, that the order appealed from should be reversed, with \$10 costs and disbursements to the appellant, and the application denied, with \$10 costs to the appellant; and, in order to allow a review, the order may state that the denial of the application is upon the law and not in the exercise of discretion. All concur.

(161 App. Div. 165)

DRUCKER v. MANHATTAN RY. CO. et al.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. EASEMENTS (§ 23*)—RESERVATION—EFFECT.

Easements of light, air, and access appurtenant to realty abutting on a public street, being inseparable from the dominant estate, pass to the grantee upon conveyance, notwithstanding the grantor's attempted reservation; and hence the grantor cannot maintain trespass against a railroad company which impairs such easements by reason of his attempted reservation.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 63; Dec. Dig. § 23.*]

2. EASEMENTS (§ 64*)—RIGHTS OF ACTION—GRANTOR AND GRANTEE.

Where a grantor of land reserved all rights of action for damages for injuries to the easements of light, air, and access appurtenant to the property conveyed, caused by the construction of an elevated railway, such reservation does not give the grantor any right to maintain an equitable action against the railroad company; there being no privity of contract or relation between them, and the only action the grantor is entitled to maintain being one to compel his grantee to hold in trust any moneys which he may recover from the railroad company.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 132, 133; Dec. Dig. § 64.*]

3. EASEMENTS (§ 23*)—SEVERANCE—RIGHT OF ACTION.

Where a grantor of land reserved all rights of action for injury to the easements of light, air, and access appurtenant to the property granted, caused by the construction of an elevated railroad, thus making his grantee a trustee, and the grantee conveyed the property with full covenants of warranty, the second grantee took the property free from any obligation to perform any personal covenants of the original grantee in relation to the easements, and hence cannot be compelled to sue as trustee for the benefit of the grantor or to release to the railroad company any rights appurtenant to the land.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 63; Dec. Dig. § 23.*]

4. EXECUTORS AND ADMINISTRATORS (§ 39*)—INTEREST IN REAL PROPERTY—EASEMENTS.

Where a grantor of land reserved to himself all rights of action for damages to the easements of light, air, and access caused by the construction of an elevated railroad, the covenant, if of any force, reserved an interest in real property which descended to the heirs at law of the grantor and not his personal representative.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 280, 285-294; Dec. Dig. § 39.*]

5. EASEMENTS (§ 64*)—SUBSEQUENT STIPULATION.

The owner of land conveyed it reserving unto himself all rights of action for damages to the easements of light, air, and access by the construction of an elevated railroad. His grantor conveyed the property with no reservation. *Held*, that a stipulation between the second grantee

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the railroad company merely providing for payment in case the grantee executed a release in favor of the railroad company did not give the grantor any right of action against the second grantee.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 132, 133; Dec. Dig. § 64.*]

6. APPEAL AND ERROR (§ 843*)—QUESTIONS PRESENTED FOR REVIEW.

In an action by a grantor who reserved all rights of action for damages for injuries to the easements of light, air, and access occasioned by the construction of an elevated railway, no question of whether a subsequent grantee can be held as a trustee for any amount received from the railroad company is presented where no amount has been paid.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8331-8341; Dec. Dig. § 843.*]

Laughlin and Hotchkiss, JJ., dissenting.

Appeal from Special Term, New York County.

Action by Ephraim Drucker against the Manhattan Railway Company and Esther Grodjinski, now known as Esther Davis, and others, revived in the name of Mary Drucker as executrix upon the death of plaintiff. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, DOWLING, and HOTCHKISS, JJ.

Roger Foster, of New York City, for appellant.

Isaac E. Bermant, of New York City, for respondents.

INGRAHAM, P. J. The nature of the action and subsequent proceedings in it are stated in the opinion of my Brother LAUGHLIN.

The plaintiff's testator acquired title to the property abutting on Division street on the 29th of May, 1885, and conveyed the premises by a full covenant warranty deed to Zimmermann on the 1st day of June, 1887. By that conveyance the legal title to the property, including the easements appurtenant to it in Division street, passed to the grantee. On the 29th of May, 1888, Zimmermann conveyed the property to the defendant Davis by a full covenant warranty deed containing no covenant in relation to these easements, and thereby Davis became the owner of the property and the easements appurtenant thereto in Division street. When the plaintiff's testator conveyed this property to Zimmermann, the conveyance contained a clause by which the plaintiff's testator reserved for himself:

"Any and all claims and causes of action against all the world for any and all losses and damages to himself and to the premises above described on account of the construction and the present and future continuance of the elevated railroad structure in Division street and the past and future operation of the same and reserves to himself the easement now occupied and invaded by the said elevated railroad and the operation of the same."

When Davis purchased the property, however, she did not assume the performance of that covenant or consent to such a reservation. Neither Zimmermann nor the grantee, Davis, undertook to prosecute any action to recover any damages sustained by the plaintiff's testator by reason of the construction of the elevated railroad in Division street, nor did they agree to pay to the plaintiff's testator any amount that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

they should receive as compensation for the encroachment by the railroad company upon the easements appurtenant to the premises. No obligation rested upon Davis to either pay to the plaintiff's testator any damages that she should recover, nor to constitute herself a trustee for the plaintiff's testator in relation to such damages or compensation for a conveyance of the easements. What the plaintiff's testator sought to do was to sever the easements from the property to which they were appurtenant and retain title to such easements notwithstanding his conveyance of the property to which they were appurtenant. If the conveyance was ineffective for such a purpose, I cannot see that the plaintiff's testator had any right in an action in equity to restrain the railroad company from continuing the trespass, for in such a case the easements would have vested in the plaintiff's testator's grantee, and such grantee only could sue for a future trespass upon the easements or apply to a court of equity to restrain a continuing trespass.

The plaintiff's testator having thus parted with title to the property, he commenced an action against the defendant on the 22d of November, 1888, after the conveyance by Zimmermann to the defendant Davis. Before this action came on for trial and on the 21st of July, 1910, the plaintiff's testator died, and on May 22, 1911, the action was revived, and the plaintiff as his executrix was substituted as the plaintiff in the action.

[1, 2] The first question presented is whether the plaintiff's testator ever had a cause of action to restrain the continuing trespass of the defendant and that would depend upon the question of whether or not the covenant in the deed of the plaintiff's testator to Zimmermann was effective to reserve to the plaintiff's testator any title to or interest in the easements appurtenant to the property that was conveyed to Zimmermann. It is conceded, as I understand it, that the covenants in the deed conveying the property from the plaintiff's testator to Zimmermann was ineffective for such a purpose, and that seems to be the settled law of this state. See *McKenna v. Brooklyn El. R. Co.*, 184 N. Y. 391, 77 N. E. 615; *Western Union Tel. Co. v. Shepard*, 169 N. Y. 170, 62 N. E. 154, 58 L. R. A. 115. In *McKenna v. Brooklyn El. R. Co.*, supra, Judge Werner, in delivering the opinion of the court, said:

"Easements of light, air, and access, appurtenant to real property abutting upon a public street or highway, are inseparable from the dominant estate, and upon a conveyance of the latter such easements pass to the grantee, notwithstanding the grantor's attempted reservation of the same, or of any rights of action for the invasion or destruction thereof."

And it was further held that the only person who could sue for damages thus caused or could execute a release in satisfaction thereof was the owner of the premises as to which such easements were appurtenant, and a person or corporation invading or destroying such easements has the right to obtain a release from the owner of the dominant estate who alone is legally entitled to the resulting damage. If notwithstanding this reservation in the deed from the plaintiff's testator to Zimmermann the title to the easements and the right to enforce a trespass thereon passed to Zimmermann, then it would seem to fol-

low that the plaintiff could not maintain an action to either enjoin a continuing trespass or to recover damages for any trespass by the railroad company after the execution and delivery of the conveyance; and, as this action was commenced after the execution and delivery of this deed, it would seem to follow that the plaintiff had no cause of action. I think it further settled that the plaintiff's testator could not at that time have commenced any action against the railroad company. In *McKenna v. Brooklyn El. R. Co.*, supra, Judge Werner also said:

"There is absolutely no privity of contract or relation between them. The plaintiff's equitable remedy is against her grantee alone, who is impressed into the relation of trustee as to the fund, merely to prevent such wrongs and hardships as might be inseparable from an inadequate legal remedy."

See, also, *Pegram v. N. Y. El. R. Co.*, 147 N. Y. 135, 41 N. E. 424.

[3] It is quite probable that the plaintiff had a cause of action to recover for the damages which had accrued up to the time of the conveyance, but that was a cause of action against the railroad company as a trespasser and in which neither the plaintiff's testator's grantee nor Zimmermann's grantee were at all interested. We may assume that by virtue of the attempted reservation a resulting trust was created by virtue of which Zimmermann, the grantee, became a trustee for his grantor as to all moneys received by him or which he should recover for the invasion or destruction of such easements; but Zimmermann never attempted to enforce any such claim against the railroad company, and, when he conveyed the property to the defendant Davis, he, by a full covenant warranty deed, conveyed the property absolutely free and clear of any engagement with the plaintiff's testator, and whatever obligation existed was not assumed by Davis. Davis thereby became the owner of the property which included the easements in Division street and, as I understand the authorities, took it free from any obligation to perform any personal covenants of Zimmermann in relation to these easements. Davis never undertook to act as trustee for the plaintiff's testator; never obligated herself to sue to enforce the plaintiff's testator's right to any damage sustained in consequence of the destruction or impairment of the easements; and certainly never undertook to execute and convey to the railroad company a release or conveyance of her interest in the street which had been appropriated or affected by the construction or operation of the railroad. As before stated, neither Zimmermann nor Davis ever attempted to recover the damages sustained by the appropriation of the easements, and neither have received from the railroad company or from anybody else any sum of money on account of the construction or operation of this railroad in the street. There is nothing, therefore, to which a resulting trust could apply. Certainly the railroad company could not be compelled to pay to the plaintiff or any one else any sum of money either for damages sustained by the abutting property after the plaintiff's testator conveyed it or as a condition for executing a conveyance of the interest in the street which was appurtenant to the abutting property without a release or conveyance from the owner of the fee of the abutting property. It is clear that the defendant Davis has never obligated herself to grant such a release or conveyance, and the

court could not by decree compel her to make such a release or conveyance, so neither at the time the action was commenced nor at any time since could the court give to the plaintiff any relief either as against the railroad company or as against the defendant Davis.

[4] Nor do I think that whatever cause of action or right the plaintiff's testator had passed to his executrix upon his death. If this covenant in the deed to Zimmermann had any force at all, it was an interest in real property that would descend to the devisees or heirs at law of the plaintiff's testator. It might be that as between the plaintiff's testator and Zimmermann an attempt to enforce this trust would be in the nature of a chose in action which would pass to the personal representatives of the deceased; but as no trust existed as between the plaintiff's testator and Davis, who had acquired absolute title to the property prior to the commencement of the action, I cannot see that there would be any cause of action existing against either the railroad company or Davis that could pass to the personal representatives of the deceased.

[5] The fact that there had been a stipulation entered into between the railroad company and Davis cannot help the plaintiff. There was nothing in that stipulation which bound the railroad company to pay Davis anything. It was conditioned upon Davis executing a release or conveyance which she has not done and which she is not bound to do and which this court cannot compel her to execute. *Maurer v. Friedman*, 197 N. Y. 248, 90 N. E. 814; *Miller v. Clary*, 210 N. Y. 127, 103 N. E. 1114, decided December 30, 1913. Such a stipulation, made long after the action was commenced, cannot given to the plaintiff any right either to recover the amount specified in that stipulation or to charge the defendant Davis as trustee for such an amount.

[6] Nor is the question as to whether or not Davis could be held as trustee for any amounts that she received from the railroad company presented in this action, as no action to impress such a trust could be commenced until Davis had either received the amount from the railroad company for the impairment of the easements, or had obtained a judgment or attempted to enforce such a claim against the railroad company. Such an action could only be commenced after such a trust fund had come into the possession of Davis to which a trust could attach.

Entertaining these views, therefore, I think the court was clearly right in dismissing the complaint as against the defendant Davis, and the judgment appealed from should therefore be affirmed.

McLAUGHLIN and DOWLING, JJ., concur.

LAUGHLIN, J. (dissenting). This action is, in effect, one to enjoin the operation of the elevated railway on account of its trespassing upon the easements of light, air, and access appurtenant to the premises known as Nos. 29 and 29½ Division street in the borough of Manhattan, New York, and for judgment against the corporate defendants for the accrued damages for depreciation and rental value of the premises, or in the alternative for such damages and the damages to the fee for the permanent appropriation of the easements.

The action was originally brought by Ephraim Drucker, but he died on the 21st day of July, 1910, and on May 22, 1911, his executrix was substituted.

The action was commenced by the service of the summons and complaint on the corporate defendants on the 22d day of November, 1888, and on the defendant Davis, whose name then was Grodjinski, on the 27th day of March, 1889, and on the defendant Zimmermann on the 15th day of April, 1889. Service of the amended complaint on all defendants was completed on the 19th day of July, 1889. Issue was joined by the corporate defendants by the service of an answer to the amended complaint on the 21st day of January, 1890. The defendant Zimmermann defaulted in appearing. The defendant Grodjinski-Davis appeared on the 19th day of June, 1911, and joined final issue by the service of an amended answer to the amended complaint on the 31st of July of the same year.

Drucker, the original plaintiff, acquired title to the premises on the 29th day of May, 1885. He conveyed the premises by a full covenant warranty deed to the defendant Zimmermann on the 1st day of June, 1887; but he attempted to reserve certain rights and interests by inserting a provision in the deed of conveyance as follows:

"The said Ephraim Drucker reserves for himself any and all claim and causes of action against all the world for any and all losses and damages to himself and to the premises above described on account of the construction and the present and future continuance of the elevated railroad structure in Division street and the past and future operation of the same and reserves to himself the easement now occupied and invaded by the said elevated railroad and the operation of the same."

The elevated railroad was constructed in Division street in front of the premises in question in the year 1879, and has ever since been maintained and operated therein. So far as appears, there has been no payment of or settlement for any damages caused to the easements by the operation of the railroad during the time of Drucker's ownership or since. On the 29th day of May, 1888, Zimmermann conveyed the premises to the defendant Grodjinski-Davis by a full covenant warranty deed containing no assumption by the grantee of any liability or obligation of the grantor by virtue of the provision in the deed from Drucker to Zimmermann herein quoted and no reference thereto.

Plaintiff alleged in the amended complaint that the individual defendants refused to allow the use of their names as parties plaintiff, and refused, after indemnity against costs and expenses was duly offered, to join with the plaintiff in bringing the action, and that the continuance of the maintenance and operation of the railroad would cause the plaintiff irreparable damages for which he had no adequate remedy at law, and that the corporate defendants were insolvent, and that the damages to the rental value of the premises exceeded the sum of \$2,000 per annum. Judgment was demanded that the individual defendants be required "to join in any conveyance or release of said easement, and any damages caused said premises which the court may direct to be made to the corporate defendants as a condition to any relief allowed to plaintiff herein," and against the corporate defendants for \$2,000 per annum from June 1, 1885, for damages to the rental

value of the premises, or an injunction perpetually enjoining the maintenance and operation of the railroad, and, as an alternative to the injunction, that the corporate defendants be required to pay the amount determined by the court as the value of the easements and damages to the fee.

On June 30, 1911, a supplemental complaint was served on all of the defendants who had appeared, and on September 30, 1911, an amended supplemental complaint was served on them. The original supplemental complaint is not in the record, but the amended supplemental complaint shows: That the defendant Zimmermann brought no action against the corporate defendants, and that the defendant Davis did not bring any action against them, either for damages or for an injunction on account of the maintenance and operation of said railroad until the month of October, 1910. That, as the result of negotiations between the plaintiff and the corporate defendants, they entered into a stipulation in writing on the 27th day of June, 1911, as follows:

"It is hereby stipulated, that in case it shall be determined that the plaintiff herein is entitled to the rental damages, if any, in respect to the property described in the complaint, for the period subsequent to June 1, 1887, and to fee damages as an alternative to an injunction, that then the amount which the defendants, Manhattan Railway Company and Metropolitan Elevated Railway Company, shall pay in return for a conveyance of the said easement occupied by the elevated railway structure as aforesaid and for said past damages shall be equal to, and not exceed the sum of, seven thousand two hundred fifty dollars (\$7,250), which sum shall include costs and counsel fees, it being understood that this fixation of the damages shall only apply in case the plaintiff procures a release by the defendant, Davis, of any and all claims against the defendants, Manhattan Railway Company and Metropolitan Elevated Railway Company, arising from the construction and maintenance of said railway, or a judgment of the court adjudicating that said Davis has no interest in the said damages; and it is further stipulated on behalf of the railway companies that the railway companies shall pay over said sum of money to such persons as may be entitled to the same at any time upon the presentation of a conveyance of the said easement and a release of all past rental damages signed by the plaintiff and by the defendant, Davis. It is understood and agreed by and between the respective parties hereto that the payment of the said sum of seven thousand two hundred and fifty dollars (\$7,250) shall be in discharge of all damages, whether rental or fee, to which either the plaintiff herein or the said Davis may be entitled, with the exception of such damage, if any, as may be due to the alterations in the said elevated railway structure incident to the change of grade in Division street, necessitated by the construction of the Manhattan Bridge."

That prior to the execution of said stipulation and during the year 1910, the corporate defendants were willing to settle the litigation and to pay the said sum of \$7,250, to whosoever might be entitled thereto upon receiving a conveyance of the easements signed by the plaintiff and by the defendant Grodjinski-Davis, but that she refused to execute a conveyance and release of the easements. That in the month of October, 1910, the defendant Davis, without the knowledge or consent of the plaintiff, began an action against the corporate defendants for damages to the rental value of the premises and for an injunction. That defendant Zimmermann disappeared more than seven years ago and has died. That neither the defendant Zimmermann nor Grodjinski-Davis ever acquired more than a formal title to the easements

and to said damages as trustees, and that they have failed to enforce and have abandoned the trust and neither has any right or title at law or in equity to any part of said damages. That it was the intention of Drucker and Zimmermann that the reservation in the deed should be a covenant running with the land obligating subsequent purchasers to assist Drucker in any litigation that might be instigated for the recovery of damages, or to institute an action in his name and for his benefit to collect the damages to the rental value and to the fee as an alternative to an injunction against the operation and maintenance of the railroad. That unless this action can be maintained plaintiff will lose the rental damages for the period between June 1, 1885, and the year 1905. Judgment is demanded in the amended supplemental complaint in accordance with the stipulation between the plaintiff and the corporate defendants, and directing the defendant Grodjinski-Davis to join in and to execute a release and conveyance of the easement, and requiring the payment of the money to the plaintiff. The corporate defendants jointly answered the amended supplemental complaint and admitted the allegation with respect to the stipulation, but put in issue other material allegations thereof. The defendant Davis answered, putting in issue the material allegations of the amended supplemental complaint.

On the trial it was shown that on the 15th day of December, 1911, a stipulation was entered into between the defendant Davis and the corporate defendants in the action which she had brought against them, to the effect that if it should be finally determined in this action that the plaintiff herein is entitled to no rental damages for the period subsequent to May 31, 1888—practically the date on which the premises were conveyed to defendant Grodjinski-Davis—and is entitled to no fee damages as an alternative to an injunction, that the corporate defendants would pay to the defendant Davis for the conveyance of the easements and the release of damages on account of the maintenance and operation of the railroad the sum of \$8,625; and it was expressly stipulated that \$1,375 of that amount was for the fee and rental damages caused by the alterations and additions to the elevated structure. The alterations and additions to the elevated railroad structure were made after the conveyance by Drucker. Deducting the amount allowed therefor, in said stipulation, we find that the settlement agreed upon between the corporate defendants and the defendant Davis was, as to the amount, the same, in effect, as that agreed upon between the plaintiff and the corporate defendants. At the close the trial counsel for the corporate defendants stated to the court that his clients were willing to pay the damages specified in the stipulation and to have them apportioned between the parties to this action "in any manner which the court deems proper." The court took no action on that suggestion and made no disposition of the action as against the corporate defendants.

Notwithstanding Drucker's attempt to reserve the easements, they passed to his grantee, and an action for an invasion thereof can only be maintained by the owner of the fee. *McKenna v. Brooklyn Union El. R. Co.*, 184 N. Y. 391, 77 N. E. 615; *Western Union Tel. Co. v.*

Shepard, 169 N. Y. 170, 62 N. E. 154, 58 L. R. A. 115; *Shepard v. Manhattan Ry. Co.*, 72 App. Div. 132, 76 N. Y. Supp. 269. Under the stipulation between the plaintiff and the corporate defendants, it is a condition precedent to the plaintiff's right to recover the stipulated amount for rental and fee damages that a release or conveyance of the easements by the defendant Davis shall be procured and delivered to the railroads. Inasmuch as she did not assume by the conveyance to her any obligation owing by Zimmermann to Drucker, with respect to the claim or cause of action for rental or fee damages, we are impelled by what we deem a controlling precedent to hold that she cannot be compelled to execute a release or conveyance of the easements. *Maurer v. Friedman*, 197 N. Y. 248, 90 N. E. 814. See, also, *Miller v. Clary et al.*, 210 N. Y. 127, 103 N. E. 1114, decided December 30, 1913. If the corporate defendants had paid the money into court or waived their right to require a release or conveyance of the easements, then the court might award the fund to the party entitled thereto, or apportion it between them if either should not be entitled to all. Although the plaintiff could not maintain an action to enjoin the maintenance and operation of the railroad for the reason that the easements passed with the fee, yet it is quite clear that she would be entitled to recover at law the damages which accrued before Drucker conveyed, and, as against the defendant Davis, to recover also any amount awarded or recovered for subsequent damages to the rental value of the land, and that as to such damages the owner of the fee would hold the same in trust for her. *Schomacker v. Michaels*, 189 N. Y. 61, 81 N. E. 555; *W. U. Tel. Co. v. Shepard*, 169 N. Y. 170, 62 N. E. 154, 58 L. R. A. 115; *Freund v. Biel*, 114 App. Div. 400, 99 N. Y. Supp. 1067, affirmed 193 N. Y. 662, 87 N. E. 1119. Although damages to the fee that might be awarded or recovered as a substitute for injunctive relief were not specifically reserved by the deed from Drucker to Zimmermann, it may well be argued that it was the intention of the parties that such damages should also be reserved to the grantor. That point, however, is not presented for decision by this appeal, and, inasmuch as the views of the members of the court are not in accord with respect thereto, it is not our intention to express an opinion thereon at this time. As the case is presented by this record, we have no fund in court to award or apportion.

It is contended, in effect, by the learned counsel for the appellant, that the offer of the corporate defendants through their counsel should be regarded as a consent on their part to have the amount awarded or apportioned without requiring the execution of a release or conveyance of the easements. It may be that the corporate defendants would, in the circumstances, be fully protected by the judgment if that were done. This offer, however, was not sufficiently definite to warrant the court, on an appeal to which they are not parties, in construing it as a waiver of the execution of any release or conveyance of the easements. But the issues in the action should be finally determined between all the parties, and, since the learned justice who presided at the trial is no longer on the bench, it becomes necessary to order a new trial.

It follows that the judgment should be reversed, and a new trial granted, with costs to appellant to abide the event.

HOTCHKISS, J., concurs.

(161 App. Div. 363)

PRESTON v. HOBBS.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. LIBEL AND SLANDER (§ 46*)—LIBEL—PRIVILEGED COMMUNICATION—QUALIFIED PRIVILEGE.

About a week before the publication of the alleged libel by defendant herein, plaintiff had published a libelous article concerning G. and defendant, and the libel complained of herein was composed and signed by G. in reply to plaintiff's prior publication and published by defendant as a paid advertisement. The article did not purport to express defendant's sentiments, but in fact contained matter which also constituted a reply by defendant to plaintiff's attack upon him and G. in the prior article, and as a reply to such article was fair and reasonable. *Held*, that the publication was qualifiedly privileged as to defendant, under the rule that, where one has been libeled so as to have the right to reply thereto, his publication of a reply is qualifiedly privileged as to the person publishing it.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 131, 141-143; Dec. Dig. § 46.*]

2. LIBEL AND SLANDER (§ 97*)—PRIVILEGED COMMUNICATION—TRIAL ON DEMURRER.

The question of whether a communication which the answer showed to be qualifiedly privileged was in fact privileged cannot be tried on demurrer.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 234-236; Dec. Dig. § 97.*]

Appeal from Special Term, New York County.

Action by Henry L. Preston against Elon S. Hobbs. From an order sustaining a demurrer to a defense, defendant appeals. Reversed, and motion denied.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

William R. Page, of New York City, for appellant.

Julius Kendler, of New York City, for respondent.

HOTCHKISS, J. The complaint alleged that plaintiff edited and controlled a publication known as the New York Produce News and that defendant was the proprietor and publisher of a similar paper called the Fruit Trade Journal and Produce Record, both of which papers circulated among persons engaged in the fruit trade, and that defendant had libeled plaintiff by publishing in his newspaper the article complained of. The defense demurred to alleges that, about one week previous to the publication of the alleged libel by defendant, plaintiff had published a libelous article of and concerning one Gibson and relating to certain acts of his in the course of his business as a dealer in fruits, and as well of and concerning the defendant, and that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the article complained of by plaintiff was composed and signed by Gibson and was published by defendant as a paid advertisement; that it did not purport to express defendant's views or sentiments, but only purported to be Gibson's reply to the article published by plaintiff; but that in fact it contained matter equally constituting a reply by defendant to the plaintiff's attack upon him; and that, as such dual reply, the article was true, fair, and reasonable.

[1, 2] Regarded as a reply by defendant, the facts alleged in the answer were sufficient to show that such reply was qualifiedly privileged. *Odgers on Libel and Slander* (5th Ed.) 291; *Keller v. Am. Bottlers Pub. Co.*, 140 App. Div. 311, 125 N. Y. Supp. 212; *Hermens v. Nelson*, 138 N. Y. 517, 529, 34 N. E. 342, 20 L. R. A. 440; *Richardson v. Northrup*, 56 Barb. 105. Under these circumstances, the question of privilege cannot be tried on demurrer. *Triggs v. Sun Print. & Pub. Ass'n*, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326. For the same reasons, if this action was against Gibson, he would be protected by a similar privilege. I think that the facts alleged were also sufficient to extend Gibson's privilege to defendant, on the principle that where one is the subject of a libel, having himself the right to make a reply, he may disseminate such reply in, or by means of, some appropriate medium, and the one through whom such dissemination is effected is protected by the same or a similar privilege as that which protects the author. Authorities on this subject are few, but the principle seems to me to be a necessary corollary to the rule which sustains the right of reply itself. A contrary doctrine would result in practically denying all opportunity for reply, for if such reply could be published or circulated only at the risk of subjecting those who took part in such publication or circulation to an action of libel, unprotected by any defense of privilege, all avenues of self-defense would be closed to him who had been the subject of the original libelous attack and whose right to appropriate reply the law recognizes and should protect. While the decision itself is not exactly in point, the principle I have referred to was recognized by *Cozens-Hardy, L. J.*, in *Edmondson v. Birch & Co.*, 76 L. J. Rep. N. S. 346. In that case, defendant had dictated a qualifiedly privileged communication to his clerk and had sent another and similar communication by cable, and it was claimed that by thus publishing the libel to strangers, defendant's privilege was lost. Lord Justice *Cozens-Hardy* said (page 353):

"If we were to accede to the view which has been urged on behalf of the respondent, we should in effect entirely destroy the defense of privilege in every case in which an action for libel was brought against a company or large mercantile house. It would be impossible for the person at the head of such a concern, or indeed for any individual, to write with his own hand every document that was required to be written in the course of its business. In such cases the correspondence must necessarily pass through the hands of more than one person and a record of it must be preserved in the letter books."

On the trial of *Cassidy v. Brooklyn Daily Eagle*, 18 N. Y. Supp. 930,¹ the late Mr. Justice Barrett, for many years a member of this

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 64 Hun, 635.

court, and a judge of great experience and learning, charged the jury in the following words:

"The newspaper which published the accused party's answer has the same privilege as that accused person. The newspaper is just as much privileged in publishing a fair defense as would be the attacked party."

Although the judgment was reversed in the Court of Appeals (138 N. Y. 239, 33 N. E. 1038), the reversal was on a different point, and the correctness of the charge does not seem to have been questioned by court or counsel.

The order should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs, with leave to plaintiff to withdraw the demurrer upon payment of said costs. All concur.

IN RE HARTRIDGE.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

ATTORNEY AND CLIENT (§ 44*)—DISBARMENT FOR UNPROFESSIONAL CONDUCT.

Where it is shown that an attorney retained in a criminal case was paid a large sum of money for use in defendant's behalf, and without authority used it to suppress testimony in violation of Pen. Law (Consol. Laws, c. 40) §§ 379, 570, and for other unauthorized purposes, expending it in gambling and otherwise appropriating it to his own use, and thereafter presented a false claim against his client for expenditures never made, he is guilty of unprofessional conduct which calls for his disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

In the matter of the application of the Association of the Bar of the City of New York to discipline Clifford W. Hartridge, an attorney, for professional misconduct. Respondent disbarred.

See, also, 144 N. Y. Supp. 1119.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

James R. Ely, of New York City, for petitioner.

Clifford W. Hartridge, of New York City, pro se.

INGRAHAM, P. J. The respondent was the attorney and counsel for one Harry K. Thaw, who had been indicted for the murder of Stanford White and who was twice tried in the city of New York. The killing of White by Thaw was conceded, and the defense was temporary insanity brought about by an alleged statement by Thaw's wife to Thaw as to her relations with White prior to her marriage to Thaw. It had become known to the respondent that Thaw had lived a dissolute life in New York, and had been intimate with prostitutes before his marriage. The substance of the first charge, which the referee has sustained, is that he paid large sums of money to various prostitutes to prevent them from giving information to the district attorney which could be used against Thaw on his trial. The respondent received over \$100,000 from Thaw and his mother to be used

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in Thaw's defense. After the acquittal of Thaw, the respondent sued Mrs. Thaw for over \$90,000 in addition to the amount which he had received, and it was upon the trial of that action in the United States Circuit Court that the facts were developed upon which these charges were based. Upon that trial the respondent claimed to have paid upwards of \$39,000 to prostitutes and others connected with them to suppress their evidence and prevent the district attorney from procuring their testimony. The official referee, upon the respondent's own testimony in the United States Circuit Court and before him, has found that respondent's acts in respect to the testimony of witnesses was in violation of sections 379 and 570 of the Penal Law.

There is a further charge that the sum of about \$39,000 procured from Mrs. Thaw for expenses and disbursements in the defense of her son were used for other purposes than those for which it had been paid to him and was in fact appropriated by the respondent to his own use. The referee finds that there is no evidence that the disbursements to these women and others associated with them were made either with the authority of the prisoner or of his mother. The respondent appears to have gotten into relations with a Mrs. Merrill, who apparently was a prostitute and the keeper of a house of assignation, which these prostitutes and others frequented. It was to this Merrill woman and other women, whom he met at this house, that the respondent claims to have paid a large proportion of this money. That such an expenditure as has been detailed by the respondent was not authorized by Mrs. Thaw or by her son is apparent, and, if they were made at all, it was a gross abuse of the confidence reposed in the respondent and without the slightest authority from his clients. The respondent's clients requested him to take receipts and vouchers for all payments made by him, with which request he failed to comply.

The referee also finds the respondent guilty of using portions of the money advanced to him by Mrs. Thaw in gambling houses and in otherwise appropriating it to his own use. The referee further finds that the respondent in the suit in the United States Circuit Court presented claim against Mrs. Thaw and bills of particulars in which he claimed to have expended large sums of money which he sought to recover that were false; that at various times when he claimed to have paid money in New York he was in fact in Southampton, Long Island; that the respondent's whole testimony before the referee was evasive, indefinite, and contradictory. The referee sums up his conclusion as to the testimony, viz.:

"Taking all things into consideration, the conclusion is unavoidable that the respondent not only had no authority, direct or implied, to spend the \$39,000, or any part thereof, to women to be kept silent, so that their stories should not reach the district attorney, but that in fact he did not pay a considerable part of said sum, as he claims he did, for that purpose, and appropriated a large part of it to his own use."

The referee further finds that the respondent had been paid \$103,000; that \$30,000 was spent for matters that have in no way been criticised or disputed, and of the remaining \$73,000 the sum of about \$33,000 was credited on account of fees, leaving a balance of \$39,000

in dispute. The conclusion of the referee is that the two charges, to which attention has been called, have been sustained by the evidence, and that the respondent is guilty of professional misconduct in regard to them.

It is quite useless to detail the evidence before the referee or to describe the respondent's disgraceful and shameless conduct in relation to his alleged defense of Thaw and the expenditure of these large sums of money, obtained from Mrs. Thaw for the defense of her son. It presents a sordid, vulgar condition by which many thousands of dollars of this woman's money were squandered in an absolutely useless and unprofessional way, except as they tended to keep witnesses away from the district attorney or to prevent knowledge of facts coming to the district attorney, which in the respondent's opinion would be detrimental to the case of his client. But, so far as they tend to suppress evidence, we agree with the referee that they were in violation of the Penal Law, and, if the payments were actually made as claimed by the respondent, they certainly constituted a misappropriation of his client's money and conduct which violated his professional obligations. That this respondent should go to gambling houses and other places of like kind and use his client's money for dishonest and immoral purposes while pretending to be engaged in advancing his client's interests, is a violation of his professional obligation. The whole story is most disgraceful and dishonorable and one for which there is no possible justification. I think the report of the referee is amply sustained by the evidence and presents a situation which imposes upon the court the clear duty to disbar the respondent.

Upon the hearing before the referee the respondent attempted to justify his payment of these large sums of money to the Merrill woman. The referee in his report doubts the fact of such payment, as it is based solely upon the uncorroborated testimony of the respondent, which the referee evidently concludes is unworthy of belief. He calls attention to the fact that the respondent has not produced the Merrill woman as a witness, although there is evidence that at the time she was available. After the report of the referee was presented, the respondent made application to have the reference reopened and opportunity afforded to produce the testimony of the Merrill woman and the application was granted to the extent of allowing commission to issue to take the testimony of the Merrill woman. Upon the request of the respondent, a commission was issued to take the testimony of the Merrill woman in Boston, where respondent had information that the witness could be found. The respondent was represented at Boston, and when the commission was about to be executed the Merrill woman could not be found, and affidavits were submitted tending to show that she had been in Boston; but, having been charged with commission of a crime, she had disappeared. Thus every opportunity has been given to the respondent to produce the testimony of this witness, and it is not pretended that the respondent has any knowledge of her whereabouts, or, if further time were to be given to him, that he could produce her for examination. Nor do I see how any testimony that she would give could aid the respondent. If she cor-

roborated him as to the various payments which he alleged have been made, it would not in any way relieve him from responsibility for squandering money obtained from Mrs. Thaw and her son, except in so far as it violated the Penal Law. If she failed to corroborate him as to the payments of money he claimed to have made to her, it would be further evidence of his misappropriating his client's money.

It is perfectly clear that this respondent has been guilty of professional misconduct and that he is utterly unworthy to remain a member of an honorable profession, and he is therefore disbarred. All concur.

(161 App. Div. 107)

LEWIS v. MATTHEWS et al.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. CORPORATIONS (§ 56*)—OFFICERS—DIRECTORS.

A resolution increasing the number of directors does not become operative until the certificate showing the increase is filed in the office of the Secretary of State and the county clerk, as required by the Stock Corporation Law (Consol. Laws, c. 59) § 28.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 152; Dec. Dig. § 56.*]

2. CORPORATIONS (§§ 283, 289*)—DE FACTO OFFICERS.

An election of directors held before a resolution increasing their number has become operative by the filing of the certificate required by statute is not void, and, where it is recognized as valid and they assume to act without objection from any one, they become de facto directors, for whose acts the corporation is responsible, and the validity of their election and the title to their office cannot be raised collaterally.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1195, 1198-1205, 1207-1235, 1240-1245; Dec. Dig. §§ 283, 289.*]

3. CORPORATIONS (§§ 308, 312*)—OFFICERS—COMPENSATION.

A vote by the directors to pay the officers for services already performed without agreement as to salary is without authority and cannot be ratified by a mere majority of the stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349, 1376-1386, 1388-1392; Dec. Dig. §§ 308, 312.*]

4. CORPORATIONS (§ 308*)—STOCKHOLDERS—MANAGEMENT OF CORPORATIVE AFFAIRS.

The fixing of future salaries of the officers of a corporation is a matter of administration within the power of the directors, and, when their action is ratified by a majority of the stockholders, it cannot be disturbed at the instance of the dissenting stockholder in the absence of fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

5. CORPORATIONS (§ 308*)—OFFICERS.

A want of power in a de facto board of directors to pass a resolution fixing the salaries of officers is an irregularity that can be ratified by the stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

Dowling and McLaughlin, JJ., dissenting in part.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, New York County.

Action by Thomas A. Lewis, suing on behalf of himself and other stockholders of the Electric Heat Storage Company similarly situated, against Thomas A. Matthews and others. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, DOWLING, and HOTCHKISS, JJ.

George W. Seligman, of New York City, for appellants.
James M. Hunt, of New York City, for respondent.

INGRAHAM, P. J. The facts are stated in the opinion of my Brother DOWLING, and I agree with him that the judgment is correct as to the sums of money which the individual defendants paid themselves from the treasury of the defendant corporation for what was called the 1911 salaries. The question as to the salaries received by the individual defendants for the year 1912, however, presents a different question, and I think that the judgment so far as it allows a recovery against the individual defendants for the salaries received by them for the year 1912 cannot be sustained.

[1] The annual meeting of the stockholders of the defendant corporation was held on November 6, 1911. At that meeting a resolution was passed increasing the number of directors from five to seven, and at the same meeting seven directors were elected by the stockholders for the ensuing year. There is no question but that this resolution was valid, and that by it the number of directors was legally increased. Under the statute, however, this increase did not become effectual until a certificate showing the increase was filed in the office of the Secretary of State and in the office of the clerk of the county of New York. See section 26 of the Stock Corporation Law; *Matter of Dolgeville E. L. & P. Co.*, 160 N. Y. 500, 55 N. E. 287; *Matter of Westchester Trust Co.*, 186 N. Y. 215, 78 N. E. 875. Such certificates were not filed in the office of the Secretary of State until November 21, 1911; and in the office of the clerk of the county of New York until November 22, 1911.

[2] At the same meeting of the stockholders which increased the directors, the stockholders elected seven directors for the ensuing year, and the first question presented is whether that election was void because the stockholders actually voted for the seven directors before the filing of the certificates. I do not think it was. The stockholders had power to increase the number of directors, and they had acted by increasing the number of directors. The resolution, however, would not become operative until the resolutions had been duly filed in the office of the Secretary of State and the county clerk. I can see no objection to the stockholders proceeding to elect the directors in accordance with their resolution, who would take office upon the filing of the certificates that made the increase effective. It may be that voting for these directors before the number was finally fixed was an irregularity, and that in a direct proceeding for that purpose it could be corrected, or the court would be justified under such circumstances in ordering a new election; but no such proceeding was taken. The

stockholders and directors recognized the election as valid, and after the resolution was filed as required by the statute the directors, with the assent of the stockholders, certainly without objection from any one, filled the offices and performed their duties during the period for which they were elected. They clearly became de facto directors, and it is clear that their acts became binding on the corporation. I think it would not be disputed that as to third parties an obligation incurred by direction of the board of directors as thus constituted, after the resolution had been duly filed and the increase had become effective, would have bound the corporation, and the corporation could not have defended in an action brought to enforce such an obligation on the ground that this election had been irregular and had taken place before the resolution increasing the directors had become effective. And so as between the corporation and its directors.

The directors certainly would be estopped from claiming that this election was irregular and void as having been held before the increase had become effective by failure to file the certificates as required by statute. And I think the same result must follow where the corporation is endeavoring to assert a claim against the directors for their acts as directors or officers of the company during the period that they held the office of director under this election. It seems to me that at most it was an irregularity which could be corrected by a direct proceeding to require a new election; but, the election having been acquiesced in by all the stockholders of the corporation, neither party could question the right of the directors elected at this meeting to act for the corporation, or attack their title to the office of director collaterally. The election was not void, for the stockholders were entitled to elect five directors. They proceeded to elect seven. There was no objection to the stockholders proceeding to an election until the certificates had been filed, and the directors assumed the duties of the office to which they had been elected and managed the corporation without objection from any one. It seems to me clear that after the certificates were duly filed the directors became acting directors of the company, for whose acts the company was responsible, and that the validity of their election or the title to their office could not be attacked except in a direct proceeding for that purpose.

On the 29th of January, 1912, after these certificates had been duly filed, there was a special meeting of the board of directors held, at which four directors were present, two of whom had been directors for the preceding year. This was a majority of the directors. The two individual defendants, Hill and Matthews, the president and treasurer of the company, were not present. At this meeting a resolution was unanimously adopted fixing the salary of the defendant Hill as president of the corporation at \$600 a month, and of the defendant Matthews as treasurer of the corporation at \$2,500 a year; such salaries to begin as of the 1st day of January, 1912. It was further resolved that the action of the treasurer in paying the president a salary of \$600 a month for the month of January, 1912, was ratified and approved; and it was also resolved that the action of the treasurer in paying the president the sum of \$1,131.88 as his expenses for

a trip to England in August and September, 1911, was ratified and approved. These resolutions having been adopted, the defendants Hill and Matthews, the president and treasurer of the corporation, joined the meeting and were present during its further deliberations. Further business was then transacted by the directors and the meeting adjourned. Subsequently, and on the 2d of February, 1912, a meeting of the stockholders of the corporation was held, and there were present in person or by proxy 7,250 shares of stock of the corporation. That meeting had been called by a notice dated January 19, 1912, for the purpose of considering and determining whether the stockholders should ratify, confirm, and approve certain resolutions adopted by the board of directors directing the payment of certain salaries to the president and treasurer and the payments of salaries pursuant to such resolutions.

At that meeting the plaintiff Lewis appeared as a stockholder representing 425 shares of the stock of the corporation. A temporary chairman of the meeting was chosen, when the plaintiff protested against ratifying the resolution of the directors providing for these salaries. A resolution was then proposed that recited that a meeting of the board of directors on the 21st day of November, 1911, a resolution was adopted that the salary of the treasurer be fixed at \$2,500 per year for the calendar year 1911, and that in the judgment of the stockholders such compensation was fair and reasonable and such resolution a proper exercise of the discretion of the board of directors. It was resolved that said resolution and the payments to the treasurer Matthews during the year 1911 as compensation for his services to the company as treasurer were in all respects ratified, confirmed, and approved. Tellers were appointed, and this resolution was adopted by a vote of 1,625 shares in the affirmative to 425 shares—the stock owned by the plaintiff in the negative. A similar resolution was passed as to the salary of the president for the year 1911, which resolution was carried by a similar majority. Another resolution was then moved, which recited that at a meeting of the board of directors on the 29th of January, 1912, a resolution fixing the salary of the president at \$600 a month and the salary of the treasurer at \$2,500 a year, payable monthly, had been passed by the directors, and that the directors further resolved that the action of the treasurer in paying the president the sum of \$600 as salary for the month of January was ratified and approved; that the salary of the secretary be fixed at the sum of \$500 a year, payable monthly, salary to begin on the 1st day of January; and it was then moved that the resolutions of the board of directors be and the same were in all respects ratified, approved, and confirmed. This resolution was then put to a vote. All the stockholders present or by proxy voted for the resolution, except that the plaintiff declined to vote, and except that Mr. Hill, who was the president, and certain stocks held by Hill and Matthews as proxy, and Hill and Matthews as trustees, and certain other stock held by the trustees, refrained from voting. Plaintiff also protested against the second resolution, but the preamble and resolution were declared adopted by a vote of 833 shares in the affirmative and none in the negative. An-

other resolution approving the payment by the treasurer of the sum of \$1,131.88 for the expenses of the president's trip to England in August and September, 1911, was adopted by the same vote.

[3-5] While, with some hesitation, I am inclined to agree with my Brother DOWLING as to the 1911 salaries as money that was taken from the treasury of the company without any authority, for services that were performed as officers of the company, without any agreement, express or implied, that they should be paid for by the company, that a ratification of those payments by the stockholders, they being absolutely without authority when made and a misappropriation of the funds of the company, could not be made by a mere majority of the stockholders, I think it entirely clear that the action of the stockholders in ratifying the action of the board of directors in fixing the salaries of the president and treasurer for the year 1912 was a complete ratification of the action of the directors, and justified the officers of the company in paying the salaries so provided for, and estopped the corporation or the minority stockholders from questioning the validity of the payments or the right of the officers to receive the salaries thus formally fixed. The corporation acted by its board of directors in fixing these salaries, and such action of the board of directors was ratified and adopted by a large majority of the stockholders; the only stockholder objecting being the plaintiff, who was the owner in his own right of but a small minority of the stock. The question was one of the internal management of the corporation—whether the officers whom the corporation had elected should receive compensation for the services that they rendered to the corporation, and the amount of compensation to be paid. It was a question to be determined by the corporation itself, in which neither the people of the state nor the public generally were at all interested, and the stockholders as those interested in the disposition of the property of the corporation were entitled to determine what, if any, compensation should be paid to its officers. Certainly a minority stockholder disagreeing with the majority had no right to impose his will upon the majority and control the action of the corporation. It may be that the salaries were excessive, or that the officers of the corporation in whose favor the salaries were voted had such a control over the other stockholders that they were thereby induced to vote for the resolution. But that was all a question for the stockholders themselves, and they voted apparently intelligently and understandingly. No stockholder—except the plaintiff who protested against the adoption of the resolutions, but refused to vote against them when the vote was cast—objected, or so far as appears has ever since objected to these resolutions, or to the payment of these salaries to the officers of the company. Unless we are to allow a stockholder holding a minority of the stock to control the internal management of the corporation as against the large majority, where no fraud is proved, certainly the effect of the act of the directors ratified by all the stockholders, except one dissenting, cannot be disturbed.

The question as to when a minority stockholder could interfere to control the internal management of a corporation was exhaustively

examined in the case of *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527. Judge Peckham, in delivering the opinion of the court in that case, said:

"I think that where the action of the majority is plainly a fraud upon, or, in other words, is really oppressive to, the minority shareholders, and the directors or trustees have acted with and formed part of the majority, an action may be sustained by one of the minority shareholders suing in his own behalf and in that of all others coming in, etc., to enjoin the action contemplated, and in which action the corporation should be made a party defendant. It is not, however, every question of mere administration or of policy in which there is a difference of opinion among the shareholders that enables the minority to claim that the action of the majority is oppressive, and which justifies the minority in coming to a court of equity to obtain relief. Generally, the rule must be that in such cases the will of the majority shall govern. The court would not be justified in interfering even in doubtful cases, where the action of the majority might be susceptible of different constructions. To warrant the interposition of the court in favor of the minority shareholders in a corporation or joint-stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company and in a manner inconsistent with its interests."

The facts in that case were then examined in which it had been found that the corporation was paying a grossly excessive price for property purchased by it and in which the president of the corporation was actually interested. In that case the individual selling the property of the corporation was its president and a director, and at a meeting of the stockholders of the corporation he voted as a shareholder to make the purchase. And that case has never, so far as I am aware, been questioned. So far as I can see, neither by the findings nor the evidence was the act of the defendants either as directors or as controlling a majority of the stock of the company, such as would, within the rule here laid down, justify the interference of a court of equity. The question as to the salaries to be paid the officers was, as before stated, a question of the internal management of the corporation to be decided in the first instance by the board of directors and subject to ratification by the stockholders. Thus in *Continental Security Co. v. Belmont*, 206 N. Y. 7, 99 N. E. 138, it was said:

"As a general rule stockholders cannot act in relation to the ordinary business of a corporation. The body of stockholders have certain authority conferred by statute which must be exercised to enable the corporation to act in specific cases, but except for certain authority conferred by statute, which is mainly permissive or confirmatory, such as consenting to the mortgage, lease, or sale of real property of the corporation, they have no express power given by statute. They are not by any statute in this state given general power of initiative in corporate affairs. Any action by them relating to the details of the corporate business is necessarily in the form of an assent, request, or recommendation. * * * Although it is said that the authority of stockholders in the management of business corporations is exhausted when they elect the directors, * * * nevertheless it is generally recognized that certain acts of boards of directors that are legal, but voidable, can be ratified and confirmed by a majority of the body of stockholders as the ultimate parties in interest, and thus make them binding upon the corporation. * * * Such recognized authority in stockholders to ratify and confirm the acts of

boards of directors is confined to acts voidable by reason of irregularities in the make-up of the board or otherwise or by reason of the directors or some of them being personally interested in the subject-matter of the contract or act, or for some other similar reason which make the action of the directors voidable."

It thus seems to me settled that the fixing of the salaries of the officers of the corporation was a matter of administration, the power to perform which was given to the directors, and that the resolution of the board of directors fixing the salaries of the individual defendants for the year 1912 was a valid exercise of that power. The question as to the validity of the election of this board of directors could not be raised collaterally in this action. A stockholder could raise that question only in a direct proceeding to set aside the election. As de facto directors they could act as for the company while continuing in the position. *Lord v. Equitable L. A. Society*, 57 Misc. Rep. 417, 108 N. Y. Supp. 67, affirmed 126 App. Div. 937, 110 N. Y. Supp. 1135, and 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420. If, however, there was any question as to the power of the board of directors to pass this resolution, it was an irregularity that could be ratified by the stockholders, and the action of the stockholders was a complete ratification and made the payment of these dividends or salaries legal.

For this reason I think the corporation was not entitled to a judgment requiring the return of the salaries paid for the year 1912; and the judgment appealed from must be modified by reducing the recovery to the amount of the salaries paid to them for the year 1911, and as thus modified affirmed, with costs to the appellants. The modification of the decision and the reversal of the findings which are opposed to the views hereinbefore expressed can be adjusted on the settlement of the order. The allowance by the plaintiff of costs in the court below is also reversed, and the judgment directing the defendants to pay the 1911 salaries will be without costs.

LAUGHLIN, J., concurs.

HOTCHKISS, J. I concur with Mr. Justice DOWLING as to 1911 salaries. As to those of 1912 the board was composed, not of usurpers, but of de facto directors. Any irregularity in their election was susceptible of ratification. *Continental Securities v. Belmont*, 206 N. Y. 7-18, 99 N. E. 138.

DOWLING, J. (dissenting in part). Plaintiff, as a stockholder in the Electric Heat Storage Company, seeks an accounting from the defendants Hill and Matthews for all moneys received by them from the company as salaries for the years 1911 and 1912. The corporation was organized in November, 1910, with five directors; the plaintiff becoming the president thereof, with defendant Matthews as treasurer and defendant Hill as secretary. Under the by-laws of the corporation, the duties of the various officers were fixed and determined, and no provision was made thereunder, nor by any resolution of the corporation, for the payment of salaries to any officer or director.

On January 3, 1911, plaintiff resigned as president and Hill succeeded him as such. In August, 1911, by which time but \$15,000 had been paid into the treasury of the company, a contract was negotiated by a committee consisting of Lewis, Lawrence, and Hill, with the General Electric Company, whereby the latter paid \$50,000, for a non-exclusive license to manufacture under a patent owned by the company, and \$25,000 thereof was paid to the Therol Foreign Patent Syndicate; the balance going into the treasury of the defendant corporation. On November 6, 1911, a meeting of the stockholders of the company was held, at which the president's report was submitted, showing that the principal business done up to that time had been the negotiation of the aforesaid license, and a trip abroad taken by the president in connection with the affairs of the company. The report of the treasurer was also submitted, in which appeared an item of, "Labor, \$8,788.32." When this was objected to by the plaintiff, it developed for the first time that the defendants Hill and Matthews had been drawing salaries as president and treasurer, respectively, for the year 1911, the payment to the former being at the rate of \$7,200 a year, and to the latter at the rate of \$2,500 a year. The first payment on these salaries was made June 15, 1911, amounting to \$1,800 to Hill and \$625 to Matthews.

It is conceded that at the time of such payments there was no resolution, either of the stockholders or of the board of directors, authorizing the same, or any provision of the by-laws requiring or permitting the same.

On November 6, 1911, the annual meeting of the stockholders of the corporation was held, at which a resolution was passed increasing the number of directors thereafter from five to seven. At the same meeting seven directors were elected for the ensuing year, including defendants Hill and Matthews. The certificate showing the increase in the number of directors in the corporation was filed in the office of the Secretary of State on November 21st, and in the office of the clerk of the county of New York on November 22d. On November 21, 1911, the newly elected board of directors of the corporation met, but six directors being present. At that meeting a resolution was passed fixing the salary of the treasurer for the calendar year 1911 at \$2,500; five directors voting therefor, and Matthews, the treasurer, refraining from voting. This resolution was offered on the motion of Hill, the president. Then Matthews moved that the salary of the president be fixed at \$7,200 for the calendar year 1911 and on this motion, Matthews acting as temporary chairman, the vote was carried by five members, Hill refraining from voting. Upon motion of Mr. Lithgow, seconded by Mr. Barnes, it was resolved that the acts of the treasurer and president in making payments to the president and treasurer upon account of their respective salaries for the calendar year 1911 were ratified and confirmed. For the purpose of putting this resolution Mr. Conklin acted as temporary chairman, and it was carried by a vote of four members; Hill and Matthews refraining from voting. Then on January 29, 1912, a special meeting of the new board of directors was held under the conditions to be hereafter referred

to, at which, until the further action of the board, the salary of the president was fixed at the sum of \$600 a month, and the salary of the treasurer at the sum of \$2,500 a year, payable monthly, such salaries to begin as of January 1, 1912; also, the action of the treasurer in paying the president the sum of \$600 as salary for the month of January, 1912, was ratified and approved.

On February 2, 1912, a special meeting of the stockholders of the corporation was held, at which the action taken by the board of directors on November 21st, in fixing the salaries for 1911, and that of January 29, 1912, fixing the salaries for 1912, was confirmed, 883 votes being registered in the affirmative and none in the negative, certain stock being represented but not voting.

With respect to the salaries for 1911, we think the determination of the court in holding the individual defendants liable on account thereof was clearly correct. There is no implied contract upon the part of the corporation to pay a director or officer for his services as such, and to form the basis for a recovery for such services there must be a pre-existing provision for the payment of such salary, either by resolution or under the by-laws, or proof that the director or officer expected to receive compensation for his services and the corporation intended to pay him for such services. *Mather v. Eureka Mfg. Co.*, 118 N. Y. 629, 23 N. E. 993; *Farmers Loan & Trust Co. v. Housatonic R. Co.*, 152 N. Y. 251, 46 N. E. 504; *Stout v. Security Trust & Life Ins. Co.*, 82 App. Div. 129, 81 N. Y. Supp. 708. In this case not only is there no proof of any such expectation or agreement as to salaries for the year 1911, but the very method adopted of concealing the payments made for that purpose under the deceptive description of "Labor" sufficiently characterizes the whole transaction. Nor do we think that the stockholders, at their meeting held in January, 1912, had the power to ratify the action of the board in so far as it assumed to vote salaries for services rendered during the year 1911. The payment of salaries in the absence of an agreement has been declared to be against public policy (see cases supra), and it has been held that the power of ratification resident in stockholders applies to such acts as are voidable only, and not to such as are prohibited by law, or against public policy. *Continental Securities Co. v. Belmont*, 206 N. Y. 18, 99 N. E. 138.

With regard to the salaries for the year 1912, a different situation is presented. Here both the directors and stockholders had notice that the officers insisted upon being paid for their services, and the directors had the right to vote a reasonable sum therefor. The exercise of this right, however, is attacked upon the ground that the board of directors as then constituted was an illegal board. This proceeds upon the theory that, inasmuch as the increase in the number of directors did not become operative until the certificate thereof had been filed in the two offices where by statute it is required to be filed (section 26, Stock Corporation Law), and inasmuch as all the directors received the same number of votes, and therefore no five persons can now be claimed to have been legally elected to the exclusion of the other two, the election of the new board of seven was a nullity and that the old board of five held over. In the *Matter of Dolgeville E. L. & P. Co.*, 160 N. Y.

500, 55 N. E. 287, it was held that the number of directors in a corporation was not reduced until after the filing of the transcript showing the action of the corporation, in the two proper public offices. In *Matter of Westchester Trust Co.*, 186 N. Y. 215, 78 N. E. 875, the case just cited was discussed, and it was held that the number of directors could not be deemed to be reduced until after the filing of the transcripts, and that the subsequent filing thereof does not relate back so as to make the election valid. As this election in question was held before the transcripts had actually been filed, it would therefore appear that the old board of five held over. But when the board held its meeting on January 29, 1912, at which these salaries were finally voted, the directors present were Messrs. Crosby, Barnes, Montross, and Conklin. Of these, only two were members of the old board, namely, Messrs. Crosby and Conklin. Barnes and Montross, the other two, were new members of the board. The resolution fixing the salary of the president at \$600 a month, and that of the treasurer at \$2,500 a year, therefore received the votes of only two of the old board, namely, Crosby and Conklin. While the minutes show that Messrs. Hill and Matthews arrived and were present during the further deliberations, this was after the resolutions in question had been passed, and the only salary question upon which they voted was that fixing the secretary's at \$500 a year, which is not in question on this appeal. We should be disposed to hold that, if a majority of the old board voted favorably upon the resolution fixing the salaries for 1912, the ratification of their action by the stockholders would not be subject to attack; but we see no way by which the vote of two out of five of the legally constituted board can furnish a proper basis to sustain such ratification. When the stockholders on February 2, 1912, ratified the action of the board of directors, they did so without knowledge of the fact, either that it was a meeting of an illegally constituted board, or that but two out of the five members of the old board were present at the time the resolution fixing the salaries for the president and treasurer was adopted; for, as a matter of fact, in the form in which it was submitted to them, the resolutions for the salaries for the three officers, president, treasurer, and secretary, appeared consecutively, and there was no information given as to who voted therefor, nor who were present.

Under these conditions, therefore, we believe that the stockholders, not having before them full and complete information of the circumstances under which the board had acted, nor of the legal infirmity attending such action, could not knowingly or legally ratify the attempted action of the board, which was void.

For these reasons we believe the judgment appealed from is correct and should be affirmed in all respects, with costs to the respondent.

McLAUGHLIN, J., concurs.

146 N.Y.S.—28

BENHAM et al. v. BOARDMAN et al.

(Supreme Court, Equity Term, Seneca County. February 16, 1914.)

1. TRUSTS (§ 61*)—TERMINATION—LIFE ESTATE.

The owner of land conveyed it to his son's wife for life, reciting his intent to furnish the wife a home for herself and her husband during her life, at her death the premises to revert to the grantor, and if the son should die before the wife, then she should have the right to sell her interest. Subsequently the grantor conveyed the same premises in trust, in case the son survived his wife, to receive the rents and profits of the premises and apply them to the maintenance of the son for life, and, after the death of the son and his wife and the survivor of them, to sell the property and divide the proceeds among grantor's legal heirs. *Held*, that, the son having died before his wife, the trust terminated and the title reverted to the grantor, subject to the life estate in the son's wife under the first deed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 83-87; Dec. Dig. § 61.*]

2. LIFE ESTATES (§ 4*)—TERMINATION—ABANDONMENT.

B. conveyed certain real property to his son's wife for life for a home for the son and the wife, she agreeing that she would not sell or lease the premises during her life, but in case of the prior death of her husband, she might sell her interest if she wished to leave. Her husband having died leaving no children she continued to reside on the premises until she was too old to longer live alone there. She sold the farming utensils and went to visit her relatives in another state, keeping a furnished room in the house, and rented the place to others, living on the income derived therefrom. *Held*, that such act was not an abandonment of her life estate in the property.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 6-10; Dec. Dig. § 4.*]

Action by Charles B. Benham and others against Mary E. Boardman and others, to partition certain real property, and for the construction of certain deeds. Judgment for plaintiffs.

George W. Pontius, for plaintiffs.

Daniel W. Moran, of Seneca Falls, for defendant Boardman and others.

William S. MacDonald, of Seneca Falls, guardian ad litem, for defendant Riley.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, for defendant Lehigh Valley Ry. Co. and others.

Charles F. Hammond, of Seneca Falls, for defendant Hamill.

CLARK, J. Deming Boardman, a resident of Seneca county, on the 24th day of August, 1876, deeded to his daughter-in-law, Mary E. Boardman, wife of his son Elijah D. Boardman, the life use of a farm situate in the town of Seneca Falls, which farm consisted of about 50 acres, and fully described in said deed. The conveyance contained the following clause:

"It is the intent of the party of the first part in making this instrument or conveyance to furnish to the said Mary E. Boardman a place for herself and her husband to live during her life, provided the said Mary E. Boardman shall

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

erect on said premises a small comfortable house sufficiently large for their use and at the death of said Mary E. Boardman all of said premises, together with any and all improvements which said Mary E. Boardman may build or grow thereon during said term shall revert back to the said Deming Boardman, and whereas it is the intention of said Deming Boardman by this conveyance to provide a home for the husband of said Mary E. Boardman as well as for herself, it is therefore agreed between said parties hereto, and the said Mary E. Boardman by accepting this instrument, agrees on her part that she will not during her life sell or convey or lease said premises to any person during her natural life, but in case the said E. D. Boardman should die before his said wife dies then she shall have the right to sell her interest if she wishes to leave and go among her friends who live in the West."

Nearly ten years after the making of the last-named deed, and on the 20th day of January, 1886, Deming Boardman conveyed the same premises described in the deed of August 24, 1876, to his son Charles D. Boardman as trustee, and this later deed contained the following provisions:

"This grant is made to the party of the second part in trust for the following uses and purposes, that is to say: After the death of Mary E. Boardman, wife of my son Elijah D. Boardman, in case he shall her survive, the party of the second part, as trustee, shall receive the rents, use, income and profits of said premises and apply the same to the support, use and maintenance of my son, Elijah D. Boardman, for and during the term of his natural life, and the said profits or income shall not be liable for or on account of any debts of my said son E. D. Boardman, the intention of this grant being to afford my said son a support during his natural life provided he shall survive his said wife.

"After the death of the said Mary E. Boardman and my son Elijah D. Boardman and the survivor of them, the party of the second part is hereby authorized and empowered to sell and convey said premises and to divide the proceeds of such sale among my legal heirs in the same manner as they would inherit the same by the laws of this state.

"The successor of the party of the second part, when legally appointed, to have the same rights and powers herein conferred upon the party of the second part."

Deming Boardman died intestate December 19, 1891, leaving a large number of heirs at law surviving him, and Charles D. Boardman, the trustee named in the last above-mentioned deed, died in the year 1890, without having executed the power of sale mentioned in said deed, because at the time of the death of said trustee both Elijah D. Boardman and Mary E. Boardman, his wife, were living and occupying the premises described in said deeds. Elijah D. Boardman died in February, 1910, leaving no children, or descendants, or parents, and leaving him surviving his widow, Mary E. Boardman, to whom by his will, subsequently probated in Seneca county, he devised all of his property. The plaintiff and the special guardian for the infant Edith Riley contend that Mary E. Boardman has abandoned the premises and has forfeited her life interest therein, and that a trustee should be appointed to succeed Charles D. Boardman, deceased, the trustee named in the deed of January 20, 1886, above referred to, and that the premises should be sold and the proceeds distributed, but not among the heirs of Deming Boardman who were living at the time of his death, but among those living at the time of the sale of the premises, or their representatives. The only answering defendant, Mary E. Boardman, contends that when Deming Boardman died the prop-

erty in question descended to his heirs at law then living, subject to her life estate, and that her husband, Elijah D. Boardman, on the death of his father, inherited an undivided one-ninth of said premises, and that his brother, Malcolm Boardman, inherited a one-ninth of said premises, which he conveyed to Elijah D. Boardman, and that she is now the owner of the shares of said Elijah D. Boardman and Malcolm Boardman, in addition to her life estate in said property. All parties seem to agree that the property in question is so situated that it cannot be divided without material injury to their rights and interests, and that it should be sold and the proceeds, after paying necessary expenses, should be divided among those entitled thereto, but plaintiff and the special guardian insist that the property should be sold by a trustee to be appointed to succeed Charles D. Boardman. It therefore becomes necessary for the court to construe the two deeds above referred to, and for convenience the second deed given by Deming Boardman to Charles D. Boardman, trustee, dated January 20, 1886, and recorded in Seneca county clerk's office in Liber 106 of Deeds at page 239, will be first considered.

[1] A careful reading of the first deed to Mary E. Boardman, dated August 24, 1876, discloses clearly that the purpose of Deming Boardman in making it was to furnish Mary E. Boardman and her husband, Elijah D. Boardman, a home and place to live in during the life of said Mary E. Boardman. She was to build a house on said premises out of her own means, which she has done, and the evidence on the trial disclosed the fact that she had faithfully carried out her part of the arrangements, and had cared for her husband on said premises during his lifetime. After Deming Boardman made the deed to Mary E. Boardman, August 24, 1876, he evidently appreciated the fact that if she died first, her husband, Elijah D. Boardman, son of Deming Boardman, would be without a home, and then he made and executed the deed dated January 20, 1886, to Charles D. Boardman, as trustee, covering the same property and containing the clauses heretofore quoted. From all the circumstances surrounding the execution of these two deeds, and the evidence given on the trial as to the care Mary E. Boardman gave to her husband, I am satisfied that the purpose of Deming Boardman in making these deeds was primarily to provide a home for his son, Elijah D. Boardman, and his wife, Mary, during their joint lives, he putting the deed of 1876 in the name of his daughter-in-law, Mary E. Boardman, because he evidently thought it was not safe to have his son, Elijah, have control of the property. He had a further purpose, to provide a home for his son, Elijah, in case he should survive his wife, the grantee named in the deed of 1876; hence he made the deed of 1886, to Charles D. Boardman, as trustee. Elijah D. Boardman predeceased his wife, Mary, who still lives. It seems clear that the sole purpose of creating the trust in the deed of 1886 to Charles D. Boardman, trustee, was to provide for Elijah D. Boardman after the death of his wife, and, she having survived him, the trust absolutely failed, and there is at this time no trust existing; consequently the appointment of a new trustee to convey this property, as urged by the plaintiff and the special guardian, would be

an entirely unnecessary proceeding, for there is no trust to execute, and it will not be profitable to spend further time on the trust deed of January 20, 1886.

[2] Elijah D. Boardman and his wife, Mary, lived for many years on the farm in question, and the husband died there February 24, 1910. They never had any children, and Mary E. Boardman, not only out of her own means built a house and outbuildings on the premises in question after they were deeded to her in 1876, but she faithfully cared for her husband up to the time of his death, and after that event she was left entirely alone on this farm. She is a lady past 70 years of age, and it was manifestly improper and unsafe for her to be living alone on an isolated farm, so in March, 1910, she had an auction, sold off the farming utensils, but she continued to reside in the house until the fall of 1910, when she went to visit relatives in the city of Detroit, keeping a furnished room in the house on the farm, and not in any way intending to abandon it as her home and place of residence. She has no income excepting such as has been derived from the farm, and while she has stayed with relatives in Detroit without expense to her most of the time since October, 1910, and has permitted various parties to work the farm, some of whom have lived in portions of the house, she never intended to abandon her home on the farm in question, and rightfully now considers it her home, and I do not think it can justly be held that by anything she has done she has abandoned the property or forfeited her interest therein.

I am not unmindful of the fact that there is a clause in this deed which would seem to prohibit her from conveying or leasing said premises, but it is followed by the statement that she would have the right to sell her interest if she went West among her friends, and if Deming Boardman was willing that she should sell her interest, it is quite reasonable to conclude that that would include the right to temporarily let the property when she was on protracted visits to relatives. Any other construction would be harsh and unreasonable, and not justified by the circumstances surrounding the making of the deed to her, or her subsequent life on the farm in question and her care of her husband.

My conclusion therefore is that Deming Boardman died owning in fee the premises in question, but subject to the life estate created in his deed to Mary E. Boardman, dated August 24, 1876, and that title never vested in a trustee under the trust deed above mentioned, and that on the death of Deming Boardman said real property descended to his then heirs at law; that Mary E. Boardman never forfeited her life estate in said premises, but holds and owns it to-day, and in addition to that she is the owner of an undivided two-ninths interest in said property, one-ninth which her husband inherited from his father at the latter's death, and one-ninth which was inherited by his brother, Malcolm Boardman, and by him conveyed to Elijah D. Boardman by deed dated June 22, 1898, Mary E. Boardman taking these two undivided shares under the will of her husband, Elijah D. Boardman, deceased, and that the infant defendant, Edith Riley, is the owner of a one forty-fifth interest in said premises, subject to said life estate of

Mary E. Boardman; that Mary E. Boardman will be 74 years of age April 26, 1914, and that she is willing to accept a gross sum in cash for her life estate; that the premises are so situated that they cannot be divided without great prejudice to the owners thereof, and that they should be sold by and under the direction of a referee appointed for that purpose, subject to the lease or agreement with defendant Vincent Hamill, which expires April 1, 1914, and that the proceeds of such sale, after paying the costs and expenses of this action and the cash value of the life estate of Mary E. Boardman, be divided among the heirs of Deming Boardman living at the time of his death, and the heirs or assigns, respectively, of such of them as have since died.

Under the circumstances, and considering the extraordinary amount of labor involved in this case, a reasonable allowance should be granted to plaintiff in addition to the usual taxable costs, besides an allowance to the special guardian, but the amount of such allowances, as well as any to other counsel, will be reserved for consideration when the referee's report of sale is confirmed.

Findings may be submitted, and judgment entered in accordance with these views.

(161 App. Div. 98)

THOMPSON v. DILLER et al.

(Supreme Court, Appellate Division, Second Department. March 6, 1914.)

1. COVENANTS (§ 84*)—RESTRICTIVE BUILDING COVENANTS—VALIDITY.

Restrictive building covenants in deeds are valid, and will be enforced in equity against subsequent purchasers who buy with notice.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 90-92; Dec. Dig. § 84.*]

2. COVENANTS (§ 79*)—RESTRICTIVE BUILDING COVENANTS—RIGHT OF ENFORCEMENT.

If it appears that building restrictions in a deed were entered into for the common advantage of all the lot owners in a common tract, the right of enforcement passes to successive lot owners.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 78-82; Dec. Dig. § 79.*]

3. COVENANTS (§ 108*)—RESTRICTIVE BUILDING COVENANTS—ENFORCEMENT—DEFENSES.

The fact that a purchaser under a deed containing a restrictive covenant for the common advantage of all lot owners, that the north line of the dwelling houses "shall stand five feet from the north line of plot," might build his house across the whole width of the 60-foot lot to the south line and destroy the building scheme, is no defense to the enforcement of the covenant, where the dwelling house in controversy was only 30 feet wide and was placed 22 feet from the north line.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 175, 179-185; Dec. Dig. § 108.*]

4. COVENANTS (§ 51*)—RESTRICTIVE BUILDING COVENANTS—CONSTRUCTION.

A restrictive covenant in a deed that the "north wall of said dwelling shall stand five feet from the north line of plot" is to be construed as being the exact position of the north wall, and not that the wall could be built no closer to the north line.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 50; Dec. Dig. § 51.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. COVENANTS (§ 108*)—RESTRICTIVE BUILDING COVENANTS—ENFORCEMENT—DEFENSES.

Where the original owner of a tract of land platted it and made all deeds to the lots therein subject to certain specific restrictive covenants for the common advantage of all lot owners, the right of enforcement of such covenants by one lot owner against an adjoining lot owner is not defeated because, in special instances, the covenants in deeds to other lots in the tract were varied and different, where such difference was based on the peculiar location of the lots.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 175, 179-185; Dec. Dig. § 108.*]

6. COVENANTS (§ 51*)—RESTRICTIVE BUILDING COVENANTS—COMMON ADVANTAGE—EXECUTED COVENANTS.

Where an original owner of a tract of land platted it and made all deeds to lots therein subject to restrictive building and beauty covenants, and the subsequent lot owners executed the covenants in accordance with the common plan, such covenants are to be enforced in the very words used if free from ambiguity.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 50; Dec. Dig. § 51.*]

7. COVENANTS (§ 79*)—RESTRICTIVE BUILDING COVENANTS—CONSTRUCTION.

A deed from a realty company contained a restrictive covenant that the north wall of the dwelling house "shall stand at least five feet from the north line" of plot. The deed also contained a recital that the deed was subject to covenants contained in deed from original grantor to realty company. The deed from the original owner contained a covenant that the north line of the dwelling house "shall stand five feet from the north line" of plot. *Held*, that the last purchaser was bound by the original covenant, and the words "at least" would be considered an inadvertence.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 78-82; Dec. Dig. § 79.*]

8. INJUNCTION (§ 113*)—LACHES.

One who stands by and suffers another to make large outlays cannot have injunctive relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 198-201; Dec. Dig. § 113.*]

9. INJUNCTION (§ 126*)—RESTRICTIVE BUILDING COVENANTS—ENFORCEMENT—BURDEN OF PROOF.

A lot owner who breaks a restrictive building covenant in a deed made for the common advantage of all lot owners in a common tract has the burden of proving laches to defeat the right of an adjoining lot owner to injunctive relief against a breach of the covenant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 276; Dec. Dig. § 126.*]

10. INJUNCTION (§ 113*)—RESTRICTIVE BUILDING COVENANTS—ENFORCEMENT—LACHES.

Where the owner of a lot, subject to restrictive building covenants in his deed, filed his building plans on October 24th, and excavation was begun November 18th, and notice claiming breach of the covenant was given December 10th, the right of a nonresident adjoining lot owner to injunctive relief was not lost by laches, though a change in the plans to conform to the covenants would cost \$2,000.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 198-201; Dec. Dig. § 113.*]

11. COVENANTS (§ 108*)—RESTRICTIVE BUILDING COVENANTS—ENFORCEMENT—DEFENSES.

Where an original owner of a tract of land platted it and made all deeds to lots therein subject to restrictive building covenants for the common

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

advantage, and a great many houses had been built conforming to the general scheme, the fact that the restrictions were to cease in 1925 was no defense to an enforcement of such covenant in 1914.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 175, 179-185; Dec. Dig. § 108.*]

12. COVENANTS (§ 51*)—RESTRICTIVE COVENANTS IN DEEDS—CONSTRUCTION.

Covenants in a deed as to the height of the finished grade "at the front line of the house," that there should be no terrace or step between the street sidewalk "and the front line or lines of house," and that no fence or hedge should be erected "near the street line or lines than the front wall or walls of the house," do not prohibit the entrance to a dwelling house being placed at the side.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 50; Dec. Dig. § 51.*]

Action by Eva F. Thompson against Frank J. W. Diller and another. Submission upon an agreed state of facts. Judgment rendered.

Submission upon an agreed state of facts of the question in difference between adjoining lot owners, on the easterly side of East Thirteenth street (now Argyle Road), in that portion of Flatbush, in the borough of Brooklyn, known as "Prospect Park South."

In 1899, Mr. Dean Alvord purchased a large tract in Flatbush, extending from Church avenue southerly to Beverly Road, and westerly from the Brighton Beach depressed railroad to Coney Island avenue. He proceeded to develop it, by sewers, gas, electricity, and telephone wires underground, and, in addition to laying out streets and parkways, put in uniform concrete sidewalks, with lawns, flowers, and shade trees. The property thus laid out was divided into about 230 building lots, upon which dwellings have been erected in substantial accordance with the restrictions hereinafter stated. His contracts also provided for a yearly contribution from the several purchasers for the maintenance of the grounds, which is hereafter referred to.

In June, 1905, Mr. Alvord conveyed all of his remaining unsold holdings to the Chelsea Realty Company. This conveyance separately described what is now the plaintiff's lot as parcel 14, and the defendants' lot as parcel 13. This conveyance contained the following covenants applicable to both lots 13 and 14, which are declared to be "real covenants running with the land until January 1, 1925, when they shall cease." The terms thereof are:

"But one dwelling house shall be erected on the plot hereby conveyed. Nothing but a private dwelling for a single family, an automobile house, a summer house, a greenhouse, or a church shall be erected on the property hereby conveyed. No dwelling house costing less than \$5,000 shall be erected on the property hereby conveyed except. * * * No part of any building (including piazzas and bow windows) to be erected on this plot shall stand nearer than fifteen feet to the building line of the street upon which said plot fronts. * * * The main north wall of said dwelling house, exclusive of bays, shall stand five feet from the north line of plot. * * * No house erected on said plot shall be built upon a foundation higher than three feet above the finished grade of plot. The finished grade of plot at the front line of the house shall be twelve inches above the curb line of the street in front of said plot, except. * * * No terrace or step shall be permitted between the street sidewalk and the front line or lines of house, except. * * * None but a cement sidewalk, five feet wide, shall be laid in front of said plot from street sidewalk to curb, and but one such sidewalk shall be permitted in front of inside plots, but one on either street in front of corner plots. No fence or hedge shall be erected or maintained on said plot nearer the street line or lines than the front wall or walls of the house, and no fence shall be maintained on any part of the plot exceeding four feet in height. No business of any description shall be conducted upon the property hereby conveyed. No pigsty, cowshed, henhouse, slaughter house, stable for horses or other animals, or other nuisance shall be allowed on said property."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Plaintiff and defendant both trace their titles to the Chelsea Realty Company; plaintiff being the devisee under the will of her father, John E. Thompson, whose title in 1907 was from conveyance by Lizzie M. Moore, a grantee in April, 1906, from the Chelsea Realty Company. The Chelsea Realty Company, on June 15, 1905, conveyed defendants' present lot to Mr. William S. Liptrott, by deed which repeated in identical words the restrictive covenants contained in the deed from Dean Alvord, except that, as to the northerly wall of the dwelling house to be erected, it read: "And the main northerly wall of said dwelling house, exclusive of bay windows, shall stand at least five (5) feet from the northerly line of said premises." After all of these restrictive covenants came the clause: "The foregoing covenants shall be considered as real covenants running with the land until January 1, 1925, when they shall cease and terminate. Subject also to covenants contained in deed from Dean Alvord to the party of the first part."

The Liptrott deed to defendants, dated June 25, 1913, repeated the same description, covenants, and restrictions, with the further recital that it was subject to the covenants contained in the deed from Dean Alvord to the Chelsea Realty Company.

Defendants are in course of erecting a dwelling, the north line of which is designed to stand about 20 feet south from the north line of their lot. The blueprint shows the exact distance as 22 feet, 4½ inches.

Plaintiff seeks to have defendants place their main north wall five feet from their north line, which would move their house 17 feet further away. Defendants say their main north building line can be "at least" 5 feet away from their north boundary.

On the 60-foot lot frontage, the buildings in the vicinity average from 25 to 40 feet in width. Defendants' proposed house is 30 feet wide. As now designed, it will come within 12 feet of the plaintiff's dwelling, which stands about 5 feet from her north boundary line.

Defendants filed building plans in October, 1913, and began excavating November 18th. They were not notified of any claim of violation of these restrictions until on December 10th, when they had expended \$2,171.69. To change the plans and buildings would cost about \$2,000. Besides this difference as to the north wall, plaintiff claims that the front entrance should be toward the street, and not at the north side, as now designed.

Argued before JENKS, P. J., and THOMAS, RICH, STAPLETON, and PUTNAM, JJ.

Robert H. Wilson, of Brooklyn, for plaintiff.

William N. Dykman, of Brooklyn, for defendants.

PUTNAM, J. The facts show an elaborated design for the erection of buildings in a select neighborhood, by what the English courts call a "building scheme," in which the lotted lands are laid out for private dwellings, and reserved from disturbance by inroads of business. Restrictive covenants to that end are familiar. They exclude buildings other than private residences; they determine their character by providing for a minimum cost, with a set-back restriction to keep the houses from being too near the street. *Silberman v. Uhrlaub*, 116 App. Div. 869, 102 N. Y. Supp. 299. Besides protecting from the encroachment of trade, and guarding against cheaper houses, provision is made for only one dwelling on a specified lot, with other efforts for uniformity of general effect. The objects are said to be for "light, air, ornamentation, or the exclusion of occupations which would render the entire property unsuitable for the purposes to which it could be most advantageously devoted." *Trustees of Columbia College v. Lynch*, 70 N. Y. 440, 446 (26 Am. Rep. 615).

[1] Such covenants are valid, and enforced by equity against subsequent purchasers who buy with notice thereof. As was said by Lord Cairns:

"All that a court of equity has to do is to say by way of injunction, that which the parties have already said by way of covenant." *Doherty v. Allman* (1878) 3 App. Cas. 709, 720.

No English judicial decision or dictum has attempted to define the extent to which restrictions affecting the user of land can be imposed by covenants. *Jenks' Dig. Civil Law*, Book III, p. 807, note (1913).

[2, 3] If it appears that such restrictions were entered into for the common advantage, the right of enforcement passes to successive lot owners. Each proprietor is thenceforward interested in having his neighbor's lots, and the buildings thereon, used in such a way as to "preserve the general uniformity and respectability of the row." *Whitman v. Gibson*, 9 Sim. 196. These advantages are not only to keep noxious trades out of a new residence quarter, but are to promote the amenities of neighborhood building, so that the pleasant natural effect preserved by such a covenant is sometimes called an "amenity." *Trustees of Columbia College v. Lynch*, *supra*; *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190. Restrictions for beauty have not been limited to the buildings alone. Thus we have an example of lots sold, with covenants to leave open and unbuilt upon the portions of the restricted lots that are colored blue upon an accompanying plan. Such covenants provide for uniformity in mode of building, so that "the enjoyment which springs from regularity in a series of dwellings may be preserved." *Peek v. Matthews* (1867) L. R. 3 Equity, 515. The present north wall covenant was obviously for uniformity, as well as perhaps, by means of these open spaces, to secure better protection against the spread of fire. It might be argued, however, that it does not prevent a builder from stretching his house to cover 55 feet of his lot. Such an abnormal departure from usage is not to be anticipated, and its bare possibility cannot entitle a builder to ignore the northerly line, and start his house on the southern half of the restricted lot. The fact that a building of extraordinary width might defeat the purpose of the restriction will not authorize a house 30 feet wide to be set 22 feet from the north line and 8 feet from the south boundary. The restriction aims to regulate the open spacing between these buildings, the value and enjoyment whereof depend on a size reasonably appropriate to its site. The natural effect of these restrictions is to project the piazzas along the southern sides of these dwellings; the house as extended and widened by these additions leaves but a moderate margin, perhaps little more than a driveway along the southern part of the lot. Still, by starting a building five feet from the north line, there may be left at the southern portion a space for grass plots or gardens much more effective by being arranged at the south side of the house, instead of the broken effect of such spaces on both sides. The benefits thereby are at least coextensive with the burden of this restriction upon the freedom of building.

[4] This covenant, providing that the main north wall shall stand five feet from the edge of the lot, was evidently framed so as to align

the houses in an open harmonious setting. To construe it to read "not nearer than five feet" would miss its spirit and purpose, as it would violate its letter. Such a construction, making elastic the provision for the north building line, would let a purchaser build anywhere within the remaining 55 feet breadth of the lot, even up against its very south boundary.

[5] The different and varying covenants in certain special parcels conveyed in Mr. Alvord's deed are not overlooked. But such parcels are along the outer edges of his park scheme, where there was no land alongside to be protected, or the localities were shown to be otherwise exceptional by the superior size of the lots, or the greater width of the road on which they front. These exceptions in no wise detract from the uniformity of the design, which is impartially carried out. No power of dispensation was reserved or was attempted. To no favored lot owner was immunity promised for any departures from his covenant, as in *Beals v. Case*, 138 Mass. 138.

[6] Such a covenant stands not only on its continued use in a general series of conveyances, repeated as to the lots abutting on the six streets running north and south in this development. The covenant has now become executed and embodied by buildings standing in substantial accord with its requirements. A plan thus impressed upon the property, which the parties have themselves made effective according to its literal terms, is to be enforced in the very words used, if free from ambiguity. As *Church, Ch. J.*, said:

"The covenant was lawful; the parties had a right to make it, and we have no power to change or alter it." *Atlantic Dock Co. v. Libby*, 45 N. Y. 499, 504.

In furtherance of the plan of maintaining a general care of all the lot fronts, even after they should be held in severalty, Mr. Alvord required each buyer to contract to pay a yearly sum for cleaning crosswalks, and sidewalks, and for the upkeep of the lawns and shrubbery beds between the sidewalks and curb. All of which indicates an improvement plan made for an entire community of lot owners as a general regulation, or as "a law perfectly well understood, and one calculated and intended to add to the security of the lessees, and consequently to increase the price of the houses." *Spicer v. Martin*, 14 App. Cas. 12, 25. See, also, *De Mattos v. Gibson*, 4 De Gex. & J. 276.

[7] Defendants, however, trace their title through Mr. W. S. Liptrott, who bought from the Chelsea Realty Company June 15, 1905. This conveyance substantially copied the Alvord restrictions, except that it provided that the main northerly wall, "exclusive of bay windows, shall stand at least five (5) feet from the northerly line of said premises." After these other covenants was the recital: "Subject also to covenants contained in deed from Dean Alvord to the party of the first part." The same forms were repeated in the conveyance from Mr. Liptrott to defendants, which also contained a recital referring to the covenants in the Alvord deed.

In 1905, when Mr. Alvord conveyed his unsold lots to the Chelsea Realty Company, his building scheme with these restrictions had been in active operation over five years. By including these restrictions in his conveyance of all the unsold lots, he made it manifest that such

restrictions were for the common advantage and did not create and continue a mere personal obligation. *Brouwer v. Jones*, 23 Barb. 153.

As the benefit of these covenants is part of the security enjoyed by all past and future lot owners, neither Mr. Alvord himself, nor the Chelsea Realty Company as his successor in title, could thereafter release, annul, or modify such restrictions, which as part of the values of the restricted lots are not to be taken away while the original scheme is preserved, and the neighborhood keeps its residential character. *Western v. Macdermot*, L. R. 1 Equity, 499; *Spicer v. Martin*, supra; *Coudert v. Sayre*, supra.

This conveyance to Mr. Liptrott shows no intent to do away with the original Alvord restrictions. The more natural inference is that the words "at least" crept in by inadvertence. The true purpose appears by the express reincorporation of the Alvord covenants. But the question of the Chelsea Realty Company's intent is unimportant, in view of its lack of power and the controlling effect of the original restrictions appearing of record. Even had the Chelsea Realty Company given a general warranty deed, with no restriction whatever, the purchaser's user would still be subject to the original Alvord restrictions, as contained in the conveyance forming part of his chain of title. *Nottingham Patent Brick & Tile Co. v. Butler*, 16 Q. B. D. 778; *Clements v. Welles*, L. R. 1 Equity, 200; *Whatman v. Gibson*, supra; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556.

[8, 9] We are reminded that a plaintiff who lies by and suffers defendant to make large outlays cannot have injunctive relief. But one who has broken such a covenant has the burden of proving laches. *Elliston v. Reacher* (1908) 2 Chan. Div. 374, 392.

[10] The defendants' building plans were filed October 24th, excavation began November 18th, and a notice claiming breach of the covenant, from counsel for the Prospect Park South Association, followed on December 10th. The foundations, with the first floor-beams, had then been laid. To change the plans and reset the foundation will cost approximately \$2,000. Considering that the neighboring residents seldom go to the Building Department to inspect plans, and that the staked-out lines for excavation do not necessarily show the outer inclosing walls, it cannot be held that the rights of plaintiff, a nonresident of this state, were lost by this delay of 22 days after excavation had been started. *Joyce on Injunctions*, § 488; *Adams v. Howell*, 58 Misc. Rep. 435, 108 N. Y. Supp. 945.

[11] It is also urged that the court should now hold its hand because these restrictions are to cease in 1925.

Mr. Alvord imposed a moderate period for the life of his restrictions. Doubtless, he thought that by 1925 the land would be built over and the advantages of his system made apparent, so that the duty, first compulsory, would then require no legal sanction. Such a time limit, however, where the original scheme has been preserved (and where the residential character of the surroundings has not declined, as in *Roth v. Jung*, 79 App. Div. 1, 79 N. Y. Supp. 822, and has not been invaded by elevated railroads as at upper Sixth Avenue, Manhattan, *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep.

365), should not invalidate or weaken the covenant, which has still 11 years to run. Indeed, the fact that since imposing the restriction so many lots have been built upon, in reliance that it shall last till 1925, is a strong reason why the court should not take away this protection before the date when it ceases by its terms.

[12] Besides the question of the north wall, plaintiff objects to defendants' house having an end toward the street and its main entrance on the north side. He urges that the restrictions clearly point to a house with front entrance directly on the street. The covenants relied on are as to height of the finished grade "at the front line of the house," without terrace or step between the street sidewalk "and the front line or lines of house"; and the clause that no fence or hedge shall be erected "nearer the street line or lines than the front wall or walls of the house."

These covenants certainly restrict the grading and the front lot surface between the house and the street. They may conduce to the effect of a broader street vista, unbroken by projecting fences or banks of varying heights. But it is not clear that a house which otherwise conformed to the site requirements may not legally have a side entrance. An adequate approach and side entrance along this five-foot strip at the northern side may present serious architectural problems, indeed difficulties such as perhaps may require modification of the present design. Where, however, such an entrance restriction is not express, and does not arise by clear implication, the court cannot read into a conveyance such an additional limitation on the right to build going beyond those express restrictions so comprehensively elaborated.

Under this submission, the judgment should enjoin and restrain the defendants, in the erection of their proposed dwelling house on Argyle Road, from departing from and violating the restriction that the main north wall of their dwelling house, exclusive of bays, shall stand five feet from the north line of their plot, being the parcel numbered thirteenth in the deed from Dean Alvord to the Chelsea Realty Company, dated June 1, 1905, and recorded in the Kings county register's office June 14, 1905, in section 16, Liber 40 of Conveyances, p. 524, which judgment, pursuant to the stipulation of the parties, is without costs. All concur.

(161. App. Div. 210)

BERGQUIST v. OREGON APARTMENTS CO. et al.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. MASTER AND SERVANT (§ 129*)—PROXIMATE CAUSE—VIOLATION OF STATUTE.

Where plaintiff, employed by a carpenter having a contract for construction work, while on the ground hoisting lumber to the twelfth floor, was struck by a piece of lumber falling from some place in the building, but made no proof of his employer's negligence aside from his violation of Labor Law (Consol. Laws, c. 31) § 20, forbidding the hoisting of lumber outside of and above the fifth floor of a building in course of construction, such violation of the statute was not the proximate cause of the injury, and hence no liability could be predicated thereon.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. NEGLIGENCE (§ 134*)—VERDICT—SUFFICIENCY OF EVIDENCE.

In a servant's action against his employer and the party found to be the owner of the building upon which he was employed, where there was nothing to connect such owner or any of its employes with the injury, a verdict against it was not justified.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.*]

Ingraham, P. J., dissenting in part.

Appeal from Trial Term, New York County.

Action by Henry Bergquist against the Oregon Apartments Company and Henry Koch, impleaded with the Charles E. McManus Building & Operating Company. There was a judgment for plaintiff entered on verdict against the Oregon Apartments Company and Henry Koch, from which, and from an order denying a new trial, they appeal. Reversed, and complaint dismissed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

George H. Bruce, of New York City, for appellant Oregon Apartments Co.

Lowen E. Ginn, of New York City, for appellant Koch.

Moses Feltenstein, of New York City, for respondent.

McLAUGHLIN, J. Plaintiff had a verdict of \$18,250 against the defendants Oregon Apartments Company and Koch, for personal injuries caused by his being hit by a piece of board which fell from one of the upper stories of a building in the course of construction. The Charles E. McManus Building & Operating Company, the owner of the premises, for the purpose of erecting a 12-story building thereon, entered into separate agreements with different contractors to do certain parts of the work. Before the building was completed, the McManus Company conveyed the property to the Oregon Apartments Company, and it thereafter continued the construction. Prior to this conveyance, the Oregon Apartments Company made a contract with the defendant Koch to do the carpenter work, and plaintiff was in his employ when the accident occurred. At that time he was engaged, with two others, in hoisting lumber from the ground to the top of the building, which had then been carried to the twelfth story, by means of a block and tackle, suspended from an "outrigger" on the roof. Koch, at the time, had only three laborers in the building, one on the roof, one inside the building at the sixth story, and the other on the ground. The duties of the one on the ground were to tie the end of the tackle around lumber to be raised, and then, with the assistance of the one located at the sixth story, pull on the rope, thus raising the load to the roof, where it was taken care of by the third laborer. Immediately preceding the accident plaintiff was located at the sixth story, but was called down by the man located upon the ground and took his place while he went for a pail of beer. While the plaintiff was hoisting a load of lumber, and before the return of the person whose place he had taken, a piece of board about four feet long, four inches

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

wide, and seven-eighths of an inch thick fell from some place in the building, just where is not disclosed by the record, and struck him in the face, practically destroying the sight of one eye, and causing a severe laceration of the face. There is also some evidence that the injuries received caused a serious nervous and mental ailment from which, at the time of the trial, plaintiff was suffering.

The only witness who saw the board fall was the laborer on the roof. He testified that he first saw it when it was near the sixth story; that he was unable to say where it came from, or what caused it to fall, except it did not come from the load of lumber which was being hoisted.

The action was brought against the McManus Company and the Oregon Apartments Company on the ground that it was one of their employes which caused the board to fall, and against Koch on the ground that he failed to supply plaintiff with a safe place in which to work. The court asked the jury to make a specific finding as to whether the building was owned, at the time of the accident, by the McManus Company or the Oregon Apartments Company, with instructions that it find a verdict of no cause of action in favor of the one which was determined not to be the owner. It also left to the jury to determine whether the accident was caused through the negligence of the owner of the building, whichever company that might be, and whether Koch discharged his duty to the plaintiff in failing to supply him with a reasonably safe place in which to work. The jury found that the McManus Company was not the owner of the building, and on the other issues found for the plaintiff, rendering a verdict for \$18,250 against both the Oregon Apartments Company and Koch. From the judgment entered thereon and an order denying a motion for a new trial, they separately appeal.

[T] Section 20 of the Labor Law provides, in part, that:

"If a building in course of construction is five stories or more in height, no lumber or timber needed for such construction shall be hoisted or lifted on the outside of such building."

Koch's liability is predicated upon a violation of this provision of the section. It was undisputed, and the court so instructed the jury, that, aside from the fact that Koch was having the lumber hoisted on the outside instead of on the inside of the building, there was nothing whatever to show negligence on his part or to connect him with the accident. The violation of the statute was not the proximate cause of the accident; in fact, it had nothing to do with it. It may be that, if the plaintiff had not been upon the ground, he would not have been hit by the board; but the hoisting of the lumber had no more to do with his being hit by a board falling or being thrown from some place in the building than it would had it been thrown from the street. The violation of a statute makes a prima facie case of negligence only where it can be said to be the cause of or in some way connected with the injury sustained; in other words, it must appear that the violation of the statute, before liability can be predicated thereon, was the proximate cause of the injury. *Weinberger v. Kratzenstein*, 71 App. Div. 155, 75 N. Y. Supp. 537; *Koch v. Fox*, 71 App. Div. 288, 75 N. Y.

Supp. 913; *Stewart v. Ferguson*, 34 App. Div. 515, 54 N. Y. Supp. 615. I am of the opinion, therefore, that the motion to dismiss the complaint as to Koch should have been granted.)

[2] I am also of the opinion that the evidence did not justify a verdict against the Oregon Apartments Company. The uncontradicted evidence shows that, at the time the accident occurred, it did not have any employes in the building, and therefore they could not have caused the board to fall. A superintendent engaged by the McManus Company, together with several laborers employed by him, were, at the time of the accident, at work about the building, as were employes of various other contractors; but this superintendent and the foreman under him both testified, and their testimony was uncontradicted, that on the day of the accident all of the employes working under them were at work in the cellar or on the sidewalk. At the close of the evidence, therefore, there was nothing to connect the Oregon Apartments Company or any of its employes with the accident in any way. Not only this, but the finding of the jury that it was the owner of the building when the accident occurred is against the evidence. The premises were conveyed by the McManus Company by deed dated April 22, 1911, acknowledged on the 24th, and recorded on the 31st of May following. The only testimony as to when the deed was delivered was that of McManus, the president of both companies, to the effect that it was not delivered until the day it was recorded, May 31st. The accident occurred on May 29th. The title to the premises, therefore, was in the McManus Company at the time of the accident, and the jury should have so found.

It follows that the judgment and order appealed from must be reversed, with costs, and the complaint dismissed, with costs.

LAUGHLIN, SCOTT, and HOTCHKISS, JJ., concur.

INGRAHAM, P. J. I concur in the reversal of the judgment and the dismissal of the complaint as to the Oregon Apartments Company, but I dissent from the dismissal of the complaint as the defendant Koch. I think the provisions of section 20 of the Labor Law were enacted for the purpose of protecting laborers engaged in the erection of a building from being injured by materials falling from the building, whether such material fell while being hoisted or from the building itself. The statute expressly prohibits lumber or timber used for the construction of a building over five stories in height from being hoisted or lifted on the outside of such building. The defendant Koch, who employed the plaintiff, was bound to obey this provision of the Labor Law and to hoist his lumber or timber in some other way than on the outside of the building. He hoisted the lumber on the outside of the building, however, and to properly perform his duties the plaintiff was required to be under the hoist and outside of the building itself. The violation of this provision of the Labor Law was, it seems to me, the direct proximate cause of the accident. If Koch had provided means by which the lumber could have been hoisted inside the building, as he was bound to do under the statute, the plaintiff would

not have been in a position where he could have been struck by a board falling from the building. I have serious doubts as to whether this verdict is not excessive, but, as my Associates are in favor of dismissing the complaint as to Koch, it is not necessary to consider that question.

I therefore think the judgment should be reversed, and the complaint dismissed as to the Oregon Apartments Company, and I dissent from the dismissal of the complaint as to Koch.

(161 App. Div. 420)

HILDRETH GRANITE CO. v. CITY OF WATERVLIET et al.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

1. BANKRUPTCY (§ 192*)—RIGHT OF MATERIALMAN TO LIEN—TIME FOR FILING —BANKRUPTCY OF CONTRACTOR.

Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3488]) § 47a, as amended in 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1500]), providing that as to all property coming into the custody of the bankruptcy court the trustee shall be vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, and also, as to all property not in the custody of the bankruptcy court, shall be vested with all the rights, remedies, and powers of a judgment creditor holding an unsatisfied execution, would not make a materialman's lien on the money due on the contract for a street improvement ineffectual because the contractor was adjudicated a bankrupt before the filing of the lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 294; Dec. Dig. § 192.*]

2. MECHANICS' LIENS (§ 5*)—POLICY OF LAW.

The rights given by the Mechanic's Lien Law (Act Cong. Feb. 24, 1905, c. 778, 33 Stat. 811 [U. S. Comp. St. Supp. 1911, p. 1071]) have been jealously guarded by the courts.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 3, 5; Dec. Dig. § 5.*]

Kellogg and Howard, JJ., dissenting.

Appeal from Special Term, Albany County.

Action by the Hildreth Granite Company against the City of Watervliet and others. From an order dismissing the complaint (82 Misc. Rep. 243, 143 N. Y. Supp. 867), plaintiff appeals. Reversed, and new trial granted.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Lester T. Hubbard, of Albany, for appellant.

Thomas S. Fagan, of Troy, and William Wallace Young and Alexander, Watriss & Polk, all of New York City (Hugh M. Hewson, of New York City, of counsel, who hears as *amici curiæ*), for respondents.

SMITH, P. J. Michael M. Nolan rendered certain services and furnished certain materials under a contract with the city of Watervliet for paving, curbing, and improving certain streets, and on the 11th of January, 1912, was adjudged a bankrupt. Prior to the bankrupt-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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cy the plaintiff under a contract with said Nolan furnished certain material which was used by him in performing said contract, and on the 13th day of January, 1912, and within 30 days from the completion of said contract, filed a mechanic's lien for the value of such material. This action was brought to foreclose that lien. Upon the trial the complaint was dismissed upon the ground that the plaintiff's lien was rendered ineffectual by the bankruptcy of the contractor, Nolan, adjudicated two days prior to the filing of the lien. This ruling presents the only question for our consideration.

In *John P. Kane Co. v. Kinney*, 174 N. Y. 69, 66 N. E. 619, it was held that under an assignment for the benefit of creditors the assignee took the title of the assignor as it was at the time of the assignment, subject to the legal or equitable claims thereon, and that under the Lien Law the materialman had a preferential statutory right in the nature of an unperfected equitable lien, which could not be defeated by the act of the debtor, and when the notice was duly filed the assignment became subject to the lien. In *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, decided 1906, it was held that a vendor under a conditional contract of sale, which under the Ohio law was void as against creditors and purchasers in good faith because not filed, but good as between the parties thereto, could hold the property against a trustee in bankruptcy, as the latter was in no better position than the bankrupt at the time of adjudication.

It has been held that prior to the amendment of the Bankruptcy Law in 1910 the filing of the plaintiff's mechanic's lien subjected the moneys due under the contract to the plaintiff's claim superior to the claim of the trustee. *Crane Co. v. Pneumatic Signal Co.*, 94 App. Div. 53, 87 N. Y. Supp. 917, affirmed 182 N. Y. 545, 75 N. E. 1128, on opinion below. The court below has held, however, that the amendment of the Bankruptcy Law in 1910 has changed the rule of law so as to make it impossible for the plaintiff to acquire any lien by filing of the notice of his lien after the adjudication in bankruptcy.

[1] Section 47a of the Bankruptcy Law prior to the amendment of 1910 defined the duties of the trustee, and required him to account for all moneys received, and to collect and reduce to money the property of the estate for which he was trustee under the direction of the court. In 1910 this was amended by adding thereto the following:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

It appears from the discussions in Congress at the time of the passage of the amendment that the primary intention of the amendment was to do away with the effect of the decision in the case of *York Mfg. Co. v. Cassell*, supra. The trial court has held that the effect of the amendment, however, exceeded the primary intent and gives the trustee in bankruptcy a creditor's lien, which is superior to the merely equitable lien of the materialman, which was not perfected at the

time of the bankruptcy by the filing of his notice of his lien under the Mechanic's Lien Law.

I am unable to agree with the trial court or with Mr. Justice KELLOGG in this interpretation of the statute. As to moneys actually in the custody of the court, or coming into the custody of the court, the trustee in bankruptcy is vested with the rights of a lien creditor. The property therein intended seems to me to be the tangible property of the bankrupt which is delivered over to the trustee in bankruptcy at the time of the adjudication, and also property which comes into the hands of the trustee without litigation. A mere right to recover moneys due or to become due upon a building contract is not intended to be covered by the first provision of the amendment, but comes explicitly within the second provision of the amendment, covering property not in possession of the bankruptcy court, upon which the trustee has only such a claim as would have a creditor with execution returned unsatisfied. That claim does not amount to a lien, but only a right to proceed, and by the commencement of an action to establish an equitable lien. As to the moneys due or to become due upon this contract, therefore, the filing of the plaintiff's notice of lien made effective his equitable lien given him by the statute prior to the claim of the trustee in bankruptcy, who has begun no action to recover such moneys.

[2] It must be admitted that the language used in the amendment is unfortunate and is not perfectly clear. It should, if possible, receive such interpretation, however, as, in the case at bar, will preserve the substance of the rights given under the Mechanic's Lien Law, which have been jealously guarded by the decisions of all courts. The interpretation given by the court below would require a materialman, in order to protect his rights, to file a new lien immediately after each load of material furnished, lest the contractor might file a petition in bankruptcy and defeat his rights. The policy of the law is well indicated in the opinion of Judge O'Brien in the Kane Case, cited above:

"A certain time is allowed in which the lien may be asserted or lost. During that time there is a preferential statutory right in the nature of an unperfected equitable lien in favor of the laborer, mechanic, materialman, or subcontractor. And when a notice of lien is filed that right is perfected. But until the 90 days allowed by the statute within which the lien may be filed have elapsed, the right cannot be defeated by the voluntary act of the party against whom it might be asserted, such as a general assignment for the benefit of creditors. If such were the effect of the assignment, no laborer or materialman's claim would be secure, and the beneficial purpose of the statute could be defeated unless a lien was filed at the time the work was commenced and from day to day thereafter. This, however, being a remedial statute, must be construed liberally with a view to carry out its intent and for the accomplishment of every beneficial purpose contemplated."

I recommend, therefore, that the order be reversed, and a new trial granted, with costs to the appellant to abide the event.

Judgment and order reversed, and new trial granted, with costs to appellant to abide event. All concur, except KELLOGG, J., dissenting in opinion in which HOWARD, J., concurs.

JOHN M. KELLOGG, J. (dissenting). Michael M. Nolan rendered certain services and furnished certain material under a contract

with the city of Watervliet, for paving, curbing, and improving certain streets, and on the 11th day of January, 1912, was adjudged a bankrupt. Prior to the bankruptcy, the plaintiff, under a contract with said Nolan, furnished certain material which was used by him in performing said contract, and on the 13th day of January, 1912, and within 30 days from the completion of said contract, filed a mechanic's lien for the value of such material.

The only question for consideration is whether the plaintiff's lien filed three days after the adjudication in bankruptcy, takes precedence over the interest of the trustee in bankruptcy in the amount due upon the contract.

In *John P. Kane Co. v. Kinney*, 174 N. Y. 69, 66 N. E. 619, it was held that under an assignment for the benefit of creditors the assignee took the title of the assignor as it was at the assignment, subject to the legal or equitable claims thereon, and that under the Lien Law the materialman had a preferential statutory right in the nature of an unperfected equitable lien which could not be defeated by act of the debtor, and when the notice was duly filed the assignment became subject to the lien.

In *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, decided in 1906, it was held that the vendor under a conditional contract of sale, which under the Ohio law was void as against creditors, and purchasers in good faith could hold the property against a trustee in bankruptcy, as the latter was in no better position than the bankrupt at the time of the adjudication. In the *Kane Case* the assignee, and in the *York Case* the trustee in bankruptcy, only acquired the rights which the assignor or bankrupt had at the time of the assignment or adjudication. Under those cases, and others to the same effect, it must be conceded that, prior to the amendment of the Bankrupt Law in 1910, a mechanic's lien, filed under the circumstances existing in this case, would be prior in rights to the claim of the trustee in bankruptcy.

In 1910 section 47a of the Bankruptcy Law, which defines the duties of the trustee in requiring him to account for all money received and to collect and reduce to money the property of the estate for which he is trustee, under the direction of the court, and to close up the estate as expeditiously as is compatible with the best interests of the parties in interest, was amended by adding thereto the following:

"And such trustee, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

The discussions in Congress at the time of the amendment show that the amendment was intended primarily to do away with the effect of the decision in the *York Case*, but it expressly gave the trustee all the rights of a creditor who had a lien by legal or equitable proceedings. The language cannot be warped from its fair meaning. The amendment changed the rule established by the cases cited, with the

result that the rights of the trustee in bankruptcy take precedence over the defendant's claim.

It is urged, however, that the bankrupt had a mere chose in action against the municipality and that the money sought to be reached by the plaintiff was not property in the custody or coming into the custody of the bankruptcy court. I think the plaintiff takes too narrow a view of the amendment. The words "all property in the custody, or coming into the custody of the bankrupt court" are not limited to the property which has been brought into the actual physical possession of the trustee. By the adjudication all the property of every name and nature representing a money value goes to the trustee, who is a mere officer or instrument of the court, and such property is in the custody of the court, at least so far as it is within the jurisdiction of the court and is not in the custody of some other court.

"An adjudication follows as matter of course, and brings the bankrupt's property into the custody of the court for distribution among all his creditors." *Hanover National Bank v. Moyses*, 186 U. S. 181, 191, 22 Sup. Ct. 857, 861 (46 L. Ed. 1113).

As to property in foreign countries, title does not pass by the adjudication, but the bankrupt court, by putting pressure upon the bankrupt, compels him to convey title. *Booth v. Clark*, 58 U. S. (17 How.) 322, 15 L. Ed. 164; *Clark v. Clark*, 58 U. S. 315, 15 L. Ed. 77.

It is unnecessary to consider whether the same rule would apply to property outside of the jurisdiction of the court or to property which at the time of the adjudication may be in the custody of another court. Such cases, and perhaps others, may be covered by the second paragraph of the amendment when it speaks of property not in the custody of the court. I think the claim to the moneys due from the municipality was property in the custody of the court before the mechanics' lien was filed, and that therefore at that time the trustee had all the rights in the property of a creditor holding a lien by legal or equitable proceedings. His claim was therefore superior to the plaintiff's. The order and judgment should therefore be affirmed, with costs.

(161 App. Div. 250)

GANS v. ÆTNA LIFE INS. CO. OF HARTFORD, CONN.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

INSURANCE (§ 144*)—POLICY—CONSTRUCTION.

Where an insured exercised his privilege of exchange contained in a five-year renewable term policy and exchanged it for an ordinary life policy bearing the date of the exchange, the second policy was not a mere continuation of the first, but created a new contract from its date; since term insurance and the ordinary life policy are essentially different, being based upon different considerations.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 273-275; Dec. Dig. § 144.*]

Appeal from Trial Term, New York County.

Action by Milton H. Gans, executor, against the Ætna Life Insurance Company of Hartford, Conn. From a judgment for plaintiff, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from an order granting an extra allowance, defendant appeals. Judgment and order reversed, and complaint dismissed.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Keyes Winter, of New York City, for appellant.

Herbert H. Maass, of New York City, for respondent.

HOTCHKISS, J. On April 5, 1907, defendant issued its two "five-year renewable term" policies on the life of the deceased. Each of these policies provided that at its expiration it might "*be renewed and continued* for successive terms of five years each without medical re-examination," on payment of the premiums expressed to be paid during such respective renewal terms; also that each policy should be incontestable after one year from its date, and each contained a "sane or insane" suicide clause, limited to a similar period of one year. Each of the several policies also provided that at certain fixed dates, on payment of appropriate premiums, and without medical re-examination, it might be "exchanged" for a policy of a different kind. The "exchange" permitted was substantially as follows, for: (1) A policy in a form in use by the company at the time the term policy was originally issued, in which case the policy so to be issued should be dated as of the date of the original term policy, and the assured should reimburse the company for any difference between the amount of premiums already paid on the term policy and the amount which would have accrued had the new policy been issued as of the date of the term policy; (2) a policy in a form in use by the company at the time of the "exchange," in which case such policy should be dated as of the date of the "exchange."

Shortly before the expiration of the first term of five years of the term policies, the deceased exercised his privilege to "exchange" the same for other policies, and thereupon signed and delivered to defendant an "application for changed insurance on my life," which among other things, contained an agreement on his part—

"that the statements and answers in the application for said term policy shall be the basis of the new contract or policy herein applied for and form a part of the same, except that the kind of policy, amount of the same and the premium thereon shall be as specified below."

In pursuance of this application, defendant accepted a surrender of the term policies, and issued to the deceased the policies which are the subject of this action.

Each of these policies bears date as of the day of the "exchange," and provides for the payment annually of a level premium for a period of 36 years, and is payable on the death of the assured, or at the expiration of said 36 years if he is then living. The policy also carried "health or disability" insurance, by the terms of which it was, among other things, provided that in further consideration of a small additional annual premium the defendant, under certain contingencies and on proof that the assured had become permanently disabled and incapacitated to perform any work, or had suffered the loss of certain members, and on surrender of the policy, would issue to the assured a

contract to pay him certain sums of money, which obligation, however, was conditioned upon the fact that the disability or injuries of the deceased should arise "from causes originating after the delivery of this agreement." These latter policies recite that they are "made in consideration of the application for this policy, which application is hereby made a part of this contract and in further consideration of the semiannual premium"; also "that this policy and the application herefor constitute the entire contract between the parties hereto and shall be incontestable after one year from its date." Each contains a clause voiding the policy in case of suicide within "one year from the date hereof * * * sane or insane." Within the year the deceased died by his own hand.

The trial court held that the policies in suit did not create a new contract, but were mere continuations of the original term policies. I think this was error. The original or "term" policies did not afford the assured insurance for the term of his natural life, but were expressly limited to "the term of five years from the date hereof and no longer except as hereinafter provided." The scheme of such insurance is familiar. In the ordinary life policy the assured pays a level premium during the whole period, over which premium payments are extended. Under such policies the amount of premium paid during the earlier years is in excess of the sum actually needed for carrying the risk, which risk naturally increases year by year, with the result that the excess of premium paid during the earlier years provides a fund from which the deficiency incident to the later years is made up, which deficiency is termed "reserve." Term insurance is essentially different, being insurance for the specified term only; the premium being calculated on a basis which provides for such deaths only as occur during the term. The premium paid is "level" during the specified term only, and increases with each renewal term. The premium in the case of term insurance is consequently lower than in the case of straight life insurance, the premium in the former case carrying no reserve, being based upon a sort of "pay as you go" theory. See Willard's *The A B C of Life Insurance*, p. 53.

Policies of this description were before the courts in *McDougall v. P. S. L. A. Society*, 135 N. Y. 551, 32 N. E. 251, and *Rosenplaenter v. Provident Society*, 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473, which involved "one year renewable term" policies. The privilege of exchange given in the term policies in question afforded him, at his option, the right to take out a policy which would have borne a date identical with that of the term policy surrendered, but in that case it was expressly provided that the assured should pay—

"the difference between the premiums already paid hereon for an amount equalling that of the new insurance and those that would have been required under the new policy, with 6 per cent. interest."

But he did not elect to take this kind of policy, or to pay its cost. On the contrary, he elected to take the policies in suit, which it was expressly agreed "shall bear the same date as this policy," that is, the surrendered term policy. The distinction between the new policies and the old is further indicated by that portion of the latter in which the

right is given to the assured to extend and keep alive the "term" insurance at the expiration of each term. The term policies say, "This policy upon its expiration may be renewed and continued for successive terms of five years each," but under the terms of the privilege for exchange, as accepted by the deceased, the assured completely abandons his term insurance, and elects to take a new contract of an entirely different character and based upon a new scheme and rate of premium; the new contract, according to the express terms of the "privilege," being purchased and paid for on the basis of the day of its date. The old contracts were not continued, nor were new policies issued based on any payment that had been previously made. On the contrary, the assured had already had full consideration for all the payments he had made under the term policies, and received new policies upon new and independent considerations, which considerations were themselves based upon the necessary cost to defendant of carrying the assured under the new kind of risk he had elected to take. That the policies in suit were intended to be new contracts operating from their date is further evidenced by that portion covering "health or disability insurance," which provided that the disabilities of the assured should arise "from causes originating after the delivery of this agreement." Could it be said that recovery could be had for a disability which clearly had its origin during any part of the previous five years when the term policies were in effect?

The situation here is entirely different from that appearing in *Dannhauser v. Wallenstein*, 169 N. Y. 199, 62 N. E. 160, *McDonnall v. Alabama G. L. Ins. Co.*, 85 Ala. 412, and *Cowles v. Continental Life Ins. Co.*, 63 N. H. 300, where paid-up policies were issued without any new consideration, and in which cases the beneficiaries received no more than they were entitled to receive because of the considerations theretofore paid by the assured, and where the new liability assumed by the insurers was determined solely on the basis of such past considerations. The principle of *Barry v. Brune*, 71 N. Y. 261, page 264, is the same as that of *Dannhauser v. Wallenstein*, because in that case the new policies were issued in consideration of nothing more than "the premiums which had accrued and become payable on the original policies," which had elapsed; the new policies bearing the same numbers as the old policies, for which they were a substitute.

To effectuate this decision the eighteenth finding of fact, and the first, third, fourth, and sixth conclusions of law will be reversed. The word "not" will be struck out of the second and fifth conclusions of law, and as thus amended the findings of the trial court will be adopted as the findings of this court; the judgment and order will be reversed, with costs to appellant, and the complaint dismissed, with costs. All concur.

(161 App. Div. 268)

ANGLO-SOUTH AMERICAN BANK, Limited, v. NATIONAL CITY BANK OF NEW YORK.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. BILLS AND NOTES (§ 74*)—LIABILITY OF ACCEPTOR—NEGOTIABLE INSTRUMENTS LAW.

Under the express provisions of Negotiable Instruments Law (Consol. Laws, c. 38) § 112, the acceptor of a bill engages that he will pay it according to the tenor of his acceptance.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 125, 126, 128, 130-135, 137-141; Dec. Dig. § 74.*]

2. ASSIGNMENTS (§ 49*)—CHECKS—EFFECT.

Under the express provisions of Negotiable Instruments Law (Consol. Laws, c. 38) § 325, a check of itself is not an assignment of any part of the funds to the credit of the drawer in the bank, and the bank is not liable to the holder until it accepts or certifies the check.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 85-96; Dec. Dig. § 49.*]

3. BANKS AND BANKING (§ 145*)—CHECKS—WRONGFUL NEGOTIATION—CERTIFICATION—INDORSEMENTS—FORGERY.

Certain conspirators, including the medical director of a fraternal association, who was also its trustee, procured him to execute a note of the association without authority, which the conspirators induced plaintiff to discount, by fraudulent representations. Plaintiff drew its check for the amount payable to the association, which one of the conspirators took to defendant, the drawee bank, for certification. After certification, such medical director, acting ostensibly as trustee, but without authority, indorsed the check, after which it was deposited in a bank and paid by defendant without knowledge of the association, which subsequently repudiated the entire transaction, never having received any portion of the proceeds of the check or note. *Held*, that possession of the check having been obtained by fraud, and it never having been legally negotiated or delivered to the payee by plaintiff, its certification, while in the hands of the conspirators, did not make it a valid, negotiable instrument, since the bank by certifying only becomes liable to the lawful holder, and hence, the check having been illegally paid, plaintiff was entitled to recover the amount from the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 419-433; Dec. Dig. § 145.*]

Appeal from Trial Term, New York County.

Action by the Anglo-South American Bank, Limited, against the National City Bank of New York. Judgment for plaintiff on report of Wilbur Larremore, Esq., Referee, and defendant appeals. Affirmed.

See, also, 148 App. Div. 906, 127 N. Y. Supp. 1109.

Argued before **INGRAHAM, P. J.**, and **LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.**

George W. Morgan, of New York City (Henry H. Abbott and Edward A. Craighill, Jr., both of New York City, on the brief), for appellant.

Edwin T. Rice, of New York City, for respondent.

LAUGHLIN, J. The plaintiff is a corporation organized under the laws of the United Kingdom of Great Britain and Ireland, engaged in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the business of buying and selling bills of exchange, issuing letters of credit, and loaning money; and it maintains a branch office in the city of New York, and had a deposit account with the defendant. On the 10th of November, 1909, one Mackenzie, its agent in charge of the New York branch, drew its check on the defendant for \$15,000, payable to the order of the National Protective Association, a secret fraternal mutual benefit association incorporated under the laws of Pennsylvania, with headquarters at Williamsport, in that state. The check was delivered to one Levick on his false representation that his firm of Uhlfelder, Thompson & Co. was authorized to procure for the payee of the check a loss in that amount on its note secured by collateral, as hereinafter stated. Levick, without authority from or knowledge of the payee, or of the plaintiff, presented the check undorsed to the defendant for certification, and it was certified on the day of its date, and the amount thereof was thereupon charged to the account of plaintiff. The check was thereafter indorsed by Uhlfelder of Levick's firm, "Pay to the order of Uhlfelder, Thompson & Co.," under which one Moyer, who was the medical examiner, a trustee, and a director of the National Protective Association, acting corruptly, having received \$300 out of the proceeds of the check from one Dunphy, who had no connection with the plaintiff and no connection with the payee, other than having formerly acted as its broker in negotiating loans, but who had participated in originating the fraudulent scheme, indorsed, "National Protective Association, F. L. Moyer, M. D., Trustee." Thereupon Uhlfelder, Thompson & Co. indorsed the check and made it payable to the order of the Italian-American Trust Company, which subsequently became and now is the Broadway Trust Company, for deposit with said company to the credit of said firm. The Italian-American Trust Company indorsed and delivered the check to the Metropolitan Bank, and it presented it to the defendant, through the New York Clearing House, for payment, and it was paid on the day after its date. The defendant in due course, and prior to the 10th day of January, 1910, returned the check to the plaintiff as a voucher.

Mackenzie took charge of the plaintiff's branch office in New York as its agent in December, 1908. Prior to the time he delivered this check to Levick, he had had business transactions for the plaintiff with Levick's firm in respect to loans and the sale of exchange and the issuance of exchange approximating \$7,000,000; but the plaintiff had not made any loans through Levick, or otherwise, to said National Protective Association. Shortly prior to the 10th day of November, 1909, Levick, without authority from the National Protective Association, applied to Mackenzie for a loan of \$15,000 to said National Protective Association on a promissory note purporting to have been made by it and 5,000 shares of the capital stock of the Canadian Mines Company as security. Mackenzie had delivered to Levick's firm blank forms of notes for use in connection with the business of said firm with the plaintiff. Levick presented to Mackenzie a collateral form promissory note for \$15,000, purporting to be made by the "National Protective Association, F. L. Moyer, M. D., Trustee," dated November 10, 1909, payable to the "agent of the Anglo-South American Bank, Limited, or order, at its banking house in the city of New

York," 60 days after date, and said stock as security, and receive from him the check in question. In March, 1909, the National Protective Association executed four notes, three for \$10,000 each and one for \$5,000, for the purpose of negotiating the same to raise funds for the use of the association. The notes were signed by the president and treasurer and were payable to the order of F. L. Moyer, trustee, and were delivered to Moyer with authority to negotiate them. Moyer came to New York with the notes and called on Dunphy, with a view to having him negotiate them; and at that time Moyer, without authority from the National Protective Association, made a promissory note in blank in its name, signing the name, "F. L. Moyer, M. D., Trustee," and left it with Dunphy. Moyer calls it a collateral loan note, and testified that it "was intended to be used in connection with the transaction." As part of the fraudulent scheme which resulted in the signing and delivery of the check by the plaintiff to Levick, this blank note was filled out payable to the agent of the plaintiff, and it is the note which was delivered to Mackenzie, as already stated, and with it Levick presented and delivered to Mackenzie 5,000 shares of the capital stock of the Canadian Mines Company, as collateral security. A few hours prior to that time, the stock had been in the possession of the firm of Mack Bros., who were the apparent owners thereof, and it had been obtained from them by Dunphy as collateral security for their note for \$7,500, which he was to discount, and for the discount of which part of the proceeds of the check in question was used. The stock was delivered by Mack Bros. under an agreement by which the pledgee was to have the right to repledge but not to sell it, and at the time of delivery a receipt was executed and delivered to Mack Bros. by said Moyer in the name of the National Protective Association, by which the association undertook to agree that it would hold the note and the certificates of stock subject to the terms of the note, and that the identical stock would be surrendered at the maturity and on payment of the note. The said note of Mack Bros. has not been paid.

A short time prior to the maturity of the note received by the plaintiff when it delivered the check to Levick, Levick and Dunphy paid the interest thereon and obtained an extension of one week, and subsequently a further extension of a few days. Dunphy was introduced to Mackenzie by Levick as the New York agent or representative of the National Protective Association. The note not having been paid at the expiration of the second extension, the plaintiff sold 3,000 shares of the stock which it held as collateral, but was unable to make good delivery, owing to the fact that the transfer agent refused to transfer the stock; the transfer thereof having been stopped by order of the Canadian Mines Company, signed by its president, on November 10, 1909. After the stoppage of the transfer of the stock had been brought to the attention of the plaintiff, its attorney examined the check and then for the first time ascertained that it had been deposited to the credit of Levick's firm, and Mackenzie testified that he first learned of this fact from plaintiff's attorney. The attorney for plaintiff testified that he first learned on February 12, 1910, that the authority of Moyer

to execute the note in behalf of the National Protective Association was challenged. Many of the facts were stipulated, and it is recited in the stipulation, among other things, that on February 12, 1910, the plaintiff "redemanded" payment of the note from the National Protective Association at its office in Williamsport, Pa., and tendered the stock held as collateral, and payment was refused; and that the plaintiff redelivered the check to the defendant in the latter part of March, 1910, and demanded of the defendant that the amount thereof be credited to its account, and on refusal it brought this action for the breach of its contract with defendant as a depositor. The defendant called upon the Metropolitan Bank to defend, and it in turn called upon the Broadway Trust Company, which, according to the points submitted in behalf of the appellant, has assumed the defense of the action. It appears that the National Protective Association and the firm of Uhlfelder, Thompson & Co. are insolvent.

The objection to the recovery made by the learned counsel for the appellant is based entirely upon the certification of the check. On the facts disclosed by this record, it appears that the indorsement of the check in the name of the National Protective Association was in effect a forgery. Section 42 of the Negotiable Instruments Law (chapter 38, Consolidated Laws; chapter 43, Laws of 1909) provides that where a signature is forged, or made without authority of the person whose signature it purports to be, "it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority." If the check was delivered by the plaintiff to the payee, it is not contended, in view of these provisions of section 42 of the Negotiable Instruments Law, that the plaintiff would be precluded from setting up the forgery or want of authority in Moyer, who assumed to indorse it in the name of the payee, were it not for the certification; but, if it had an inception, then the certification doubtless would be effective. It is contended on the part of the appellant that the plaintiff is precluded by the allegations in the complaint from contending that the check was not delivered to the payee. The plaintiff alleges that it "drew and issued" the check "and thereby required the defendant to pay to the National Protective Association," or to its order, the amount thereof, and that the check, after it was issued, "came wrongfully into the possession of one F. L. Moyer, who indorsed the said check" in the name of the payee, but that said indorsement was fraudulent and was not authorized by the payee, and gave the defendant no right or authority to pay the check "to the holder or holders thereof other than the National Protective Association," and that the payment was in violation of the plaintiff's rights as a depositor with the defendant and was void, and that the defendant did not pay the amount of the check to the payee or to its order, and that the payee "never received said amount so directed to be paid to it." The defendant admitted by its answer that the plaintiff drew and issued the

check and pleaded the certification of the check, as already stated as a defense.

Upon the trial, the defendant objected to the evidence with respect to the circumstances under which the check was drawn and delivered, upon the ground that the plaintiff had pleaded that the check was issued, as stated. The learned referee, however, received the evidence and found the facts in accordance therewith. It is contended, in effect, in behalf of the appellant that, if the plaintiff had not alleged that it issued the check to the payee, the defendant might have shown that the plaintiff was guilty of negligence in signing the check and in parting with possession thereof, and that therefore, in view of the state of the pleadings, it was error to receive the evidence with respect to the circumstances under which the check was issued and delivered to Levick. I am of opinion that there is no force in that contention. If the check had not been certified, mere negligence on the part of the plaintiff with respect to signing and delivering it to Levick would not have justified the defendant in paying it on the forged or unauthorized indorsement. If the check had ultimately been received and accepted by the payee, and it had indorsed and negotiated it, that probably would have constituted a ratification of Levick's acts in procuring the loan, and the plaintiff might then be precluded from contending that it did not intend to issue or deliver the check to the payee. There is no evidence tending to show, or from which an inference would be warranted, that the plaintiff in any manner represented that Moyer was authorized to indorse the check for the payee. If it were not for the certification of the check, there is no conceivable ground upon which it could even be contended that the defendant was justified in appropriating the funds of the plaintiff to the payment of the check. The real question in the case, therefore, arises on the effect of the certification of the check.

If the plaintiff itself, before the issuance and delivery of the check, had caused it to be certified and had thereafter determined not to deliver the check to the payee, there is and can be no question but that it would be entitled to have the amount charged to its account, on the certification, again credited to its account. In other words, the certification in such circumstances would not estop the plaintiff from surrendering the check at any time before it issued and delivered it and demanding that the defendant credit its account with the amount with which it had been charged on the certification of the check. The certification of a check, if made at the instance of the drawer, does not become effective until the issuance and delivery of the check to the payee, for the implied obligation of the bank is to pay the money deposited to the depositor or to his order. *G. N. Bank v. Bingham*, 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 16 Am. St. Rep. 765; *Lynch v. First Nat. Bank, etc.*, 107 N. Y. 179, 13 N. E. 775, 1 Am. St. Rep. 803; *Thomson v. Bank of British North America*, 82 N. Y. 1; *Shipman v. Bank of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106; *Citizens' Nat. Bank v. Importers' & Traders' Bank*, 119 N. Y. 195, 23 N. E. 540; *Kearny v. Met. Trust*

Co., 110 App. Div. 236, 97 N. Y. Supp. 274; *Carnegie Trust Co. v. First Nat. Bank*, 156 App. Div. 712, 141 N. Y. Supp. 745; *Freund v. Importers', etc., Bank*, 76 N. Y. 352. See *Nassau Bank v. Broadway Bank*, 54 Barb. 236; *First Nat. Bank v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708; *Worth v. Case*, 42 N. Y. 362.

The effect of a certification of a check at the instance of the payee, or other holder thereof, is to create a new contract between the drawee and the payee, or other holder, for the payment of the amount thereof, and the drawer is thereby released from liability thereon. *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83, affirmed 183 N. Y. 511, 76 N. E. 1100; *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708; *Freund v. Importers', etc., Bank*, 76 N. Y. 352. See, also, *Carnegie Trust Co. v. First Nat. Bank of City of N. Y.*, 156 App. Div. 712, 141 N. Y. Supp. 745. I am of opinion that this rule is logically and necessarily confined to cases in which the check is certified at the instance of the payee, or other holder thereof in due course. *Thompson v. Bank of British North America*, supra; *Hartford v. Greenwich Bk.*, 157 App. Div. 448, 142 N. Y. Supp. 387. See, also, *Morrison v. Chapman*, 155 App. Div. 509, 140 N. Y. Supp. 700; *G. N. Bank v. Bingham*, supra. The certification of the check in question was not made at the instance of the payee, or of any holder thereof in due course, but at the instance of *Levick*, who had induced the drawing and issuance thereof by fraud, and he was not authorized to and did not represent the payee. The act of certification was not binding on the payee. The payee was in no manner estopped thereby from holding the drawer liable on the contract under which the check was issued, if it had ratified such contract. If the payee had accepted the check after it had been certified at the instance of *Levick*, it doubtless would have thereby released the drawer and have accepted the liability of the defendant on the certification, and have become liable to the drawer on the note in consideration for which the check was drawn and delivered to *Levick*; but that was not done. The payee in no manner became a party to the transaction, for the loan was neither authorized by it originally nor ratified by it. It is conceded that the indorsement of the check was not made by the authority of the payee, and was not binding upon it, and it is quite clear from the evidence that the payee did not become liable to the plaintiff on the note, or on any representation that it owned, or had authority to pledge the stock as collateral security therefor.

The facts pleaded by the defendant with respect to the certification of the check were formally stipulated, and the stipulation was read in evidence by the plaintiff. That, however, was not part of the plaintiff's case and should not be deemed to preclude it from meeting the facts with respect to the certification by evidence of the facts and circumstances under which the check was drawn and issued, which were received over the defendant's objection and exception.

On the uncontroverted evidence as thus presented, the case was, I think, no more favorable to defendant than if the plaintiff had procured the certification and did not thereafter deliver the check to the payee. The allegations of the complaint with respect to the issuance

of the check should be construed in the light of the evidence, which shows that the plaintiff was induced to draw and deliver the check to Levick under the false and fraudulent representation that he was authorized to negotiate the note of the National Protective Association. The point made by the appellant relates to form rather than to substance. It is, in effect, conceded that the defendant was not warranted in paying the check, but it is contended that it is liable to the payee and not to the plaintiff. It is also, in effect, conceded that, if the plaintiff had brought a suit in equity against the defendant and the payee of the check for the cancellation of the certification, there would be no defense, but it is contended that this is an action at law, and that, in view of the allegations of the complaint with respect to the issuance of the check, the defendant may be liable to the payee, and that it will not be protected against such liability by the judgment in this action. The uncontroverted evidence clearly shows that the payee of the check has no claim against the defendant thereon, for the check was in fact never delivered to or accepted by it, but was fraudulently received by Levick and negotiated by him without the knowledge or consent of the payee and without any fact tending to show a ratification by the payee; but, on the contrary, the uncontroverted evidence shows a repudiation by the payee by its denial of liability on the note in consideration for which the check was issued; and, through such fraudulent negotiation, the check was finally returned to the hands of the drawer, in whose hands it now is, and who tendered delivery thereof to the defendant, which, in the circumstances, should be deemed a demand for the cancellation of the certification.

The effect of the certification of the check and charging the amount thereof to plaintiff's account was to set apart to the credit of the check the amount thereof (*Schlesinger v. Kurzrok*, 47 Misc. Rep. 634, 94 N. Y. Supp. 442; *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83; *Willeys v. Phoenix Bank*, 9 N. Y. Super. Ct. 121; *First Nat. Bank v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708); and, since it has not been lawfully paid, it is still in law held by defendant subject to the check (*Bank of British North America v. Merchants' Nat. Bank*, supra); and, since the check never had a valid inception, the fund still belongs to the plaintiff.

It follows, therefore, that the judgment should be affirmed, with costs.

INGRAHAM, P. J. I concur in the affirmance of this judgment. The plaintiff was induced to deliver to one Levick a check drawn on the defendant to the order of the National Protective Association, a Pennsylvania corporation, for \$15,000 by the false and fraudulent representation that this National Protective Association had applied to the plaintiff for a loan and had executed a note which was signed on behalf of the corporation by one Moyer, as trustee, and which Levick delivered to the plaintiff and received a check payable to the order of the corporation for that amount. The National Protective Association had made no application for a loan and knew nothing about the transaction. Moyer had no authority to apply for the loan or to ex-

ecute promissory notes for the corporation; and the whole transaction was a fraud upon the plaintiff. After Levick got this check, he procured its certification by the defendant, induced Moyer to indorse it on behalf of the payee, and then Levick or his associates deposited it with a trust company, which collected it from the defendant and paid the proceeds to Levick or his associates. This note, purporting to be signed on behalf of the National Protective Association, was renewed by the plaintiff, but, when it was finally presented to the National Protective Association for payment, that association repudiated the whole transaction, and plaintiff then demanded of the defendant the return of the amount which it had paid upon this check. If this check had not been certified, there could be no question but that the plaintiff would be entitled to recover. The only question presented is whether the certification of the check under these circumstances operated as an assignment of the funds to the credit of the drawer with the bank and made the bank liable as a principal debtor to the one presenting the check for payment.

[1] Under section 112 of the Negotiable Instruments Law, the acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance.

[2] Section 325 of the Negotiable Instruments Law provides that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. In *Freund v. Importers' & Traders' Nat. Bank*, 76 N. Y. 352, the court, after holding that Blun & Sons were the legal holders of the check, with such right as that they could enforce it against the makers, held that the certification of it by the defendant at their request had all the legal effect which the same certification would have had had it been indorsed by the payees; that the legal effect is the same as if the defendant had paid the money upon it, with the proper indorsement upon it of the payees; that:

"By the certification of a negotiable check, properly negotiated, the depository of the fund checked upon becomes liable to the owner of the certified paper, and is bound to have in readiness the money to meet it, from the fund drawn upon. When the check is not negotiable, or has not been indorsed, but has by assignment come into the hands of a lawful owner, who has a right to enforce it against the maker, the effect is the same."

And this case was followed in *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83, affirmed 183 N. Y. 511, 76 N. E. 1100, but was distinguished in *G. N. Bank v. Bingham*, 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 16 Am. St. Rep. 765, and *Lynch v. First Nat. Bank of Jersey City*, 107 N. Y. 179, 13 N. E. 775, 1 Am. St. Rep. 803.

[3] Undoubtedly, if this check had lawfully come into the hands of the payee, and the payee or any indorsee or transferee thereof had presented the check to defendant, who had certified it, the bank would have become the principal debtor, the plaintiff as drawer would have been discharged, and the defendant would have become liable to the legal holder of the check. But, from the facts found by the referee,

the check was never legally negotiated or delivered to the payee by the plaintiff; possession of the check had been obtained by fraud, not by the payee, but by the conspirators who had been guilty of fraud; while in their hands they presented it to the defendant, and it was certified; then by forging the indorsement of the payee they procured payment of the check. The certification was a part of the scheme by which the conspirators procured the check, had it certified, had the payee's name forged, and procured payment. This check in the hands of the conspirators was never a valid negotiable instrument. It had its inception in fraud; the certification was procured by fraud; the indorsement was forged; and the payment was obtained by a fraudulent scheme to defraud the plaintiff. The plaintiff was entitled to repudiate the whole transaction, and, the payee never having indorsed the check, the defendant was not justified in paying it and was under no obligation either to the payee or to the holder of the check who had secured no title to it, and who had no authority to negotiate it or collect it. By the certification of the check the certifying bank became indebted to the lawful holder of the check; but, if there never was a lawful holder of the check or a person entitled to enforce the check or collect the amount thereof, I do not see that the certification of the check can affect the liability of the drawer, nor is the bank certifying it under any obligation to pay it. It seems to me clear, if defendant had refused to pay the check, that neither the trust company, in which it had been deposited, nor any other holder, in the absence of an indorsement by the payee, could have recovered the amount thereof from the defendant. That being so, the defendant had plaintiff's money on deposit, which it had set aside to pay this check when presented, properly indorsed by the payee, and therefore, it never having been indorsed, it never could have been collected. The defendant having in its hands the plaintiff's money set aside to pay the check, which had never been negotiated by the drawer nor indorsed by the payee, the defendant could not hold the money as against plaintiff's claim for reimbursement.

For the reasons stated, I concur in the affirmance of this judgment.

CLARKE, SCOTT, and HOTCHKISS, JJ., concur.

(161 App. Div. 335)

WOOD v. SHERWOOD.

(Supreme Court, Appellate Division, Third Department. March 13, 1914.)

1. SALES (§ 405*)—CONTRACT—BREACH.

Provision in a contract of sale of young apple trees, "Any stock that does not prove to be true to name as labeled is to be replaced free or purchase price refunded," applies only to incidental errors, and does not bar recovery of damages for substantial breach of the contract as to kinds of trees furnished.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1147–1155; Dec. Dig. § 405.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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2. EVIDENCE (§ 13*)—JUDICIAL NOTICE.

Judicial notice cannot be taken that "Delaware Reds" are not common fruit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 18; Dec. Dig. § 13.*]

3. SALES (§ 181*)—BREACH—EVIDENCE.

Evidence, in an action for breach of contract of sale of young apple trees, they to be three certain varieties, *held* insufficient to show a substantial breach thereof, as to varieties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.*]

Appeal from Trial Term, Clinton County.

Action by Mary Wood, administratrix of Joseph Wood, deceased, against Elmer Sherwood. From a judgment for plaintiff, and from an order denying a motion for new trial, made on the minutes, defendant appeals. Reversed, and new trial granted.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Agnew & Agnew, of Plattsburgh (David H. Agnew, of Plattsburgh, of counsel), for appellant.

John B. Riley, of Plattsburgh (Ernest C. Gordon, of Plattsburgh, of counsel), for respondent.

WOODWARD, J. The complaint in this action alleges that "within the six years last past plaintiff ordered from defendant, and defendant sold and delivered to plaintiff, upwards of 300 apple trees, and plaintiff caused the same to be transplanted on his farm in the town of Schuyler Falls, and has since expended much time and money in the care and cultivation of the same;" that "plaintiff ordered and defendant agreed to deliver to plaintiff trees of the varieties known as McIntosh Reds, Delaware Reds, and Fameuse, and represented the trees so delivered to plaintiff to be trees of said varieties, and plaintiff relied upon such representations, paid the defendant the agreed price therefor, and set out the same, and has ever since cultivated and cared for them, believing that they were McIntosh Reds, Delaware Reds, and Fameuse trees;" that "plaintiff has recently discovered that said trees were not Fameuse or McIntosh Reds or Delaware Reds, but were of other varieties known as Ben Davis and others that are unprofitable to cultivate and maintain as an orchard for growing apples for profit." The complaint then alleges on information and belief that the usual crop of apples, "if said trees had been McIntosh Reds, Delaware Reds, and Fameuse, as represented by defendant, would have been worth when said trees are full grown, each year, \$300 more than will be produced by the kinds of trees delivered to the plaintiff, and that plaintiff has and will suffer loss and damage in consequence thereof in the sum of \$600." The same facts are realleged in two other counts, upon different theories of damages, but these are not material to the determination of the appeal.

The defendant, answering the complaint, "admits that during the years 1907, 1908, and 1909 he sold and delivered to the plaintiff a num-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ber of apple trees; that a part of said trees were to be and were of the varieties known as McIntosh Reds, Delaware Reds, and Fameuse; and that the plaintiff has paid the defendant on account of said trees the sum of \$33.20," and that the defendant "further admits that a part of the trees ordered by the plaintiff of the defendant were to be of the varieties known as McIntosh Reds, Delaware Reds, and Fameuse. (2) Further answering said complaint, the defendant denies knowledge or information sufficient to form a belief as to each and every allegation therein contained, not hereinbefore specifically admitted or denied."

[1] The defendant then sets up a separate defense, alleging that a condition of the contract under which the plaintiff purchased was that "any stock that does not prove to be true to name as labeled is to be replaced free or purchase price refunded," and then offers and pays into court upon the trial the amount of the purchase price, together with a sum sufficient to pay the interest, and then, "further answering said complaint, defendant denies, upon information and belief, each and every allegation therein contained, not hereinbefore admitted."

We are of the opinion that the affirmative defense pleaded is of no value to the defendant, unless it appears from the evidence that there was a substantial performance of the contract on his part; the clause permitting replacements or the refunding of the money being intended merely to provide for incidental errors in the delivery of the trees and not to an entire failure to perform the conditions of the contract. *Sanford v. Brown Bros. Co.*, 134 App. Div. 652, 119 N. Y. Supp. 333.

[2, 3] We come, then, to the question of whether the plaintiff has established the cause of action alleged, this question being presented by the motion to dismiss at the close of the evidence and by the motion for a new trial; both of these motions having been denied, the defendant taking exceptions. It will be recalled that the complaint alleged the purchase from the defendant of upwards of 300 trees, and that it was agreed that these trees should be of the varieties known as McIntosh Reds, Delaware Reds, and Fameuse; and the answer admitted that this was the contract entered into between the parties. The complaint also alleged that the "plaintiff has recently discovered that said trees were not Fameuse or McIntosh Reds or Delaware Reds, but were of other varieties known as Ben Davis and others," and this allegation is denied, so the plaintiff, in order to establish any cause of action for a breach of the contract which, as we have seen by its terms, is one to be satisfied with substantial performance, must show that a substantial proportion of the trees delivered by the defendant were not of the varieties known as McIntosh Reds, Delaware Reds, and Fameuse, for it is still necessary that judgments should be rendered in conformity with the allegations and proofs of the parties; *secundum allegata et probata* is fundamental in the administration of justice. *Wright v. Delafield*, 25 N. Y. 266, 268. The defendant admitted the selling of the Fameuse, the Delaware Reds, and the McIntosh Reds, just as alleged in the complaint; and the plaintiff testified that he could not remember just how many trees he purchased since 1906.

"In 1906," he says, "I had two orders, 37 trees; they were to be McIntosh Reds and Fameuse; in 1907, 100; in 1908, 65; in 1909, 30." This makes a total not upwards of 300 but of 232, and the witness says he has not purchased any since 1909, and he says, "I purchased Fameuse and McIntosh Reds from him;" but he alleged in his complaint that he purchased Delaware Reds, and this fact was admitted, and the only trees which he specifically says were to be McIntosh Reds and Fameuse were the 37 trees purchased in 1906, so we must assume that the other 195 were either to be Delaware Reds or of the other two varieties alleged in the complaint; and the record will be searched in vain for any evidence that all of the trees in this orchard, with the exception of one Ben Davis tree, were not comprised within these three varieties, for this court can hardly take judicial notice that Delaware Reds are not common fruit, if it can be said that there is any real evidence that any part of the trees were in fact common fruit. No one of the witnesses claimed to be able to distinguish between the kind of trees before they bore fruit, and the plaintiff testified:

"I could not tell how many of these trees have borne fruit because I have not counted them. As near as I can tell, near enough, 25."

This was certainly indefinite enough, although it might have been "near enough" to suit the plaintiff's purposes; and he then tells us that:

"One variety is Ben Davis; the rest I cannot tell you. I know the McIntosh Reds and Fameuse. There are none of them,"

—referring, we suppose, to the trees which have borne fruit, for it immediately follows his guess of 25 bearing trees in the record, and then he adds:

"I did not buy any Ben Davis; they are not worth while cultivating and growing."

There is a suggestion in the evidence, but not very direct, that there was one Ben Davis apple tree upon the plaintiff's premises; certainly there is no evidence which would warrant any one in concluding that there were any more. One witness, it is true, testifies that he visited the orchard in question, and that there "are no Fameuse or McIntosh Reds among those trees"; but he admitted immediately afterwards that he could not distinguish "the McIntosh Reds from Fameuse or common fruit by going through his orchard," but said that he formed his judgment from the fruit which he picked up under the trees, and that:

"There was one tree we got Ben Davis from. The rest of them I don't know what variety they are. They are good for nothing, common fruit."

But all of this must be referred to the 25 trees more or less out of the orchard which had borne fruit, and there is not a particle of evidence that the so-called common fruit is not the Delaware Reds alleged in the complaint, with the exception that the plaintiff testified that there is "one other tree in the young orchard than those purchased from Sherwood, an early apple tree, an old tree;" and there is nothing to show that the witness Weaver, who was clearly testifying as the

wise farmer of the neighborhood rather than from any definite knowledge of the facts, did not pick up some of his sample apples from under this very tree.

The fact, if it is a fact, that out of the 25 more or less bearing trees there were no Fameuse or McIntosh Reds, and that there was one Ben Davis, the others not being known to the witness, does not establish a breach of the contract alleged by the plaintiff, for it fails entirely to negative the presumption that substantially all of the other trees were Delaware Reds. The only positive evidence of the purchase of Fameuse and McIntosh Reds is given by the plaintiff, who says that he purchased 37 trees in 1906, and that these were to be of those varieties, and, if none of these were found among the 25 bearing trees, it would not establish that there were not the required number in the orchard, especially where it does not appear that the bearing trees were the ones which were labeled as belonging to these varieties. Concededly there were to be Delaware Reds among the trees sold and delivered to the plaintiff; the complaint alleges this; and the allegation is specifically admitted by the defendant, so that this fact is established beyond controversy; and, until the plaintiff has established that the orchard is not made up substantially of the three varieties which he says he purchased from the defendant, he has failed to make out the breach of the contract which he has alleged, and he has no right to any damages. The presumption must be that the defendant has delivered the goods contracted to be delivered, and evidence that out of a group of 25 trees, in an orchard of several hundred, there are no trees of two of the varieties is not meeting the burden of proof; is not furnishing any proof whatever of a violation of the contract.

The court disapproves of the findings of fact that the defendant failed to perform the contract, and that the plaintiff suffered damage.

The judgment and order appealed from should be reversed, with costs. All concur.

MYER v. IDLEWOOD ASS'N.

(Supreme Court, Equity Term, Erie County. January, 1914.)

1. VENDOR AND PURCHASER (§ 228*)—NOTICE OF EQUITY—EFFECT.

A grantee with notice of the claim of one owning and occupying a gore of land between the boundary marked by a fence and the line described by his deed must be deemed to have taken title subject to the rights and equities of such owner.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495-501; Dec. Dig. § 228.*]

2. REFORMATION OF INSTRUMENTS (§ 13*)—MISTAKE—DEED.

A deed intended to convey premises bounded by a blazed and monumented line, but which by mutual mistake described such line as within and wholly on the grantee's land, should be reformed so as to express and carry out the true agreement and intention of the parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 42-60; Dec. Dig. § 13.*]

3. REFORMATION OF INSTRUMENTS (§ 18*)—MISTAKE—EQUITABLE RELIEF.

Where parties, intending to reduce a parol agreement to writing, make a contract different from that intended, because of a misunderstanding of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the terms used, equity will relieve by reforming the instrument and compelling them to perform the agreement as they made it; and it is immaterial whether such mistake is called a mistake of law or of fact.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 72, 73; Dec. Dig. § 18.*]

4. BOUNDARIES (§ 49*)—PRACTICAL LOCATION—EFFECT.

Practical location of a boundary line with a continued and undisturbed occupation thereto by the grantee for more than 20 years is conclusive on the parties and their successors in title, even though the boundary line so located is erroneous.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 243-248; Dec. Dig. § 49.*]

Action to quiet title and for reformation of a deed by Gertrude W. Myer against the Idlewood Association. Findings for plaintiff.

Charles P. Norton, of Buffalo, for plaintiff.

George Clinton, of Buffalo, for defendant.

WHEELER, J. This action, in substance, is one to quiet title to a parcel of land in dispute between the parties to this action. The essential and controlling facts are unquestioned.

The evidence shows that prior to January, 1867, one Marion Stewart was the owner of a farm on the shore of Lake Erie, in the town of Hamburg, N. Y., commonly known as the "Morsman Farm." Gen. Albert J. Myer entered into negotiations with her for the purchase of the northerly part of this farm, consisting of about 15 acres of land. These negotiations appear to have been conducted principally, if not wholly, through Mrs. Stewart's husband, Elliott Stewart. Stewart and Gen. Myer met on the farm in company with one Peter Barker a local surveyor, and proceeded to fix the division line between the property to be purchased by Myer and that retained by Mrs. Stewart. After running two lines, both of which, for reasons stated, were unsatisfactory to the parties, a third line was run by the surveyor midway between the two, which was assented to by both Myer and Stewart. The course of this line as thus agreed upon ran from an established point to the shore of the lake, and was marked by blazes made upon trees standing upon the line thus agreed upon. The surveyor was then instructed to prepare a written description of the property for insertion in the deed to be given. Barker prepared a description, and it was given to the attorney, who incorporated it into the deed subsequently executed by Mrs. Stewart to Myer. This deed bears date January 9, 1867. In this description the division line between the two properties is given as running from a certain corner north 55 degrees and 40 minutes west, to the shore of Lake Erie.

This course, as matter of fact, was wrong, as it did not correspond with the blazed line agreed upon by the parties. If the course written in the deed were followed, it would diverge to the north from the blazed line, varying in the degree of divergence according as to whether the line was run with reference to the true or magnetic meridian. In any event, between the agreed blazed line and the line given by the course written in the description in the deed there is a gore of land

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

over which this litigation arises. Each party to this action claims to be the owner of this gore. The plaintiff contends that as successor to the title of her father, Gen. Myer, the true division line between her property and that of the defendant is the blazed line originally agreed on by her father and Stewart. The defendant, on the other hand, contends that the description in the deed must prevail, and that it is entitled to take up to the record line of the deed.

As against the course given in the deed, the plaintiff contends that it was inserted by the mutual mistake of the parties, and that she is entitled to have the deed reformed so as to express the real agreement and intent of the parties to it, and, also, that there having been a practical location of the division line, acquiesced in for more than 20 years, the line so established cannot now be questioned by this defendant.

A statement of these respective contentions of the parties necessitates the recital of certain other facts established by the evidence, and over which there appears to be no substantial dispute.

After the deed from Mrs. Stewart to Gen. Myer was given, and in June, 1873, Gen. Myer and Mrs. Stewart built a division fence between their properties; each sharing in the expense of the construction. This fence was built on the blazed line above referred to. The fence stood on this line for many years. It was there in 1883, when the Stewarts conveyed the remainder of the Morsman farm to the Idlewood Association. In time the posts rotted, and the original fence was replaced by a wire fence along the same line. These fences remained in this condition until a few years prior to the commencement of this action. The land north of this fence was for years used for pasturage by Gen. Myer and tenants under him.

I am unable to discover in the evidence given on the trial anything tending to show that the Stewarts or the Idlewood Association ever claimed or gave notice to Gen. Myer or to his successors in interest, until within a short time before the commencement of this action, that these fences were not on the division line between their respective properties. In time, it is true, the fence became dilapidated, and portions of it fell to the ground; but that did not change the general situation. The defendant's counsel lays stress upon the fact that, after the Idlewood Association acquired its property by purchase from the Stewarts, members of the association owning cottages on its grounds broke down the wire fence near the banks of Eighteen Mile creek, and were accustomed to pass through onto the Myer property. This passage through the fence does not appear, however, to have been forced under any claim that the fence was not properly placed, but simply to enable persons wishing to stroll along the creek for their pleasure to do so, and this concededly on the Myer property.

On the other hand, it appears that the general dining hall of the association was built near this division fence. It was destroyed by fire on two occasions. The fire so damaged certain trees just north of the fence that they were likely to fall, and the association asked permission of the Myers to go upon the property and cut them down. The permission was given, and the trees removed. This action on the part of the association was a recognition of the rights and title of the

Myers, and quite inconsistent with the claim now made that the mere breaking through of the wire fence under the circumstances was done by virtue of any claim of strict right to do so.

As has been previously stated in this opinion, the Stewarts, in the year 1883, sold and conveyed the remainder of the Morsman farm, not previously sold to Gen. Myer, to the Idlewood Association. To be more accurate, the Stewarts conveyed to A. J. Riegel, who in turn, and three days thereafter, conveyed to the association. Riegel, however, in purchasing the property, in fact acted for the association, and was its president. In the deed of conveyance from the Stewarts, the property conveyed was bounded "on the north by land owned by the late A. J. Myer." At the time of making this conveyance, Riegel and his associates were informed by the Stewarts that they only owned up to the division fence in question. In addition to the statement so made to the purchasers, there existed the fence in question, and the open and notorious occupation of the land north of it by the Myer family. So that the defendant had not only constructive but actual notice that the Myer family claimed to own down to the fence in question.

[1] The association therefore is in no position to contend that it took its deed in ignorance of the claims of those holding and occupying under the deed to Gen. Myer. It had ample and full notice, and must be deemed to have taken such title as it acquired subject to the rights and equities of the plaintiff and her predecessors in title. The plaintiff has succeeded to all the title and rights her father had, under a partition of his estate, and the defendant, having asserted ownership to the gore of land in question, brings this action to quiet her title to the same, and in connection therewith to reform the erroneous description contained in the deed from the Stewarts to her father, Gen. Albert J. Myer.

Inasmuch as the Idlewood Association has succeeded to all the rights of the Stewarts and as no one appears to be in any way interested in the property except the parties to this action, we see no reason why this court should not render such a decision and judgment as the circumstances and equities of the case justify.

[2] We are of the opinion the plaintiff is entitled to the relief demanded. We can reach no conclusion other than that the description drawn by the surveyor, Barker, and copied into the deed to Gen. Myer, was an erroneous description; that it did not properly describe the land intended to be sold and conveyed; that when said deed was executed the parties to it supposed and believed that it conveyed the premises in question bounded on the south by the blazed and monumented line above referred to; that the mistake was mutual on the part of the grantors and grantee therein; and that, as between the parties thereto and those claiming under and through them, the deed should be reformed so as to express and carry out the true agreement and intent of the parties.

[3] It is a well-recognized rule of law and equity that where parties intending to reduce a parol agreement to writing, because they are ignorant of the force of language and misunderstand the meaning of the terms used, make a contract different from that designed, equity

will grant relief by reforming the instrument and compelling the parties to perform the agreement as they made it, and it matters not whether such mistake be called one of law or of fact. *Pitcher v. Hennessey*, 48 N. Y. 415; *Bush v. Hicks*, 60 N. Y. 298; *Bacot v. Fessenden*, 139 App. Div. 647, 124 N. Y. Supp. 370; *Le Gendre v. Scottish U. & N. Ins. Co.*, 95 App. Div. 565, 88 N. Y. Supp. 1012.

[4] There is still another principle of law which entitles the plaintiff to relief in the nature of a decree quieting the title to the strip of land in dispute. It is the doctrine touching the effect of the practical location of a boundary line. The evidence fully justifies the finding that the parties to the deed from Stewart to Myer established and agreed upon the division line, and that there had been a continuous and undisturbed occupation by the grantee and his successors in title up to that time for more than 20 years. Under such circumstances, the division line thus located and marked, even if erroneous, is conclusive on the parties and their successors in title. *Herse v. Mazza*, 100 App. Div. 59, 91 N. Y. Supp. 778; *Reed v. Farr*, 35 N. Y. 113; *Baldwin v. Brown*, 16 N. Y. 359; *Goodhue v. Cameron*, 142 App. Div. 478, 127 N. Y. Supp. 120; *Taub v. Spector*, 124 App. Div. 158, 108 N. Y. Supp. 723; *Smith v. Faulkner*, 48 Hun, 188.

Let findings be drawn in accordance with these views.

So ordered.

(161 App. Div. 206)

In re FARLEY, State Com'r of Excise.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. INTOXICATING LIQUORS (§ 106*)—LIQUOR TAX CERTIFICATE—CANCELLATION—GROUNDS.

Liquor Tax Law (Consol. Laws, c. 34) § 30, subd. "e," provides that it shall not be lawful for any person to permit the premises on which the traffic is conducted to become disorderly, or suffer, permit, or have any opening or means of entrance or passageway for persons between the room or place where the traffic is carried on, and any other room or place which any person whosoever suffers or permits to become disorderly, or carry on or permit to be carried on or to be interested in any traffic, business, or occupation which is in violation of law. *Held* that, where respondent conducted a barroom under a liquor tax certificate, and there was a hallway and staircase giving direct communication from the barroom to hotel rooms used for immoral purposes, his certificate was subject to cancellation, without reference to whether respondent was interested in the conduct of the hotel or rooms.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 113, 115; Dec. Dig. § 106.*]

2. INTOXICATING LIQUORS (§ 108*)—LIQUOR TAX CERTIFICATE—CANCELLATION—PROCEEDINGS—EXPIRATION OF CERTIFICATE.

In proceedings to cancel a liquor tax certificate because respondent had sold liquor on Sunday contrary to law, it was error for the court to refuse to try such issue because the certificate would expire by limitations on the day succeeding that on which the trial was had, since, where the right to cancellation exists at the date of the institution of the proceedings, it is not impaired by the subsequent expiration of the license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 116-118; Dec. Dig. § 108.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, New York County.

Petition by William W. Farley, as State Commissioner of Excise, for the revocation and cancellation of liquor tax certificate No. 4857, issued to Alexander Spier. From an order denying the relief prayed, petitioner appeals. Reversed, and new trial granted.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Charles R. O'Connor, of Hobart, for appellant.

Maurice Meyer, of New York City, for respondent.

SCOTT, J. On September 27, 1912, the respondent, Alexander, Spier, applied for a liquor tax certificate to cover the year beginning October 1st. In his application he stated that liquors were to be sold at Nos. 2025, 2027, and 2029 Lexington avenue, borough of Manhattan, in "front room; ground floor; south 2029, side or end of building." He also stated that he intended to carry on a hotel in the premises, and that said premises had been continuously operated as a hotel since 1889.

The evidence showed in the most conclusive manner that the hotel portion of the building (that is, the portion above respondent's liquor saloon) was conducted as a disorderly house and an immoral resort. The respondent strives to shield himself behind the plea that it is not shown that he had anything to do with the hotel portion of the business which it is conceded was conducted by the Baltic Hotel Company. This plea is the only one upon which respondent seeks to sustain the order appealed from, and is presumably the one upon which the Special Term acted, since no other defense to the prayer of the petition is apparent upon the record. If such a plea is to succeed, an easy way will be opened to evade the provisions of the Liquor Tax Law. Fortunately it need not.

[1] Section 30, subd. "e," of the Liquor Tax Law, provides as follows:

"It shall not be lawful for any person * * * to suffer, or permit such premises to become disorderly, or to suffer, permit or have any opening or means of entrance or passageway for persons or things between the room or place where the traffic * * * is carried on and any other room or place which any person whosoever suffers or permits to become disorderly, or to carry on or to permit to be carried on or to be interested in any traffic, business or occupation, the carrying on of which is in violation of law."

It appeared without contradiction that there was direct communication between respondent's barroom and the hallway and staircase leading to the hotel rooms which were used for disorderly purposes. This of itself was sufficient to justify the revocation of the liquor tax certificate. This has already been held by the Appellate Division in the Third Department. In re Farley, 151 App. Div. 291, 136 N. Y. Supp. 115. Indeed, the violation of the statute in this regard is plain. Furthermore we are of the opinion that the mere concession that the hotel portion of the premises was conducted by the Baltic Hotel Company was not sufficient, without other proof, to rebut the presumption that

the respondent "permitted and suffered" the premises to become disorderly in the face of his declaration that he proposed to carry on the hotel, and of the close connection between the hotel and the barroom.

[2] The petition also alleged, as a reason why the liquor tax certificate should be revoked, that the respondent had sold liquor on Sunday contrary to law, and the petitioner was prepared and offered to prove this allegation.

The trial took place on September 30, 1913, and the court refused to try the issue as to unlawful selling because it would be a waste of time, since the certificate would expire on the next day. This was error. It has been uniformly held that the expiration of the certificate or its surrender for rebate is not a bar to a proceeding for cancellation. The right to cancellation where the evidence warrants it exists at the date of the institution of the proceeding and is not impaired by the subsequent expiration of the license. The issue had been made by the petition and the answer, and the petitioner was entitled to have it tried and determined.

For these reasons, the order appealed from must be reversed, and a new trial granted, with \$10 costs and disbursements to the petitioner appellant. All concur.

HANER v. VILLAGE OF OWEGO.

(Supreme Court, Trial Term, Tioga County. March 18, 1914.)

1. NEW TRIAL (§ 66*)—FINDINGS OF JURY.

Where notice of injury on a sidewalk was not served on the municipality within the time required by its charter, but plaintiff on the trial gave evidence of mental and physical condition to relieve her of the default, the jury's finding in her favor will not be disturbed on motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 132-134; Dec. Dig. § 66.*]

2. MUNICIPAL CORPORATIONS (§ 812*)—NOTICE OF INJURY—VERIFICATION.

The Owego Village Charter, § 52, provides that the village shall not be liable for injuries on sidewalks, unless written notice of the injury is given the board of trustees. The Village Law (Consol. Laws, c. 64) § 341, requires a written verified statement of the nature of the claim, and section 380 provides that a village incorporated under a special law shall be subject to the provisions of the general village law, which are not inconsistent with such special law. *Held* that, the general village law not being inconsistent with the Owego village charter as to the verification of the notice of injuries, a verified notice of injury was not required to be given to the village trustees.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1696-1707; Dec. Dig. § 812.*]

Action by Hattie M. Haner against the Village of Owego. Judgment for plaintiff, and a motion for new trial by defendant denied.

Wallis & Clifford, of Owego, for plaintiff.

B. W. Loring, of Owego, for defendant.

KILEY, J. In this action the plaintiff charged the defendant with negligence in not properly caring for and maintaining its sidewalks,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs, 1907 to date, & Rep'r Indexes

and that by reason thereof she fell upon the sidewalk of defendant and received the injuries, for which she recovered a judgment of \$1,000 in said action. Trial of the issues was had at an adjourned term of the court commencing December 9, 1913. The defendant, on the trial, interposed an objection to the sufficiency of the notice of injury, urging particularly two grounds, viz.: That the notice was not served within the time prescribed by the charter of the defendant, and that said notice was not verified.

[1] The plaintiff did not serve her notice within time limited by defendant's charter, but upon the trial gave evidence of mental and physical condition, which she claimed relieved her of such default, and which evidence was submitted to the jury, and the question resolved in her favor. I see no reason why the ruling at the time of the trial should be disturbed. The verdict found by the jury was in all respects a proper one and must stand so far as this motion for a new trial is concerned, unless the second objection above referred to prevails. The charter of the defendant, so far as applicable to this inquiry, reads as follows:

Village Charter.

Section 52:

"The trustees shall have the power to cause to be immediately repaired or rebuilt any sidewalk, in front of or adjoining any premises in said village, or to cause new walks to be built, and to determine and prescribe the manner of doing the same, and the materials to be used therein, and the quality or kind of such materials; and the provisions of section 161 and 168 of the Village Law not inconsistent with the provisions of this act, shall be and they are hereby made applicable to the construction and repair of crosswalks and sidewalks and keeping the sidewalks and streets cleaned of weeds, ice, snow and other accumulations thereon and the assessment and collection of the expenses thereof. Such village shall not be liable in damages to any person on account of injuries received, by reason, or on account of, any defective condition of any sidewalk in said village unless written notice of such injury shall be given to the said board of trustees within ten days after such injury shall have been caused."

The provisions of the General Village Law, which are urged by the defendant as governing the construction of the above section of its charter, read as follows:

Village Law.

Section 341:

"No action shall be maintained against the village for damages for a personal injury or an injury to property alleged to have been sustained by reason of the negligence of the village or of any officer, agent or employé thereof, unless the same shall be commenced within one year after the cause of action therefor shall have accrued nor unless a written verified statement of the nature of the claim and of the time and place at which such injury is alleged to have been received shall have been filed with the village clerk within sixty days after the cause of action shall have accrued. An action on such a claim shall not be commenced until the expiration of thirty days after it is presented."

Section 380:

"A village incorporated under and subject to a special law, and each officer thereof, possesses all the powers and is subject to all the liabilities and

responsibilities conferred or imposed upon a village incorporated under this chapter, or upon an officer thereof, not inconsistent with such special law."

[2] The defendant is operating under a special charter. As heretofore intimated, the only question not definitely passed upon during the trial was the one of failure to verify the notice served upon defendant by plaintiff. It was not verified. Defendant's counsel has called my attention to many cases where a similar question has been considered, and urges that they are controlling here. The defendant in the case of *Freligh v. Village of Saugerties*, 70 Hun, 589, 24 N. Y. Supp. 182, did not provide for any notice under its charter. It was there held, and I think properly so, that the service of notice was governed by the general law. The general law was not inconsistent with the special law. The charter of the defendant in this action provides, "Unless *written notice* of such injury be given." In *Cotriss v. Village of Medina*, 139 App. Div. 872, 124 N. Y. Supp. 507, *Eggleston v. Town of Chautauqua*, 90 App. Div. 314, 86 N. Y. Supp. 279, *Lee v. Village of Greenwich*, 48 App. Div. 391, 63 N. Y. Supp. 160, *Rauber v. Village of Wellsville*, 83 App. Div. 581, 82 N. Y. Supp. 9, and *Johnson v. Troy*, 24 App. Div. 602, 48 N. Y. Supp. 998, the charters of the defendant municipality require "*written verified notice*." Section 341 of the General Village Law requires a "*written verified statement*." The defendant contends that there should be read into section 52 of its charter the word "verified" either before or after the word "written" in that section, and in connection with the word "notice." The word "verified" is not a participle nor a preposition; it is a word of force, of utmost significance; and whenever and wherever it appears it carries with it a different meaning than prevails when it is absent. While it is in common use in the connection contended for here, it is not universal. It is not found, in this connection, in some charters of municipalities. The words "written notice," as used here, do not necessarily draw with them the word "verified." When it is understood that section 52 of defendant's charter was amended for the benefit of defendant, cutting down the time in which to serve a notice of claim, one is led to inquire: Why was not the word "verified" used in the amendment thus added? Two answers to that inquiry present themselves: Either the defendant, through its representatives, did not want that word in the amendment as contended for here, or it was omitted by mistake. If the former, should the defendant be given now what it did not want at the time of the passage of the amendment? If the latter, is it the province of the court to assume legislative functions? Is it not the province of the Legislature rather than that of the court to insert this word "verified" into the charter of the defendant? Should the liberal construction contended for here be invoked in favor of this defendant?

In *Barry v. Village of Port Jervis*, 64 App. Div. 268, 72 N. Y. Supp. 104, Mr. Justice Woodward says:

"For no principle of the jurisprudence of this state is better established than that the municipalities of the grade of villages and cities are answerable for negligence at common law, and that this right of action cannot be taken away without an entire revolution in our system of laws."

Such being the law, it is in derogation of the common-law right of this plaintiff and should be strictly construed, and not in favor of the defendant against the plaintiff.

In *Murphy v. Village of Ft. Edward*, 159 App. Div. 471, 144 N. Y. Supp. 451, it was held that a child of five years could maintain an action founded upon negligence of the defendant, although no notice of any kind was served by such infant, nor in its behalf.

In *Vinson v. Sewer, Water, and Street Commission of Saratoga Springs*, 158 App. Div. 132, 142 N. Y. Supp. 598, it was held that the provisions, as to time of serving notice, provided for in defendant's charter, should be followed instead of the different time provided for in the General Village Law. I am of the opinion that the same rule prevails in this case.

Motion for new trial denied, with costs.

(84 Misc. Rep. 126)

POPENBERG v. R. M. OWEN & CO.

(Supreme Court, Trial Term, Erie County. February, 1914.)

1. CONTRACTS (§ 318*)—BREACH—RIGHT TO TERMINATE.

Where one party to a contract defaulted in fulfilling the terms of its agreement, the other party could terminate the contract and refuse further performance on his part.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1508-1527; Dec. Dig. § 318.*]

2. CONTRACTS (§ 316*)—ACTION FOR BREACH—ESTOPPEL.

In an action for damages for breach of a contract which, however, had been continued in force by the parties and acted upon by them during its term, the plaintiff could not claim that defendant could not recover for breaches on his part.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1382-1387, 1395, 1398-1400, 1480-1491; Dec. Dig. § 316.*]

3. CONTRACTS (§ 326*)—ACTION FOR BREACH—RIGHT OF ACTION.

In such case all that could be claimed by the plaintiff was the right to recover for the defendant's breach.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 326.*]

4. SALES (§ 371*)—ACTION FOR BREACH—TENDER OF PERFORMANCE.

A contract provided that, in consideration of an order for a certain number of motor cars given to a distributor, the other party as agent should have the exclusive right to sell all such cars in certain territory, and that he should take a certain number each month, and that shipping specifications for each month's allotment should be given by him 30 days in advance and if not received by that time, the distributor should have the right not to furnish the allotment for that month. *Held*, upon the distributor's claim of damages for the agent's breach that, as by the terms of the contract no shipment could be made without the agent's order, that was a condition precedent without which a physical tender of the cars was not a necessary condition of recovery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1086-1088; Dec. Dig. § 371.*]

5. NEW TRIAL (§ 40*)—GROUNDS—ERRORS AT TRIAL—NECESSITY OF PREVIOUS OBJECTION.

Where plaintiff's contention at the trial was that defendant's measure of damages on his counterclaim for breach of contract in not taking the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

full number of cars agreed was the difference between the contract and the market price, he cannot urge, first on motion for new trial, that defendant's recovery must be limited to the amount of plaintiff's deposit as liquidated damages.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 62-66; Dec. Dig. § 40.*]

6. DAMAGES (§ 81*)—LIQUIDATED DAMAGES OR PENALTY—BREACH OF CONTRACT.

A contract, in consideration of the purchase of a certain number of motor cars from the distributor handling the manufacturer's entire output, gave the purchaser an exclusive agency for such cars, and provided that he should, on the signing of the contract, "deposit \$1,500 on each machine," to be placed to his credit, shipments to be made sight draft against bill of lading, *f. o. b.*, the amount of deposit on each machine being deducted from draft as shipments were made, and that if the agent rejected or refused to accept or pay for any cars, all deposits theretofore made by him should belong to the distributor as liquidated damages for breach of the contract, and thereunder only one deposit of \$1,500 was made. *Held*, in the agent's action for damages in which defendant counterclaimed for damages, that, since the parties had not insisted upon strict compliance with the contract, the distributor's recovery was not limited to the \$987 remaining as the balance of the first deposit.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 177; Dec. Dig. § 81.*]

7. DAMAGES (§ 76*)—LIQUIDATED DAMAGES OR PENALTIES—CONSTRUCTION.

Courts regard with disfavor agreements by which the damages of the parties are fixed, regardless of the actual losses sustained; and, while such agreements under certain circumstances are binding, the courts incline to treat them rather as a provision for penalty than for liquidated damages, particularly where the stipulated sum is clearly disproportionate to actual losses sustained, and the actual damages are readily ascertainable.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 154, 155; Dec. Dig. § 76.*]

8. SALES (§ 384*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Under Personal Property Law (Consol. Laws, c. 41) § 145 as added by Laws 1911, c. 571, declaring the measure of damages for nonacceptance of goods to be the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach, and that where there is no available market for the goods, the measure of damages, in the absence of special circumstances, is the profit the seller would have made if the contract of sale had been fully performed, an agent's breach of a contract whereby, in consideration of the purchase of a certain number of cars from the sole distributor who handled the manufacturer's entire output of special machines, built on special models, and the price for which was established by the distributor, so that there was no available market or market price, entitled the distributor to recover the profits lost by reason of the breach, *i. e.*, the difference between the price agreed to be paid for the cars not taken and the cost to him of furnishing such cars.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.*]

Action by Gustave Poppenberg against R. M. Owen & Co., with counterclaim by defendant. Motion by plaintiff for a new trial after a verdict for defendant. Denied.

See, also, 149 App. Div. 932, 134 N. Y. Supp. 1143.

Frank Gibbons, of Buffalo, for plaintiff.

Irving W. Cole and Hamilton Ward, both of Buffalo, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WHEELER, J. The plaintiff moves for a new trial on the ground of alleged errors claimed to have been committed by the court on the trial of this action. The complaint set forth eight causes of action upon a contract entered into between the parties to this action, nearly all of which were either admitted by the pleadings, or conceded upon the trial. There was, however, a controversy touching the right of the plaintiff to a reduction on the list price of certain automobiles made in July, 1911. The main controversy arose out of the contract between the parties, dated June 30, 1910. By the terms of this contract the defendant, in consideration of an order for 420 Reo motor cars, gave the plaintiff "the exclusive right to sell all styles of Reo motor cars," in the counties of Erie, Niagara, Chautauqua, Cattaraugus, Orleans, Genesee, Wyoming, Allegany, Livingston, Monroe, Steuben, Yates, Ontario, and Seneca, in this state until July 31, 1911. The plaintiff agreed to push the sale of the Reo cars to the best of his ability in the territory named, and as part of the contract agreed to handle, during the term of the contract, "only cars sold by the party of the first part, except upon the written consent of the party of the first part." It was conceded the plaintiff did not take or pay for all the 420 cars agreed to be purchased, nor did he handle exclusively the cars sold by the defendant, but, on the contrary, handled and sold a large number of automobile cars manufactured by other concerns. The defendant set up, by way of counterclaim in its answer, the failure of the plaintiff to comply with the contract in the particulars above specified, and demanded damages for such breach. The plaintiff, on the trial, contended that the requirements of the contract in these respects had been waived by the defendant, and these questions of fact so presented by the evidence were submitted to the jury for their disposition, under proper instructions. The jury returned a verdict in favor of the defendant for the sum of \$31,315.33, which it may be said represented the damages sustained by the defendant, less the demands of the plaintiff allowed by the jury.

So far as the disputed questions of fact have been settled by the verdict of the jury, they are not now the subject of further consideration. Their verdict was fully sustained by the evidence. It only remains to review, as briefly as possible, the questions of law raised and involved in the case.

[1] The plaintiff contends, in the first place, that the defendant is entitled to recover no damages whatever for any breach of the contract by the plaintiff, for the reason that the defendant was guilty of a breach of the contract in question on its part, in that the defendant did not make or deliver, or offer to sell or deliver, any of the automobiles designated and described as "Models K or J," in the contract. An examination of the contract shows that 85 of the 420 cars agreed to be purchased were to be what is designated as the "K Roadster" and "J Roadster." Some time after the contract had been entered into, and prior to December 21, 1910, the defendant notified the plaintiff that it would not be able to furnish any of the automobiles described as Models K and J, but proposing instead to substitute in place thereof what is known as the "Torpedo Roadster." The defendant claims that this

proposed substitution was mutually agreed upon by the parties. But we deem it quite immaterial in this case whether such was the fact or not. If the defendant defaulted in fulfilling the terms of its agreement, the plaintiff had a perfect right to terminate the contract, and refuse further performance on his part. This he did not do. On the contrary, he insisted on the right to continue to act as the representative of the defendant under it. In fact the evidence discloses that early in the winter of 1911 the defendant became solicitous about the plaintiff living up to his agreement with it, and wrote the plaintiff, calling attention to the fact that he was not taking cars as he had contracted to do, and expressing doubt whether, under the circumstances and by reason of his delay, he would be able to handle and dispose of the cars he had agreed to purchase, and offering on its part to cancel the contract with the plaintiff, with a view, of course, of making arrangements with others to handle the business in the territory given the plaintiff exclusively. The plaintiff declined to terminate the existing contract, and sent his representative to the defendant, excusing his delay in performing his agreement to take cars, and assuring defendant's officers that all would be satisfactory, and the cars agreed to be purchased would ultimately be taken and disposed of within the life of the contract. Upon these assurances the parties continued to act and do business under the contract in question, and no question was raised by either but that the contract was in full force and effect.

[2, 3] Of course, if the defendant failed to fulfill some of the stipulations of the contract, and the plaintiff suffered damage by reason of such failure, the plaintiff was entitled to maintain an action for such a breach. The court so charged the jury, but the plaintiff neither alleged in his complaint nor proved on the trial any damages resulting from the failure of the defendant to manufacture or deliver the "Model K" roadster, or any other of the cars covered by the agreement. In fact, I recall no evidence in the case where any shipping orders for such roadsters were given. The contract having been continued in force and effect by the parties, and acted upon by them during the term of its life, the plaintiff is now in no position to say that the defendant cannot recover for breaches on its part. *Deeves & Son v. Manhattan Life Ins. Co.*, 195 N. Y. 330, 88 N. E. 395; *Ruff v. Rinaldo*, 55 N. Y. 664; *Granniss & Hurd Lumber Co. v. Deeves*, 72 Hun, 171, 25 N. Y. Supp. 375, affirmed 147 N. Y. 718, 42 N. E. 723; *Beyer v. Huber Co.*, 115 App. Div. 344, 100 N. Y. Supp. 1029; *Crocker-Wheeler Co. v. Varick Realty Co.*, 104 App. Div. 570, 88 N. Y. Supp. 412, 94 N. Y. Supp. 23; *Sinclair v. Tallmadge*, 35 Barb. 602-606; *Rogers v. Beard*, 36 Barb. 31; *Ming v. Corbin*, 142 N. Y. 334, 37 N. E. 105; *Tipton v. Feitner*, 20 N. Y. 425; *Secor v. Sturgis*, 16 N. Y. 548. All that could be claimed by the plaintiff under such circumstances was the right to recover for the defendant's breaches, and in this case the damages, if any, were at best purely nominal, so far as the evidence discloses.

[4] It is further contended, on the part of the plaintiff, that the defendant cannot recover for the failure of the plaintiff to take and pay for the automobiles agreed to be purchased, for the reason that the defendant never tendered the cars not taken, and that without such a

tender the defendant could not put the plaintiff in default. On the other hand, the defendant contends that no such physical tender was necessary under the terms of the contract and the circumstances of the case. The justice presiding at the trial held that a physical tender was not necessary, and denied a request to charge in accordance with the plaintiff's contention in this regard.

In order to fully understand the question presented and the ruling made, it is necessary to examine the provisions of the contract between the parties. This agreement recites that :

"In consideration of an order for 420 Reo motor cars placed by the party of the second part with the party of the first part, the party of the first part grants to the party of the second part the exclusive right to sell all styles of Rea motor cars"

—in certain territory embracing all Western New York. The contract provides that the plaintiff was to take a certain number of cars each month; 4 in August, 21 in September, 21 in October, 11 in November, 9 in December, 18 in January, 39 in February, 75 in March, 79 in April, 82 in May, 42 in June, and 19 in July. The different types and styles of motor cars, and the number of each type were specified. It was also provided that :

"Shipping specifications for each month's allotment of cars must be given the party of the first part by the party of the second part [i. e. the plaintiff] 30 days in advance. If shipping specifications are not in factory thirty days prior to the above monthly delivery table, then the party of the first part reserves the right not to furnish the above-specified allotment for the month in question."

The contract further provided the plaintiff should sell only the cars sold by the defendant; that the plaintiff should not invade other territory than that given him, and agreed to refer all inquiries outside that territory to the defendant. He also agreed to appoint subagents for properly handling the business contemplated, and to report the names and addresses of all purchasers of Reo cars, and to provide ample facilities for handling, adjusting, and repairing machines sold to purchasers. It will thus be seen that the contract was not simply for the purchase of a given number of cars, but for an exclusive agency, in which the plaintiff was to represent the defendant and push the sale of its cars.

It was further provided that after the receipt of shipping specifications, the "shipments to be made sight draft against bill of lading f. o. b. Lansing, Mich.' The shipping specifications in use provided for the number of cars, the manner of shipment, by what route, the place of delivery, and to whom delivery was desired, directions as to how to draw draft, and other details.

The defendant had the exclusive sale of the entire output of the Reo Manufacturing Company, and it was evident that the provisions of the contract were framed as they were in order to give the defendant opportunity to meet the requirements of the plaintiff by, in turn, placing the orders received from him with the Reo Company, the manufacturer.

It will thus be seen that by the very terms of the contract the defendant could make no shipment, or draw any draft for a shipment,

until it had received from the plaintiff the shipping specifications or directions, and instructions contemplated by the agreement. The initial act or duty rested on the plaintiff and not on the defendant. The plaintiff made an affirmative agreement to give these specifications, and his failure so to do constituted a breach of the contract on his part. These shipping specifications by the plaintiff were things to be done before the defendant was called on to do any act toward shipment or delivery.

The evidence shows that the defendant was constantly and emphatically demanding of the plaintiff that he furnish such specifications, and that it was ready at all times to fill, and actually did fill, all orders received, for which specifications were sent. The plaintiff, on his part failed and omitted to perform the duty imposed by the contract on him. It was an act imposed on the plaintiff as a condition precedent to the duty or right of the defendant to ship.

The facts in this case bring it fairly and squarely within the decided case of *Gordon Malting Co. v. Bartels Brewing Co.*, 206 N. Y. 544, 100 N. E. 462, where Judge Werner, speaking for the court, said:

"The subject-matter of the contract was such that it was not necessary for the plaintiff to make a physical tender. Shipments were to be made, moreover, according to directions from defendant, and when it refused to give such directions after request by the plaintiff the breach was complete."

See, also, *Atkinson v. Truesdell*, 127 N. Y. 230, 27 N. E. 844.

We, therefore, think the point that a physical tender of the cars agreed to be purchased was unnecessary, and the plaintiff's exceptions to the rulings of the trial court not well taken.

The remaining questions raised on this motion relate to the measure of damages, which should control the defendant's recovery.

The plaintiff contends that the contract between the parties limits the recovery to the deposit made by the plaintiff, and further insists that, if such is not the case, the rule laid down by the trial court for the guidance of the jury was erroneous.

We proceed to a consideration of these questions in the order presented, and call attention to clauses 14, 15, 16, 17, and 18 of the contract, which provide:

"14. It is mutually agreed that the following terms of payment shall prevail in the matter of all orders, viz.:

"15. The party of the second part shall deposit with the party of the first part, at the signing of this contract 1500 dollars on each machine, which amount will be placed to the credit of the party of the second part; shipments to be made sight draft against bill of lading, f. o. b. Lansing, Mich.

"16. Accounts for parts and accessories ordered by the party of the second part shall be due and payable at the office of the party of the first part in Lansing, Mich., on or before the tenth of each month for goods ordered during the preceding month. If the party of the second part fails to remit as heretofore provided the party of the first part is hereby authorized to apply in payment of said parts account any cash deposits held by the party of the first part for account of the party of the second part, and until such deposits are restored by the party of the second part there shall be no deduction of deposits theretofore made.

"17. The party of the first part agrees, that if credit is passed to the party of the second part for parts returned and parts account has already been paid

by the party of the second part, it will, upon request, immediately send its check to the party of the second part for such credit memorandum.

"18. And it is hereby expressly agreed that in case the party of the second part shall neglect or refuse to accept or to pay for any car or cars which the party of the second part has theretofore specified, then and in that case all deposits theretofore made by the party of the second part shall belong to and be the property of the party of the first part as liquidated damages for the breach of this contract."

[5] When the contract was executed, the plaintiff deposited with the defendant the sum of \$1,500. At the time the contract, by its terms, expired, a balance of \$986.92 remained in the defendant's hands. The plaintiff contends that any right of recovery on the part of the defendant was, by the terms of the contract, limited to that amount as *liquidated damages*. It is perhaps sufficient answer that this contention is made for the first time on this motion for a new trial. It was not raised upon the trial; but, on the contrary, the plaintiff's counsel proceeded upon an entirely different theory as to the rule which should be applied in the disposition of the case. After taking exception to the rule as given to the jury by the court, plaintiff's counsel requested the court to charge that if the jury awarded damages to the defendant upon its counterclaim, "the measure of damages would be the difference between the contract price and the market price at the time and place of delivery." The court refused to charge the proposition. The request, however, shows that no claim was made on the trial that the defendant's damages were limited to the amount of the deposit in the defendant's hands as liquidated damages. Nor was the question raised by any allegation in the plaintiff's reply to the defendant's counterclaim. If the plaintiff had desired to stand on the proposition that the damages were limited to the deposit in the defendant's hands, he should have raised the question on the trial, and insisted on the rule as now claimed; otherwise he will be deemed to have waived his right. In other words, the plaintiff, by the position he took upon the trial, assumed and proceeded upon the theory that the defendant, if entitled to recover at all, was entitled to recover substantial damages, uncontrolled and unrestricted by the clause of the contract now insisted upon. It is a well-recognized rule of law that on an appeal, a case must be disposed of upon the theory upon which it was tried. *Hicks v. British Am. Assur. Co.*, 162 N. Y. 284-290, 56 N. E. 743, 48 L. R. A. 424; *Caponigri v. Altieri*, 165 N. Y. 255-263, 59 N. E. 87; *Daley v. Brown*, 167 N. Y. 389, 60 N. E. 752; *Vann v. Rouse*, 94 N. Y. 401; *Wellington v. Morey*, 90 N. Y. 656; *Tyng v. Corp. Trust Co.*, 104 App. Div. 486, 93 N. Y. Supp. 928. We, therefore, think the question cannot now be raised for the first time on this motion for a new trial.

[6] Irrespective, however, of the question as to whether the point raised is available to the plaintiff on this motion, we are of the opinion that the defendant's recovery was not limited to the deposit in its hands.

The fifteenth clause of the contract provides that:

"The party of the second part [the plaintiff] shall deposit with the party of the first part [the defendant] at the signing of the contract, \$1,500 on each machine, which amount will be placed to the credit of the party of the second part; shipments to be made sight draft against bill of lading, f. o. b. Lansing, Michigan."

An examination of the original contract will show that a printed form of a contract was used, and this form had, immediately following the words of the fifteenth clause quoted; the following additional words which were eliminated by the drawing of a pen through them, viz.: "The amount of deposit on each machine being deducted from draft as shipments are made." As the contract stands, and if construed according to its terms, the plaintiff was required to deposit with the defendant \$1,500 for *each* of the 420 cars ordered, and agreed to be purchased "at the signing of the contract." This, of course, was not done. A strict compliance with the contract in this respect was not insisted on by the defendant. One deposit of \$1,500 was in fact made, which amount was reduced at the time of the suit to \$986.92 by charging against it for extras furnished the plaintiff.

In addition there is attached to the contract a letter from the defendant to the plaintiff, in which reference is made to clause 15 of the contract, in which it is provided that when one-third of the cars ordered are delivered, one-third of the deposit is to be returned, and when two-thirds of the cars have been delivered, \$500 is to be returned, and the balance at the completion of the contract. The parties have certainly left these provisions in a hopeless jumble so far as the wording of the contract is concerned. So far as the literal reading is concerned, we have an agreement to put up \$1,500 on each machine at the time of the signing, modified by the letter that one-third of the amount is to be returned when one-third of the machines have been delivered, \$500 when another third has been delivered, and the balance on the completion of the contract.

The eighteenth clause of the contract as to liquidated damages should be read and interpreted in the light of the agreement as made, notwithstanding that a strict and literal compliance was not insisted on by the defendant. When, therefore, the eighteenth clause provided:

"And it is hereby expressly agreed that in case the party of the second part shall neglect or refuse to accept or to pay for any car or cars which the party of the second part has theretofore specified; then and in that case all deposits theretofore made by the party of the second part shall belong to and be the property of the party of the first part as liquidated damages for the breach of this contract"—

it may be argued that the parties had in view the entire deposit agreed to be made, of \$1,500 on each car of the 420 agreed to be taken. This amount would more than have indemnified and saved the defendant harmless from any loss or damage it could have sustained by reason of any failure to accept drafts, or pay for machines shipped, or which he had contracted to buy.

In any event, can the plaintiff stand on the strict letter of the contract and now insist that the small balance in the defendant's hands must be accepted and deemed the total recovery to which the defendant is entitled when that small unexpended balance was due to the failure of the plaintiff himself to comply with the strict letter of the agreement as to the amount to be deposited, owing to the indulgence of the defendant in not insisting on a strict compliance with its terms on the plaintiff's part at the time of signing? If the plaintiff is to insist on the letter of the contract, and stand on the proposition that

the contract liquidates the damages between the parties for a general breach of the contract, then the defendant has an equal right to insist that the plaintiff should make good the amount which it was stipulated should constitute the liquidated damages, that is, \$1,500 for each machine. This would leave the plaintiff in a far worse condition than he now finds himself under the ruling of the court confining the defendant's damages on the counterclaim to such losses as it actually sustained by the failure of the plaintiff to fulfill.

If, on the other hand, the contract between the parties is to be construed as fixing an amount as liquidated damages for the failure to pay for each particular car shipped pursuant to shipping specifications given, then it is plain that such damages do not relate to or cover a general breach of the contract, such as is presented by the facts in this case, and the recovery cannot be limited to the amount of the particular deposit. Whether the contract is susceptible of this latter interpretation or not, it is sufficient for the purposes of this case to say that whichever of the two interpretations is to prevail, neither of them aid or assist the plaintiff in his contention.

[7] It, however, may be said as a general proposition, that courts are disposed to regard with disfavor agreements by which the damages of parties to them are fixed at stated amounts, regardless of the actual losses sustained. Such agreements have been held valid and binding in certain cases and under certain circumstances. The disposition of the courts, however, is to treat such engagements rather in the nature of a provision for a penalty than as liquidated damages, particularly in cases where the stipulated sum is clearly disproportionate to actual losses sustained, and where the actual damages are easily and readily ascertainable, as they were in the case at bar. *Curtis v. Van Bergh*, 161 N. Y. 47, 55 N. E. 398; *Hicks v. Monarch Cycle Co.*, 176 N. Y. 111, 68 N. E. 127; *Cæsar v. Robinson*, 174 N. Y. 492, 67 N. E. 58; *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45; *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713; *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716.

In *Curtis v. Van Bergh*, 161 N. Y. 47, at page 52, 55 N. E. 398, at page 400, the court said:

"Where the sum agreed to be paid is so great as to be unconscionable, it will be regarded as a penalty, even if the parties have expressly declared their intention to be otherwise. *Kemble v. Farren*, 6 Bing. 141; *Jackson v. Baker*, 2 Edw. Ch., 471; *Spencer v. Tilden*, 5 Cow. 144; *Niver v. Rossman*, 18 Barb. 50; *Mott v. Mott*, 11 Barb. 184; *Beale v. Hayes*, 5 Sandf. 640."

In *Hicks v. Monarch Cycle Mfg. Co.*, 176 N. Y. at page 114, 68 N. E., at page 128, the court said:

"The rule is that 'when the stipulated sum is disproportionate to presumable and possible damages, or to a readily ascertainable loss, the courts will treat it as a penalty, and will rely on the principle that the precise sum was not the essence of the agreement, but was in the nature of security for performance.' *Ward v. Hudson River Bldg. Co.*, 125 N. Y. 230 [26 N. E. 256]; *Curtis v. Van Bergh*, 161 N. Y. 47 [55 N. E. 398]; 8 *Parsons on Contracts* (6th Ed.) 157."

In the case of *Cæsar v. Robinson*, 174 N. Y. 492, at page 496, 67 N. E. 58, at page 59, Judge O'Brien, speaking for the court, said:

"A provision in a contract such as that now under consideration will be treated as liquidated damages only in those cases where from the nature of the transaction the actual damages consequent upon a breach of the contract are incapable of accurate measurement, or where the sum specified in the instrument is not out of all proportion to any damages which could possibly arise from a breach. In the cases where these general features do not exist, the tendency of the courts is to treat the stipulation not as providing for liquidated damages, but in the nature of a penalty. Where the language of such a provision specifying the amount of damages to be paid in case of a breach of the contract is clear and explicit to that effect, the amount is to be deemed liquidated damages when the actual damages contemplated at the time the agreement was made are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not on the face of the contract out of all proportion to the probable loss."

These principles should obtain whether the stipulated amount is excessively large or grossly inadequate.

When we consider this case in all its bearings, with all the surrounding circumstances, we can reach no other conclusion than that the contention of the plaintiff that the defendant's damages should be limited to the \$986.92 in hand must be repudiated as unsound.

[8] It then only remains for us to consider whether the rule of damages actually laid down by the trial court for the guidance of the jury was the proper rule in this case. The court, in substance, charged the jury that, if the defendant was entitled to recover upon its counterclaim, it was entitled to recover the profits lost by reason of the breach; that is, the difference between the price agreed to be paid for the cars not taken and the cost to the defendant of furnishing the cars in question. To fully understand the situation, it will be necessary to here state certain undisputed facts bearing on the question of damages. The cars agreed to be purchased were the Reo motor cars, manufactured by the Reo Manufacturing Company, of Lansing, Mich. The defendant in this action had a contract with the Reo Manufacturing Company by which it took and handled the entire output of that factory. This contract specified the prices to be paid by the defendant for the various styles or models made by that company. The defendant in turn disposed of the automobiles so purchased by it through the means of subagencies for their sale, and by arrangements with dealers throughout the United States and Canada. No cars were to be had, except through the defendant, which, in order to facilitate and advance the sale of these cars, expended many thousands of dollars in extensive advertising of these cars in various ways—by display advertisements in various journals and magazines published throughout the country, and by exhibitions in large cities. In fact the defendant may be said to have stood practically in the place and stead of the manufacturer, for it took all cars made by it, and none were to be had except from the defendant. The defendant, by this arrangement with the factory, was able to deliver to the plaintiff all the cars agreed by him to be purchased, excepting, of course, the Model K Roadsters, which we have discussed earlier in the opinion. It in fact shipped and delivered to the plaintiff every car for which the plaintiff gave any shipping specifications, and was prepared to fulfill its contract with the plaintiff in every respect.

It is thus perfectly plain that when the plaintiff failed to carry out his contract and to pay for the cars he had agreed to purchase, the defendant necessarily lost the difference between the price which the plaintiff agreed to pay and what those cars cost the defendant at the factory. This difference, the court charged the jury, the defendant was entitled to recover, if a recovery was allowed the defendant on its counterclaim. The simple question is whether this was the correct rule of damages to be applied in this case. Section 145 of the Personal Property Law of the state lays down the general principles governing damages. It provides:

"Action for Damages for Nonacceptance of the Goods:

"1. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

"2. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"3. Where there is an *available market* for the goods in question, the measure of damages is, in the *absence of special circumstances*, showing approximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept. * * * *The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.*"

This section is nothing but a codification of the common-law rules of damages long established by the decisions of the courts.

It is to be noted in the first place in this case that there was no *available market* or *market price* of the cars agreed to be purchased. These cars are not like staple articles like wheat or other food products, where there is an established market and a market price, and any one desiring to purchase can go into the open market and by paying the price, obtain what is desired. This was a special machine, built on special models, and after special designs, only to be purchased from the defendant in this action, which took the entire output of the factory. The price the defendant established was the price that controlled. So we have a special article of manufacture, handled only by, and exclusively by, the defendant.

In the case of *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676, the Court of Appeals laid down the general rule that in cases of this general nature the injured party is entitled to recover such damages as he has sustained by reason of the breach, i. e., *the value of the contract*, not merely imaginary or speculative damages, but such as are reasonably certain, and such only as actually follow, or might follow, from such breach, and that prospective profits, so far as they can properly be proven, and which would certainly have been realized but for the defendant's default, are recoverable. This rule has been repeatedly applied and followed in various cases and under varying circumstances.

In *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225, it was held that the general rule fixing the measure of damages for a breach of a contract of sale by the vendee, the difference between

the contract price and the market value, had no application to a breach of a contract for the manufacture and sale of a commodity, unless it appears that, upon the breach by the vendee, the vendor could have placed the commodity upon the market and thus have relieved himself from the consequence of the vendee's default.

Consequently it was held that where the subject of a contract of sale at a fixed price is an article to be manufactured by the vendor, having a limited demand and no real market, the vendor was entitled to recover the difference between what it would cost him to manufacture and deliver the article under the contract and the contract price. To the same effect are the cases of *Gordon Malting Co. v. Bartels Brewing Co.*, 206 N. Y. 529, 100 N. E. 457, 461; *Belle of Bourbon Co. v. Leffler*, 87 App. Div. 302, 84 N. Y. Supp. 385; *Snell v. Remington Paper Co.*, 102 App. Div. 138, 92 N. Y. Supp. 343; *Lehmaier v. Standard Specialty Co.*, 123 App. Div. 436, 108 N. Y. Supp. 402; *Isaacs v. Terry*, etc., 125 App. Div. 534, 109 N. Y. Supp. 792; *Meyer Bros. Drug Co. v. McKinney*, 137 App. Div. 541, 121 N. Y. Supp. 845.

The facts in this case bring it squarely, we think, within the rule enunciated above. The defendant was not technically the manufacturer of the cars contracted to be purchased, but it stood, so far as its relations to the plaintiff were concerned, in that position. Under contract with the factory the defendant took its entire product. It controlled every car turned out by the factory. In other words, the Reo Manufacturing Company manufactured for the defendant alone, and was prepared and equipped to supply the defendant with all cars which it could sell. The evidence shows that the Reo Manufacturing Company in fact had on hand the constituent parts of the different styles of cars capable of being assembled and made into a completed motor car on short notice, and in time to have fulfilled any orders received from the defendant. It will be noted that the contract between the plaintiff and defendant distributed the time of purchasing the 420 cars in question over the entire year, specifying the number and kind to be taken each month, and further providing that shipping specifications should be given 30 days in advance. This timely notice was undoubtedly required so that the defendant might have ample opportunity to make the necessary arrangements with the factory for the proper assembling of the parts into the completed machine. Consequently the defendant had the same right to assert against the plaintiff the same rule of damages as would be applied had the contract run direct to the factory instead of to the defendant.

The amount of the damages was absolutely definite and certain, and was in no sense speculative. The defendant got the cars at a specified price from the factory. The plaintiff agreed to buy from the defendant for another fixed price, and the difference between these prices on the number of cars not taken was a simple matter of computation. It is only proper to add at this time that the overhead charges or expense of the defendant, the evidence showed, would have been in no way increased by the fulfilling of the contract with the plaintiff.

The number of models K and J mentioned in the contract, the jury were instructed to eliminate from their consideration in arriving at

the amount of damages in the defendant's counterclaim. This they did, and made their award solely on the number of other machines which the plaintiff failed to take and pay for. We think their verdict was correct, and that the court committed no error in the rule of damages charged.

The motion for a new trial is therefore denied.

So ordered.

(161 App. Div. 322)

PEOPLE v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Appellate Division, Third Department. March 13, 1914.)

1. WOODS AND FORESTS (§ 8*)—FIRES—FOREST PRESERVES—MEASURE OF DAMAGES.

Under Const. art. 7, § 7, providing that lands constituting the forest preserve shall be forever kept as wild forest lands, the measure of damages against a railroad company for burning trees on portion thereof is the difference in value between the land with the growing forest and the land as the foundation for a new forest, which must be planted in order to maintain the tract for the purpose for which it was set apart.

[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 8.*]

2. CONSTITUTIONAL LAW (§ 246*)—FOREST PRESERVE—DESTRUCTION—EQUAL PROTECTION OF THE LAW.

Making the measure of damages for the burning of the trees on portions of a forest preserve the difference in value between the land with the growing forest and the land as the foundation for a new forest does not deny the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 702, 709; Dec. Dig. § 246.*]

3. CONSTITUTIONAL LAW (§ 302*)—FOREST PRESERVE—DESTRUCTION—DUE PROCESS OF LAW.

Making the measure of damages for the burning of the trees on portions of the forest preserve the difference in value between the land with the growing forest and the land as the foundation for a new forest does not deny due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 851-856; Dec. Dig. § 302.*]

4. WOODS AND FORESTS (§ 8*)—FOREST PRESERVE—TIMBER.

The standing timber included in a forest preserve is not property in and of itself.

[Ed. Note.—For other cases, see Woods and Forests, Dec. Dig. § 8.*]

Smith, P. J., and Howard, J., dissenting.

Appeal from Trial Term, Franklin County.

Action by the People of the State of New York against the New York Central & Hudson River Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

McClary & Allen, of Malone (Martin E. McClary, of Malone, of counsel), for appellant.

Thomas Carmody, Atty. Gen. (John T. Norton, of Troy, of counsel), for the People.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WOODWARD, J. The complaint in this action, supplemented by the bill of particulars, alleges in substance that on or about July 11, 1908, a fire was started on the north side of defendant's right of way, at about between telegraph poles 125—05 and 125—19, on lot 21, township 20, great tract 1 of Malcomb's purchase, town of Santa Clara, Franklin county, N. Y., and about 3 to 3½ miles westerly of Saranac Inn Station, and that another fire started on or about October 16, 1908, on the north side of said right of way, and about 2½ miles westerly of Saranac Inn Station; that said fires were negligently caused by the operation of defendant's railroad, and negligently allowed to spread upon the adjacent lands of the plaintiff; that the fire of July 11th burned over about 39.18 acres, and the fire of October 16th about 461.83 acres, of plaintiff's lands, causing damages in the sum of \$27,000. The answer denies negligence in the starting of the fires or the spreading of the same, and denies all liability for the damages claimed by the plaintiff.

Upon the trial of the action the learned court took from the jury all question as to the negligence of the defendant in reference to the construction and maintenance of its engines, and confined the issue of negligence to the question whether the fires originated upon the defendant's right of way, and whether the defendant was negligent in permitting the fires to spread to the lands of the plaintiff. While the evidence was not as clear as might be desired in actions of this character, we are satisfied that it was such as to call for a submission of the defendant's negligence to the jury, and that there is sufficient evidence to support the verdict.

[1] The defendant urges, however, that, if there is sufficient evidence to support a finding of negligence on the part of the railroad company, the judgment should be reversed because of an alleged erroneous measure of damages permitted by the learned trial justice. It is conceded that the court properly charged the jury that:

"The rule of damage in a case of this character is this: That witnesses may be allowed to testify as to the value of the property before and after the burning. The difference between the two is the damage."

But it is urged that the court, in various rulings, by refusing to admit testimony as to the value of the timber left after the burning, erred to the detriment of the defendant.

The property involved in the fire is a part of the forest preserve, and the court held that, under the provisions of section 7 of article 7 of the state Constitution, the timber remaining after the fire could not be removed as salvage, and that the defendant was not entitled to any evidence showing the value of such timber for the purpose of reducing its liability. This question was presented in various aspects, and each time with an exception to the defendant, so that the matter is squarely up for determination; but we are of the opinion that it is not a ground for the overturning of the judgment in this action, for the reason that it is based upon a misapprehension of the basis of the damages to the plaintiff. The defendant says that the damage is to timber; that the plaintiff's method consisted of counting and measuring the trees that had been killed upon the property; then stating a

hypothetical question to their expert witnesses, and asking them to testify what the property was worth before the fire, with the timber alive and standing, and then what it was worth after the fire, with the timber killed. The defendant, upon its theory that it was entitled to salvage out of the killed timber remaining, took men of experience in that line of work and went over the property, estimating the value of the property with the timber alive and growing, and then the value after the fire, with the killed timber considered valueless, and also making allowances for the value of the killed timber after the fire, and it was claimed that this was the true measure of damages.

As above suggested, the difficulty with the defendant's position is that it misapprehends the foundation of the damages. The damage is not to timber but to the estate. The public policy of the state, the necessity for recreation grounds, for adequate supplies of pure and wholesome water, have combined to give to timber lands in certain portions of the state a value entirely independent of the market value of the timber on such lands. The value is found, not in the timber as such nor in the land as land, but in the combination of land and forest, conserving the water supply and preserving the game and the opportunities for recreation, and this forest preserve has a market value just because it is forest, because of the number of trees, their kind, their age, their healthfulness, etc., in conjunction with the land, and not because of any particular price that the trees would bring if taken to a sawmill. Indeed it is because of this peculiar value that the state has annually appropriated large sums of money for the purchase of these lands, so that the forest could be preserved as against the selfish interests of individual owners who were denuding the land to the detriment of the general welfare of the state, and which has resulted in a constitutional provision which says:

"The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold, or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed, or destroyed." Article 7, § 7.

It is not the land nor the trees, as such, that have the value; it is the "wild forest lands" which have the value to the state. These trees are taken out of the market as timber entirely; they are not to be "sold, removed, or destroyed," and for this reason the defendant is not entitled to any salvage. It has destroyed some portion of the plaintiff's "wild forest land" because it has killed the trees which made it such forest land, and these trees, as timber, having been wholly withdrawn from the market, the defendant is bound to pay the damage, not to the timber, but to the "wild forest land," and that damage is the difference in the value to the plaintiff between the land with the growing forest and the land as the foundation for a new forest, which must be planted in order to maintain the tract for the purpose for which it was set apart by the people of this state.

[2] This construction of our state Constitution does not violate any of the provisions of the fourteenth amendment to the federal Constitution; it is not denying to the defendant the equal protection

of the laws, for it is merely holding it to the same responsibility to which any other individual or corporation would be held where he or it had been guilty of a trespass upon the forest preserve.

[3] It is not denying due process of law, for it is only taking from the defendant the damage which the state has sustained to its "wild forest lands" by reason of the trespass, which is an entirely different kind of damage from that which would result to an individual owner whose interests did not extend beyond his own homestead. He could make use of the timber, could get the market price for it as burned timber, while his lands, for private purposes of agriculture, might be worth as much or more than for supporting the growth of timber, but in the case of the state, which is fostering its forests, the loss is irreparable.

[4] The timber is not property in and of itself, for the law has withdrawn it from the market to serve another and higher purpose, and one which might be largely defeated if the burned timber was permitted to be made use of, for it would offer inducements to forest fires in the preserve region, and the defendant has no ground for complaint if it operates its railroad under the same conditions that would apply to any other corporation or individual in the same locality under like circumstances. The defendant could not lawfully buy this timber: it could not take it under its general power of eminent domain for the purposes of its railroad; it is not property to be disposed of, but finds its peculiar value in the fact that it helps to constitute the "wild forest lands" of the state; and the true measure of damage is not the land and the trees as agricultural land and timber, the timber being estimated at its growing value before and its burned value after the fire, but is the value of the entity known as "wild forest lands" before the burning and after it, and this is what the land is worth for "wild forest lands" with the wild forest killed, and only to be replaced by time and the expenditure of money. Neither the land nor the timber can be put to any other use; in contemplation of law it has no existence as property except for the limited purpose to which it is dedicated; and, if individuals or corporations will commit trespasses upon this sacred preserve, they must expect to compensate the state of New York for this peculiar value, without diminution for salvage from the timber which, in the law as it now stands, is not timber but an ingredient of the "wild forest lands," which it is the policy of the state to preserve in the higher interests of the defendant and others within the state.

The judgment and order appealed from should be affirmed, with costs. All concur, except HOWARD, J., dissenting in an opinion in which SMITH, P. J., concurs.

HOWARD, J. (dissenting). No fixed rule for measuring the damage done by fire to the "wild forest lands" of the state has ever been adopted. In the absence of any recognized measure of damages in such cases, the plaintiff in this case undertook to prove its damages by the rule applicable between private individuals. In view of the ownership of these lands, the uses to which they are put, and the constitutional prohibitions concerning them, their value can only be fixed by an arbitrary standard. No natural standard (that is, no market stand-

ard) can be employed. The value of these forest preserve lands is entirely a matter of opinion, not of computation. How much they are worth for the purpose of conserving the water supply, how much they are worth as a rendezvous for consumptives, as a haunt for wild animals, as a Mecca for hunters, as a wilderness for recreation, must necessarily depend upon the different tastes and views of those whose opinions are sought. There would be such a wide fluctuation in these views and tastes as to render opinions on the subject wholly impracticable in measuring damages. Therefore, in fixing the value of these lands, in case of damage by fire, the courts must hit upon and establish some arbitrary rule. The rule in this case (that is, the rule employed when private parties come into court) is, in my judgment, as accurate and fair as any rule which can be thought of, provided that it is correctly applied and allowed to operate in all directions as it would operate between individuals. But in this case, as I view it, the rule was incorrectly and most unfairly applied.

When the state comes into court as a litigant, it is entitled to no more than a private suitor, to no different measure of damages. *People v. Stephens*, 71 N. Y. 527. But in this case it got more than a private suitor, and the defendant labored at a disadvantage in having the state as an opponent. The state attempted to prove the damages by swearing witnesses as to the value of the property before, and then as to its value after, the fire; the difference being the damages. The defendant by cross-examination and otherwise attempted to show that much of the burned timber could have been cut off and sold and the damages greatly lessened in this manner. This evidence was rejected on the theory that section 7 of article 7 of the Constitution forbids the removal or sale of these dead trees. Of course, between private litigants this evidence would have been entirely competent, because the Constitution would not have been in the way. And it was competent here for the reason that a rule, inapplicable to the circumstances and arbitrarily applied, was being employed.

The Constitution surely prohibits the sale of live timber, and yet in each question of the plaintiff it was assumed that the live timber could be sold. This assumption was proper because the ordinary rule of damages would have been unworkable without this assumption; but it was a lopsided application of the rule, amounting to its complete subversion, to assume that the live timber could be sold in violation of the Constitution, and that the dead timber could not be sold. This was the employment of that part of the rule which favored the state; a rejection of that part which favored the defendant. This distortion of the rule worked great harm to the defendant. It was an invocation of the Constitution to the profit of the state and to the detriment of the defendant. It denied to the defendant the "equal protection of the laws." The measure of damages employed was manifestly improperly employed. The error worked great havoc to the rights of the defendant. It was wholly unreasonable, wholly unfair. The judgment should be revoked.

SMITH, P. J., concurs.

(161 App. Div. 255)

In re WOLFF'S ESTATE.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 17*)—LETTERS OF ADMINISTRATION—GRANTING—AUTHORITY OF SURROGATE.

The Surrogate's Court has no discretion as to the granting of letters of administration; its duty being limited to following the order prescribed by Code Civ. Proc. § 2660.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

2. EXECUTORS AND ADMINISTRATORS (§ 17*)—RIGHT TO APPOINTMENT—PERSONS ENTITLED—STATUTES—CONSTRUCTION—LIMITATIONS.

Code Civ. Proc. § 2660, provides that administration in case of intestates must be granted to the relatives of deceased "entitled to succeed to his personal property," who will accept the same in the following order: (8) To any next of kin "entitled to share in the distribution of the estate." *Held*, that the words quoted constitute a limitation on the right of the next of kin to administer; and hence, where a first cousin of an intestate was not entitled to share in decedent's estate, he was not entitled to letters as against the public administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

Appeal from Surrogate's Court, New York County.

Application by Emil Wolff for letters of administration on the goods, chattels, and credits of Raphael H. Wolff, deceased. From a surrogate's order denying petitioner's application and granting letters of administration to the public administrator, petitioner appeals. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Nathaniel A. Elsberg, of New York City, for appellant.

Frank W. Arnold, of New York City, for respondent.

SCOTT, J. Raphael H. Wolff, a citizen of the United States, and resident of the county of New York, died intestate in Berlin, Germany, leaving personal property in Germany as well as in the county of New York. He left no widow or children; his only next of kin being a brother and four sisters, all of whom are resident aliens and therefore incapable of receiving letters of administration here. Code Civ. Proc. § 2661. Application for such letters was made by the petitioner, Emil Wolff, a resident of the city of New York, and a first cousin of the deceased, but not one of the next of kin of said deceased entitled to succeed to a share in his personal estate. The surrogate refused to grant letters to said petitioner, but did grant them to the public administrator. The petitioner appeals.

[1] The Surrogate's Court is vested with no discretion as to the granting of letters of administration. Section 2660, Code of Civil Procedure, prescribes to whom letters shall be granted, and all that the surrogate has to do in any given case is to follow the mandate of the statute. To do this, however, it is necessary, in the present case, to construe the statute to ascertain what its mandate is.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] Section 2660, as far as applicable, reads as follows:

"Administration in case of intestates must be granted to the relatives of the deceased, entitled to succeed to his personal property, who will accept the same, in the following order: (1) To the surviving husband or wife. (2) To the children. (3) To the father. (4) To the mother. (5) To the brothers. (6) To the sisters. (7) To the grandchildren. (8) To any next of kin entitled to share in the distribution of the estate. (9) To the executor or administrator of a sole legatee named in a will whereby the whole estate is devised to such deceased sole legatee. * * * If no relative, or guardian of a minor relative, will accept the same, the letters must be granted to the creditors of the deceased; the creditor first applying, if otherwise competent, to be entitled to preference. * * * The public administrator in the city of New York has preference after the next of kin, and after an executor or administrator of a sole legatee named in a will whereby the whole estate is devised to such deceased sole legatee, over creditors and all other persons. * * *

The real question involved in this appeal is whether or not the words "entitled to succeed to his personal property," in the first sentence of the section, and the words "entitled to share in the distribution of his estate," in the eighth subdivision, are words of qualification, so that to entitle any relative or next of kin to letters of administration it must appear that the applicant is "entitled to succeed to the personal estate" of the deceased, or is "entitled to share in the distribution of his estate."

In the case at bar, the petitioner, while a relative of the deceased, is not, strictly speaking, a next of kin, and is not entitled to succeed to or share in the distribution of his personal estate. The question involved is one which arises not infrequently, because the order in which personal property of an intestate passes to his next of kin under the statute of descent and distribution differs somewhat from the order in which the right to administer is prescribed by the section of the Code above quoted. Thus in *Matter of Patten*, 80 Misc. Rep. 482, 142 N. Y. Supp. 452, the contest for letters of administration was between a half-brother of the intestate, who took no share in his estate, but stood fifth in the order of preference in section 2660, and a grandchild who took the entire estate under the statute of distribution, but stood only seventh in the order of preference in said section 2660. If the words "entitled to succeed to his personal property" in the first sentence of section 2660 were not words of qualification controlling the right to administer in the order of preference prescribed by the section, and that right rested upon kinship alone, the half-brother who had no interest in the estate would have been entitled to administer it to the exclusion of the grandchild who was solely interested in it. If, however, the words last quoted are to be considered, as the surrogate in the case cited said they should be, as words of qualification, the grandchild, being the only person entitled to succeed to the personal property, was entitled to letters of administration in preference to any other relative of the intestate not entitled to share in such distribution, notwithstanding the apparent preference given to such other relative by section 2660.

The question under consideration has been variously decided in this state. The appellant here, and those decisions upon which he relies, follow the rule announced in *Lathrop v. Smith*, 24 N. Y. 417, which

arose under a section of the Revised Statutes (2 R. S. p. 74, § 27). That section provided that:

"Administration, in case of intestacy, shall be granted to the relatives of the deceased, who would be entitled to succeed to his personal estate, if they or any of them will accept the same, in the following order: First, to the widow; * * * Seventh, to any other of the next of kin who would be entitled to share in the distribution of the estate."

The intestate in that case had left a father and a brother, the sole next of kin. The father, who was entitled to succeed to the whole personal estate, had renounced the right to receive letters of administration, and the contest for such letters was between the brother and a creditor of the decedent. The Court of Appeals held that it had been the apparent intention of the Legislature to provide that administration should be awarded according to the kinship of applicants to the intestate, without regard to the question whether the applicant would or would not share in the personal estate. To arrive at this result, the court construed the words "would be entitled to succeed to his personal estate" as if they were "might be entitled to succeed." Judge E. Darwin Smith dissented in a vigorous opinion to the effect that the true construction of the section was:

"That the relatives of the deceased therein mentioned should respectively be entitled to share in the distribution of the personal estate of the deceased at the time of his death, to entitle them, as matter of right, to take out letters of administration upon his estate; and that the fact of an existing present interest in the estate, contingent only in respect to its amount after payment of the debts, must distinctly appear to the surrogate at the time of such application to entitle the applicant, as a matter of right, to such administration."

He referred with approval to an opinion to the same effect delivered by Surrogate Bradford, whose competency and authority as an exponent of the law of Surrogate's Courts is universally recognized. *Public Administrators v. Peters*, 1 Bradf. Sur. 100. Judge Smith also pointed out that our statute regulating the administration of intestates' estates had been copied from the English Statute upon the subject, and that the established rule in England was "that the rights of administration of the effects of the deceased follows the rights of property in them." *Lathrop v. Smith* was decided in 1862. In the following year the Legislature amended the section of the Revised Statutes, by adding to it the following:

"This section shall not be construed to authorize the granting of letters to any relative not entitled to succeed to the personal estate of the deceased as his next of kin at the time of his decease." Laws 1863, c. 362, § 3.

In 1867 the section was again amended by inserting the mother of the deceased intestate among those entitled to administer, and in this amendment the amendatory words contained in the act of 1863 were omitted. Laws 1867, c. 782, § 6. The law remained in this condition until 1896, when the law regulating the practice in Surrogate's Courts was codified and incorporated into the Code of Civil Procedure. Laws 1896, c. 686. By this act, section 2660 was enacted in its present form so far as concerns the question now under consideration; the words "would be entitled" being superseded by the single more imperative

word "entitled," a change which would seem to preclude the construction of "might be entitled" adopted in *Lathrop v. Smith*. This statute came before the General Term in the Fourth Department in *Matter of Wilson*, 92 Hun, 348, 36 N. Y. Supp. 882. The court refused to attach any significance to the change in phraseology above noted, and followed the ruling in *Lathrop v. Smith*. The point, however, was not strictly necessary to the decision of the case then before the court. The contest for administration was between the widow of the intestate and his son, and the denial of the widow's rights to administer was based upon a separation agreement executed by her, by which, as it was claimed, she had renounced and released all claims upon his personal estate. It was quite a sufficient answer to this objection to her competency to receive letters that the Surrogate's Court had no power to construe or enforce the separate agreement. The case cannot therefore be deemed of controlling authority.

Since the case last above cited, the question has not been considered by any appellate court. In *Matter of Lowenstein*, 29 Misc. Rep. 723, 62 N. Y. Supp. 819, Surrogate Varnum of the county of New York followed, without re-examination of the question, *Lathrop v. Smith* and *Matter of Wilson*. In *Matter of Seymour*, 33 Misc. Rep. 271, 68 N. Y. Supp. 638, Surrogate Silkman of Westchester county re-examined the question de novo, reviewing at length the previous decisions and the successive changes in the statutes, quoting in addition thereto, the remark of Chief Judge Church in *Cottle v. Vanderheyden*, 11 Abb. Prac. (N. S.) 17, that:

"The obvious policy of the statute is to grant administration directly to those most interested in the estate, and the appointment of the representatives of persons entitled is purposely preferred only to strangers."

The learned surrogate arrived at the conclusion that the words "entitled to succeed to the personal property" contained in the present statute were words of qualification, and that in order to claim administration as a matter of right an applicant must show not only kinship, but also a present right to succeed to the personal property. This same view was adopted by Surrogate Ketcham of Kings county in *Matter of McNamee*, 78 Misc. Rep. 324, 139 N. Y. Supp. 304, and by the surrogate from whose order this appeal is taken in *Matter of Patten*, 80 Misc. Rep. 482, 142 N. Y. Supp. 452.

After careful consideration, we are convinced that the later construction given to section 2660 of the Code of Civil Procedure by the cases last above cited is the correct one. We think that the change in phraseology adopted in the codifying act of 1896 is very significant, especially in view of the previous construction given to the language of the Revised Statutes. Careful codifiers, as were those who prepared the act of 1896, do not generally make a deliberate change in the phraseology of a statute which has been judicially construed, unless it is intended to alter in some way the meaning given to this statute by such construction. At the very least, we may attribute to the codifiers and the Legislature an intention to avoid the binding effect given to the former section by way of construction, leaving the new language to be construed as it reads, and not as the former act read. So construing the lan-

guage as it now stands, it seems to be quite clear that the words "entitled to succeed to his personal property," and "entitled to share in the distribution," are words of qualification. Otherwise they would be surplusage, and it is a cardinal rule in the construction of statutes that effect must be given, if possible, to every part of the statute. If it had been intended that administration should be granted solely on account of kinship in the order specified, the section would have read: "Administrations in cases of intestacy must be granted to the relatives of the deceased * * * who will accept the same in the following order," etc. This would have been a complete and perfect provision if the Legislature had intended to provide, as the appellant insists it did intend. We must assume that there was some intention in inserting after the words "relatives of the deceased" the qualifying words "entitled to succeed to his personal property," and if there was any intention it must have been that to entitle an applicant to letters of administration it must appear not only that he is a relative of the deceased, but also that he is entitled to succeed to the personal property. If we are right in this construction of the statute, it follows that the order appealed from is right and must be affirmed. The only relatives of the deceased who are entitled to succeed to or to share in his personal estate are nonresident aliens and incompetent to administer in this state. The petitioner is a relative and a resident, but is not entitled to share in the distribution of the personal estate. Letters must therefore issue to the public administrator.

Order affirmed, with \$10 costs and disbursements. All concur.

(161 App. Div. 79)

IN RE BALL'S ESTATE.

(Supreme Court, Appellate Division, Second Department. March 6, 1914.)

1. TAXATION (§ 895*)—TRANSFER TAX—APPRAISAL OF GOOD WILL.

Evidence in the appraisal of the good will in determining the transfer tax on the estate of a deceased member of a firm examined, and *held*, that the surrogate erred in determining its value by computing the sum of the average net profits for three years, then deducting the value of the personal services of the decedent and multiplying the remainder by two, but that, in view of the nature of the business and the circumstances involved, its value should be computed by taking the average net profits for five years and from the proportionate share thereof of the partner involved deducting the value of the personal services, and the interest on the original investment, and multiplying the balance by three.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1714-1721; Dec. Dig. § 895.*]

2. GOOD WILL (§ 1*)—NATURE.

"Good will" has been described as the advantage or benefit acquired by an establishment aside from the value of the money or property employed therein, in consequence of the general public patronage and encouragement received from customers on account of its position or celebrity or reputation for skill, affluence, or punctuality, or other circumstances or necessities, or even from ancient partialities or prejudices.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3128-3130; vol. 8, p. 7673.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. TAXATION (§ 866*)—TRANSFER TAX—GOOD WILL.

Good will is property and taxable as such under the Tax Transfer Law (Consol. Laws, c. 60 [Laws 1909, c. 62]) §§ 220, 243, amended by Laws 1910, c. 706, and Laws 1911, c. 732.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 866.*]

4. TAXATION (§ 895*)—TRANSFER TAX—GIFTS.

Evidence considered, and *held*, that a purported gift of shares of stock of a corporation by a decedent to his sons, if not merely colorable, was at least not an absolute transfer of title, but that there was a retention of ownership and control by the decedent making the shares taxable to his estate.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1714-1721; Dec. Dig. § 895.*]

5. TAXATION (§ 879*)—TRANSFER TAX.

A gift of shares of stock not intended to become complete in either enjoyment or possession until after the death of the donor is subject to transfer tax on his death.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. § 879.*]

Appeal from Surrogate's Court, Suffolk County.

In the matter of the estate of Thomas R. Ball, deceased. From a decree of the Surrogate's Court appraising the estate under the acts in relation to the transfer tax, the Comptroller of the State appeals. Reversed, with directions.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and PUTNAM, JJ.

John R. Vunk, of Patchogue, for appellant.

John W. Boothby, of New York City (Noah C. Rogers and Alfred H. Holbrook, both of New York City, on the brief), for respondents.

BURR, J. Thomas R. Ball died December 21, 1911, leaving a last will, proved before the Surrogate's Court of Suffolk county on January 6, 1912. By this will he gave to his two sons all of his interest in the assets of the firm of "Best & Co.," including merchandise, accounts, bills receivable, patents, trade-marks, good will, leases, leasehold interests, and all other property, upon conditions not here important. He also made these sons his residuary devisees and legatees. In assessing the value of the taxable transfers under said will, the Surrogate's Court was called upon to determine the value of said good will. The tax appraiser reported its value to be \$251,174.88. The Surrogate's Court reduced this to \$92,219.28. The correctness of this decision is now before us for review.

[1] In determining its value, the learned surrogate computed the sum of the average net profits of the firm of Best & Co. for three years preceding the death of Thomas R. Ball, deducted therefrom a sum estimated to be equal to the value of the personal services of said Thomas R. Ball at the rate of \$30,000 a year for said period, and multiplied the remainder by two. He claims to have found authority for this method of computation in the decision of this court in the case of *Matter of Silkman*, 121 App. Div. 202, 105 N. Y. Supp. 872.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] Mr. Justice Story says:

"Good will may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Story on Partnership (7th Ed.) § 99; *Boon v. Moss*, 70 N. Y. 465, 473.

That many of the elements referred to exist in the case at bar may not be denied. At the time of testator's death, the firm was composed of himself and his two sons, T. Arthur Ball and Ancell H. Ball, but the will contains a recital that the latter had "no interest whatsoever in the assets of said business, but only in the profits thereof." For a long time there had been no one interested therein bearing the name of Best, and yet this name had been maintained as a thing of value. The reputation of the firm, particularly as a dealer in children's clothing and supplies, was extensive. Among its trade-marks were the words "Lilliputian Bazaar," and a very large portion of its business was of the character known as "mail order" business; that is, patronage from persons who did not actually visit its shops, but, by reason of its reputation, were accustomed to trade with it through the medium of written communications sent through the mail. Decedent manifestly considered this good will of value, for in the articles of copartnership into which he entered with his two sons in March, 1904, and which were renewed in October, 1907, and again in December, 1910, among other things he contributed to the capital of said copartnership the use of the "trade-marks, furniture, fixtures, good will," etc., owned by him in the conduct of the existing business of Best & Co., and there was contained in the copartnership articles an express covenant that no interest or title of any nature, kind, or description passed to either of the sons in the "trade-marks, good will," etc., but only the use thereof so long as the firm continued; and in his will, executed on November 16, 1906, and republished with a codicil thereto on October 4, 1909, he bequeaths these to his two sons.

[3] This good will is property, and, although intangible, the transfer thereof is taxable under the law relating to taxable transfers. Tax Law (Consolidated Laws, c. 60 [Laws of 1909, c. 62, as amended by Laws of 1910, c. 706, and Laws of 1911, c. 732] §§ 220, 243); *Godley v. Crandall & Godley Co.*, 153 App. Div. 697, on page 713, 139 N. Y. Supp. 236; *Matter of Dun*, 40 Misc. Rep. 509, 82 N. Y. Supp. 802; *Matter of Hellman*, 174 N. Y. 254, 66 N. E. 809, 95 Am. St. Rep. 582; *Matter of Vivanti*, 138 App. Div. 281, 122 N. Y. Supp. 954, appeal dismissed 200 N. Y. 513, 93 N. E. 1134. The determination of the value of this intangible property is always difficult, and any rule adopted with respect to the same must of necessity be more or less arbitrary.

In Allan on the Law of Good Will (page 85) the rule is thus stated:

"The usual basis of valuation is the average net profits made during the few years preceding the sale."

In *Mellersh v. Keen*, 28 Beavan, 453, Sir John Romilly, Master of the Rolls, determined that "the average of three years' annual profits" was a fair basis of value.

In *Page v. Ratcliffe*, 75 Law Times Rep. (N. S.) 371, Mr. Justice Stirling, of the High Court of Justice, said:

"It is assessed at so many years' purchase."

And in fixing the value of the good will of a brewery, he added:

"It seems to me that competition and a desire to exclude rivals in trade would lead a brewer to give not less than three years' profit."

In *Von Au v. Magenheimer*, 115 App. Div. 84, 100 N. Y. Supp. 659, this court said, speaking through Mr. Justice Rich, that as a general rule "the value of good will may be fairly arrived at by multiplying the average net profits by a number of years, such number being suitable and proper, having reference to the nature and character of the particular business under consideration," and that the proper number of years is not a question of law, but one of fact. In the same case, on a second appeal (126 App. Div. 257, 110 N. Y. Supp. 629), it was held not to be error to refuse to charge that in estimating good will by the net profits the number of years cannot exceed five.

In *Matter of Keahon*, 60 Misc. Rep. 508, 113 N. Y. Supp. 926, the value of the good will was determined by multiplying the average net profits for a series of years by three.

In *Matter of Silkman*, *supra*, the average net profits for the three years immediately preceding the testator's death was ascertained, and this sum, multiplied by two, was held, under the circumstances there disclosed, to be a fair basis of computation. But that it was not thereby intended to establish this as an inflexible rule of computation is clear from the fact that the writer of the opinion, the present Presiding Justice of this court, quotes with approval the language of Mr. Justice Rich in *Von Au v. Magenheimer*, *supra*.

It appears in the case at bar, from the balance sheet in liquidation, that the value of the entire assets of Best & Co., exclusive of good will, was \$178,405.12, of which \$137,710.96, or about 70 per cent. thereof, was in the ownership of Thomas R. Ball. The net profits for the years immediately preceding his death were, in 1907, \$210,-911.66; in 1908, \$142,845.94; in 1909, \$165,033.80; in 1910, \$130,-915.46. In the year 1911 there was a loss amounting to \$67,620.32. In that year the firm of Best & Co. moved from 62 West Twenty-Third street, where it had been located for many years, to the north-west corner of Fifth avenue and Thirty-Fifth street, where it is now located. The effect of this change was not to diminish the yearly gross sales of the concern; on the contrary, they exceeded those of the previous year by about \$156,000, and the average for the preceding years, from 1907 down, by a still greater sum. The expense account for 1911 was, however, greatly increased. But one very large item therein was the rent of the Twenty-Third street store, which was substantially unoccupied, and the lease for which had a year still to run, and which rent, over and above the amount received from subtenants, was \$42,247.50. In addition, there was some outlay for actual moving

expenses, amounting to about \$2,000, and a charge for fixtures in connection with fitting up the new store on Fifth avenue, relatively much greater than would have been the case if the firm had remained in West Twenty-Third street, judging from similar expenditures made in preceding years. The conditions for the year 1911 were so unusual that, to obtain a fair average of net profits, we feel justified in computing the same from the year 1907, so that the bad year at one extreme is offset by a good year at the other, with three intervening years showing approximately similar net profits. So computed, the average yearly net profits for the period were \$116,417.31, of which Thomas R. Ball's share was \$81,492.12.

Three factors may be said to enter into net profits: First, interest on the capital; second, personal services of the party; and, third, the reputation or good will of the concern. By the partnership agreement Thomas R. Ball was to receive 6 per cent. upon the capital invested by him. This amounts to \$6,985.02. There is some evidence that the personal services of Thomas R. Ball were of the value of \$30,000 per year. If we deduct from his share of average annual profits these two amounts, we have as the annual value of the good will, all of which belonged to him, the sum of \$44,507.09. Strictly speaking, it might be a little more than this, since this is estimating its value upon the amount of decedent's share of the net profits only, and not upon those of his copartners also, although the entire good will was his property, and of this good will, as well as of his personal services, his copartners had the benefit during his life. If we deem the gross value equal to three years' purchase, we have as a result the sum of \$133,521.27. Substantially similar results would follow if, from the average annual profits, we deduct 6 per cent. interest on the entire capital invested at the time of the devolution, to wit, \$178,405, and salaries for all three parties, stated to be \$60,000, and deduct the same from the entire net profits. The annual value of the good will thus computed would be \$45,713.01, and three years' purchase of this would be \$137,139.03. Therefore we deem the former figure, to wit, the sum of \$133,521.27, as a conservative estimate of the value of such good will, and we accordingly find this to be the value thereof, and reverse the finding of fact of the Surrogate's Court that such value was only \$92,219.28.

[4] The second question determined by the said Surrogate's Court related to ownership of stock in the Ball Realty Company. The Ball Realty Company was incorporated in the year 1906, with a capital stock of \$100,000. It was a close corporation, having but four stockholders, Thomas R. Ball, his son Ancell H. Ball, his son T. Arthur Ball, and Charles H. C. Duncan, who was superintendent of Best & Co., and the "confidential man" of the concern. Apparently it was formed chiefly to be a holding company for the real property acquired, either in fee or upon lease, at the corner of Fifth avenue and Thirty-Fifth street, now occupied by the firm. Its present assets over liabilities are of the conceded value of \$508,265.59. Although organized in 1906, no stock was actually issued until the following year. On August 15, 1907, six certificates were issued, as follows: No. 1 to Thomas

R. Ball for 500 shares; No. 2 to Thomas R. Ball for 490 shares; No. 3 to Charles H. C. Duncan for one share; No. 4 to T. Arthur Ball for one share; No. 5 to Ancell H. Ball for one share; and No. 6 to Thomas R. Ball for 7 shares. No other certificates of stock have since been issued to any person. According to the affidavit of Charles H. C. Duncan, submitted to the appraiser in June, 1912, upon the succeeding day the stock transfer upon the back of three of these certificates was signed by Thomas R. Ball, but the blanks thereon have never been filled up, nor has any transfer of the stock been made upon the stock book of the corporation. The affidavit states that certificates 1, 2, and 5 were thus indorsed. Certificate No. 5, for 1 share, had been issued to Ancell H. Ball, and not to Thomas R. Ball. As the same affidavit states, however, that these certificates were for 500, 490, and 7 shares, respectively, it may be that it was certificate No. 6 that was so indorsed by him. It also appears that, at some time not specified, the other certificates were also indorsed by the persons to whom they had been issued. On August 19, 1907, in the presence of said Duncan, according to his affidavit, Thomas R. Ball took certificate No. 1, for 500 shares, and put it in an envelope which had written upon it the words: "T. Arthur Ball, Aug. 19, 1907. 500 shares. B. R. Co."—and handed the envelope to T. Arthur Ball, and said, "I give you half of the stock of the Ball Realty Company." He then took certificate No. 2, for 490 shares, issued to him, certificate No. 3, for one share, issued to Duncan, certificate No. 4, for one share, issued to T. Arthur Ball, certificate No. 5, for one share, issued to Ancell H. Ball, and certificate No. 6, for 7 shares, issued to himself, put these in another envelope, which had written upon it the words: "Ancell H. Ball. Aug. 19, 1907. 500 shares, B. R. Co."—and handed it to his son Ancell, and said, "I give you one-half of the stock of the Ball Realty Company." He then said to Duncan, "Now you are a witness to my delivery of the shares of the Ball Realty Company to my two sons." One of the sons, the affiant cannot state which, then handed these envelopes to him, and he put them in a safe belonging to the firm of Best & Co., where they remained until after the death of Thomas R. Ball. They were locked up in a compartment of this safe, of which there were three keys. Duncan had one, H. Ball (if by this description is intended Ancell H. Ball) had another, and there is no evidence who had the third key. It may be that if this was the whole of the transaction, and there were no circumstances tending to contradict the inferences to be drawn therefrom, a completed gift *inter vivos* would be established.

[5] But, when we consider the entire evidence relating thereto, it scarcely admits of doubt that, if the transaction was not a mere pretext to evade the payment of the transfer tax, at least the gift was one not intended to become complete in either enjoyment or possession until after the death of the donor. In such case the transfer is subject to tax. *Matter of Bullard*, 76 App. Div. 207, 78 N. Y. Supp. 491; *Matter of Jones*, 65 Misc. Rep. 121, 120 N. Y. Supp. 862; *Matter of Raleigh*, 75 Misc. Rep. 55, 134 N. Y. Supp. 684.

Proceedings before an appraiser to determine the value of taxable

transfers of a decedent's property are quite informal. After this affidavit by Duncan had been submitted, he was produced before the appraiser, for cross-examination by the comptroller, on November 26, 1912. The stock book was offered in evidence, from which it appeared that the stock still stood in the names of the parties to whom it was originally issued. At that time Duncan testified that he was still the owner of one share of stock, represented by certificate No. 3, which was included in the stock purporting to have been the subject of the gift to Ancell H. Ball. At a subsequent date, December 4, 1912, the stock certificates were produced by Duncan, and offered in evidence by the comptroller, for the limited purpose of showing that no stamps had been affixed thereto. At the date of the alleged transfer, in August, 1907, the Tax Law provided as follows:

"There is hereby imposed and there shall immediately accrue and be collected a tax as herein provided, on all sales, or agreements to sell, or memoranda of sales, or deliveries, or transfers, of shares or certificates of stock, in any domestic or foreign association, company or corporation, made after the first day of June, nineteen hundred and five, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money or the future transfer of any stock, on each share of one hundred dollars of face value or fraction thereof, two cents. * * * The payment of such tax shall be denoted by an adhesive stamp or stamps affixed as follows: In a case where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer of a certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale to which the stamp provided for by this article shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers, and no further tax is hereby imposed upon the delivery of the certificate of stock, or upon the actual issue of a new certificate when the original certificate of stock is accompanied by the duly stamped memorandum of sale." General Laws, c. 24 [Laws of 1896, c. 908, as amended Laws of 1905, c. 241, and Laws of 1906, c. 414] § 315.

In this case there is no evidence of transfer shown on the books of the company, and, if there was any change of ownership, the evidence of the payment of the tax must be found in the stamps placed upon the certificates thereof. The same act further provides that:

"No transfer of stock made after June first, nineteen hundred and five, on which a tax is imposed by this article, and which tax is not paid, at the time of such transfer shall be made the basis of any action or legal proceeding, nor shall proof thereof be offered or received in evidence in any court in this state." *Id.* § 323.

If the point is properly raised, failure to pay the tax thus imposed at the time of the transfer of stock is sufficient to defeat a claim to title arising therefrom, and proof shall not be received in any court of this state respecting the same. *Bean v. Flint*, 138 App. Div. 846, 123 N. Y. Supp. 385, affirmed 204 N. Y. 153, 97 N. E. 490; *Sheridan v. Tucker*, 145 App. Div. 145, 129 N. Y. Supp. 18. It is true that in *Bean v. Flint*, *supra*, the Court of Appeals held that the provisions

of the statute did not impose upon the transferees of stock, as a condition precedent to a good pleading for a cause of action arising out of such transfer, the duty of affirmatively showing the affixing of stamps, but that the failure so to do must be set up as a defense.

In the case at bar there were no pleadings. The alleged transferees are claiming as against the estate of Thomas R. Ball, which is the record owner of the stock upon the books of the company, solely through the transfer above referred to. While it is true that in the first instance the affidavit of Duncan was received as his direct examination, as soon as it appeared through cross-examination that no stamps had been affixed to the certificates themselves at the time of the alleged transfer, the comptroller moved to strike out his direct testimony, and this motion was, we think, improperly denied. Not only, then, are the alleged transferees without any competent evidence of such transfer, but the remaining evidence in the case affirmatively establishes that none of the parties contemplated that this transfer should be effective at the time that it is alleged it was made. For four years thereafter the affairs of the corporation were conducted precisely as if Thomas R. Ball were still the owner, not only of a majority, but substantially of all, of the capital stock of the company. He was re-elected director, and thereafter president, from year to year. It is true that the certificate of incorporation provided that a director need not be a stockholder, but the by-laws of the corporation were not put in evidence, and we are not informed whether this privilege was availed of. Far more significant, however, than this or any other omission on the part of the transferees is the affirmative acts of the stockholders, including the said T. Arthur Ball and Ancell H. Ball. Although, if this was a bona fide transfer to take effect in possession and enjoyment at once, between 1907 and 1911 Thomas R. Ball was not the owner of a single share of stock, nor indeed was any other person except his sons, by a unanimous vote of all the directors and the four original stockholders above named Thomas R. Ball was given sole authority to acquire the real property necessary for the use of Best & Co. at the corner of Fifth avenue and Thirty-Fifth street, or his previous purchases of a portion thereof, without express authority, were subsequently ratified. Still more significant was the action of the same original stockholders and directors at a directors' meeting held January 12, 1911. It would appear that prior to December 28, 1910, Thomas R. Ball had advanced large amounts of money out of his own funds toward the acquisition of said property. On the latter date, in the presence of Mr. Duncan, a written instrument was executed by Thomas R. Ball, which, among other things, contained a recital that he was a "large stockholder in the Ball Realty Company," and that he was "desirous of conserving its resources, with a view of making valuable the stock of said Ball Realty Company and insuring its financial stability." Thereupon he assigned by said instrument to said company any and all claims which he had, "or might have by reason of any moneys advanced by him on account of either of the properties aforesaid, or which may be advanced by him in the future in connection with completing the building erected at the northwest cor-

ner of Thirty-Fifth street and Fifth avenue." He thereupon, by the same instrument, released the said company from all claims and demands of every nature, kind, and description whatsoever. This release was on motion of Ancell H. Ball accepted, and the minutes of the meeting contained a recital in connection therewith that at that time Thomas R. Ball was a "majority stockholder in said company." The attempted explanation of these entries does not impress us forcibly. The lawyer who drew the release states that he drew it at the request of Thomas R. Ball, and that he "did not know at the time that he had given his stock in the concern to his two sons." It may be that Thomas R. Ball was likewise ignorant that any effect would be given to the alleged transaction of August 17, 1907, which would prevent him from being a "majority stockholder" during his lifetime. T. Arthur Ball testifies that according to his recollection the paper was read at the directors' meeting, but "no particular attention was paid to the wording of it," because "the meetings of the Ball Realty Company were more or less perfunctory, and the company was entirely a family affair." It certainly did not affect the "entire family," if Thomas R. Ball was no longer a stockholder therein. Ancell H. Ball also testified that the company was "entirely a family affair," and he does not recollect that the release was even read at the meeting. Charles H. C. Duncan also thus testifies, and that the minutes of the meeting "were written up by Mr. Barrett, who had charge of the records of the Ball Realty Company and was present at the meeting." But Mr. Barrett was not called as a witness, nor is there even an affidavit from him that the minutes which he thus transcribed did not correctly set forth exactly what occurred. The two sons of Mr. Ball are claiming large benefits through this release to a company of which they are now at least the principal stockholders. We are deprived of the testimony of Thomas R. Ball as to the accuracy of the recitals contained in it. Under such circumstances, so long as the former retained the benefit, it is not inequitable that they should be bound also by the recital.

We find, therefore, that the stock of the Ball Realty Company was not transferred by any assignment to take effect in possession or enjoyment during the lifetime of Thomas R. Ball, and that the transfer thereof is taxable, and we reverse the finding of the surrogate to the contrary.

The decree of the Surrogate's Court of Suffolk county is reversed, with costs to the appellant, payable out of the estate, and the proceedings are remitted to said Surrogate's Court to fix the transfer tax in accordance with this opinion. All concur.

(161 App. Div. 127)

HILLS v. FLYNN et al.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. **PLEDGES (§ 25*)—RIGHTS OF PLEDGEE—PROSECUTION OF DEBT TO JUDGMENT.**
A pledgee does not destroy the pledge or affect his rights under it by prosecuting his debt to judgment.

— [Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 51-57, 60; Dec. Dig. § 25.*]

2. **WILLS (§ 634*)—CONSTRUCTION—VESTED INTERESTS—ASSIGNMENT.**

Testator devised certain real property to his executors in trust to apply the income to the use of his daughter for life, after her death the trust to cease, and the property to pass with its appurtenances to her children, if any, then living or to the issue of any child then dead. Testator then made his two sons, G. and F., his residuary legatees, and devised the residue to them and their heirs. G. died, leaving him surviving four children as his only heirs. Thereafter one of the children died intestate, unmarried, and without issue, at which time one of the other children assigned his interest under the will to his grandfather's estate to pay an indebtedness. *Held*, that such child, at the time of the assignment, was possessed of a vested assignable remainder in one-sixth of the trust estate, subject to the contingency that the life tenant should die leaving issue, and, she having died without issue, the interest passed under the assignment.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

3. **REMAINDERS (§ 17*)—OPERATION OF LIMITATIONS—TIME—TERMINATION OF LIFE ESTATE.**

Where one of the heirs of a remainderman had a vested assignable interest in one-sixth of certain trust property, subject to the termination of a preceding life estate, limitations did not begin to run against the right of a pledgee of such interest to enforce the same until the termination of the life estate.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12-17; Dec. Dig. § 17.*]

Submission of controversy on agreed statement of facts by William E. Hills as administrator of the estate of George Eliot Sill, deceased, against Henry S. J. Flynn as receiver in supplementary proceedings, and the United States Trust Company of New York as trustee. Judgment for plaintiff.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Katz & Sommerich, of New York City (William E. Hills, of New York City, of counsel, and Otto C. Sommerich, of New York City, on the brief), for plaintiff.

Miller & Bretzfelder, of New York City (Bertram Bodenheimer, of New York City, of counsel), for defendants.

CLARKE, J. On August 23, 1894, George E. Sill of Hartford, Conn., loaned \$3,385.45 to Hubert K. Wood, and received from him the following instrument:

"Hartford, Conn., Aug. 23, 1894.

"On demand after date I promise to pay to George Eliot Sill or order the sum of three thousand three hundred and eighty five 45/100 dollars, with interest at the rate of six per centum per annum from date.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"To secure the payment of the above amount and any accumulated interest I hereby assign and set over to the said George Eliot Sill all my right, title and interest in and to a certain trust created by the will of my late grandfather George Wood of New York City; which trust is now held by Frederick Wood of Morristown, N. J., as trustee for the benefit of Julia Wood of Morristown, N. J., and my proportion of which trust is payable to me or my order at the death of the said Julia Wood. Provided that any balance remaining after the payment of the above amount and any accumulated interest shall be paid over to me.

Hubert K. Wood."

The will of George Wood admitted to probate by the Surrogate's Court of New York County, November 10, 1862, created a trust of certain real property for the benefit of Julia Wood for life. The United States Trust Company was appointed substituted trustee of said trust by a decree of the Surrogate's Court January 23, 1896. Said trust on September 3, 1909, was represented by a fund upwards of \$30,000, held by said company as substituted trustee for the benefit of Julia Wood and remaindermen, and the said Hubert K. Wood is one of said remaindermen. Julia Wood died April 5, 1913, and the said trust became then distributable. The share of H. K. Wood in said fund amounted to \$5,153.51. Prior to June 7, 1901, George Eliot Sill died intestate. George G. Sill was duly appointed administrator, and on said date as administrator recovered a judgment in the superior court of Hartford County, Conn., against Hubert K. Wood upon the aforesaid note, which judgment was duly docketed, and was for the amount of \$5,605.73, damages and \$26.45 costs. Thereafter George G. Sill died, and Harry M. Burke of Hartford was duly appointed administrator de bonis non of the estate of George Eliot Sill. Upon the death of George G. Sill, the sole beneficiaries of the estate of George Eliot Sill were and still are William R. Sill and Helen Sill Wood, a sister, who are now the sole surviving next of kin of the said George Eliot Sill and George G. Sill.

On September 3, 1909, said Hubert K. Wood executed and delivered an instrument to Charles B. Barkley by which he granted, bargained, and conveyed all his right, title, and interest in and to the said trust fund to the full extent of \$4,000, together with interest at the rate of 6 per cent. thereon from the date of the death of said Julia Wood, and appointed the party of the second part his true and lawful attorney for his own benefit to make demand, sue for, and collect said amount. In said instrument he expressly subordinated his assignment to the estate of George E. Sill to this assignment to Barkley. Prior to the said transfer to Barkley the said Burke as administrator, with the consent of the heirs at law and next of kin of said George Eliot Sill, released, to the extent of \$4,000, and interest, the said assignment made by Hubert K. Wood to George Eliot Sill, and so informed the United States Trust Company.

On February 14, 1913, the Nestor Manufacturing Company a New York corporation, duly recovered judgment against Hubert K. Wood in the Municipal Court, borough of Manhattan, and a transcript was duly docketed in the office of the county clerk, for \$431.63. Thereafter an execution was duly issued, and returned wholly unsatisfied. On April 9, 1913, an order in supplementary proceedings was made

thereon. Wood appeared and was examined. On May 14, 1913, an order was made and duly served upon the Trust Company to appear as a third party for examination in supplementary proceedings upon said judgment, and in said order there was a provision enjoining the Trust Company from disposing of any property belonging to said Wood then in its possession.

On October 16, 1913, the defendant Flynn was duly appointed receiver in supplementary proceedings, and the order was duly filed and Flynn duly qualified. On October 8, 1913, the plaintiff, Hills, was duly appointed administrator in the place of Burke in the probate court of Hartford.

The injunction contained in the order of May 14th was modified by a stipulation executed by Nestor Manufacturing Company, Wood, Flynn as receiver and the Trust Company and an indenture executed by said parties and Hills, Barkley, and William R. Sill and Helen Sill Wood. Pursuant to said instruments the Trust Company holds the sum of \$550, of the share of Wood in said trust fund, subject to the adjustment of the claims thereto of his creditors, Nestor Manufacturing Company and the estate of George Eliot Sill, deceased, his assignee. Pursuant to said instruments the Trust Company has paid out the balance of Wood's share, \$4,603.51, to Barkley and Hills as administrator. No action was ever brought in the New York courts upon the said judgment record in the state of Connecticut, and the said assignment from Wood to Sill was never filed in the office of the clerk of the county of New York. Notice of the assignment from Wood to Sill was given to the Trust Company prior to the assignment to Barkley. The said Wood was a resident of Connecticut until the first half of the month of September, 1907, and since has been and is now a resident of New York. No part of the said judgment and note has been paid. Said assignment from Wood to Sill was in good faith, for valuable consideration. In Connecticut there is no limitation, by statute or otherwise, setting the time during which an action upon a judgment recovered in that state, or any other state, shall be brought.

This agreed statement of facts is without prejudice to the running of the statute of limitations, if the same has run against the said assignment from Wood to Sill, or the indebtedness secured thereby.

Plaintiff demands judgment, decreeing that the defendant United States Trust Company pay to him, as administrator de bonis non of George Eliot Sill, deceased, the said sum of \$550 on account of said assignment. Defendant Flynn prays for judgment decreeing that the company pay said sum to him as receiver in supplementary proceedings upon the judgment recovered by the Nestor Manufacturing Company against Wood. The defendant Trust Company prays for judgment decreeing to whom it shall pay out the said sum.

The plaintiff claims that the note and assignment, as security, constitute a pledge, that it is a chose in action, and that the pledgee may retain or sell the pledge, though the debt to secure which the pledge was given is outlawed.

[1] The question involved is what interpretation shall be given to the instrument, Exhibit A. It was an unsealed promissory note dated

August 23, 1894, containing an assignment of so much of Wood's vested remainder in a trust estate limited on the life of Julia Wood, the cestui que trust, as would pay the amount thereof. As against the note itself the statute of limitations has run, but judgment was obtained on the note in Connecticut before the running of the statute. The entry of judgment does not affect the assignment.

"A party who holds property under a pledge to secure a debt of the pledgor does not destroy the pledge or affect his rights under it by prosecuting his debt to judgment. The pledge still remains the security for the judgment debt, or so much of it as it was originally made to secure." *Sickles v. Richardson*, 23 Hun, 568. See, also, *Fisher v. Fisher*, 98 Mass. 308; *King v. Hutchins*, 28 N. H. 561.

[2] As appears by Exhibit C, the grandfather of Hubert K. Wood by his will devised to his executors in trust certain real estate to apply to the use of his daughter, Julia Wood, for and during her life, and after her death the trust is to cease, and upon her death the testator gave the said trust estate with appurtenances to her children, if any, then living or to the issue of any child then deceased. The said will further made his two sons George and Frederick his residuary legatees, and gave to them all the rest and residue of his real and personal estate in equal shares to hold to them and to their heirs. George Kip Wood, the father of Hubert Kip Wood, one of the residuary legatees and devisees under said will, died on or about the year 1873, leaving him surviving George E. Wood, Louise M. Wood, Allen G. Wood, and Hubert K. Wood, his children and only heirs at law. Thereafter Allen G. Wood died intestate, unmarried, and without issue. Therefore, at the time of the execution of the assignment in question, Hubert K. Wood as one of the three surviving heirs of his father, was possessed of a remainder in one-sixth of the trust estate left by his grandfather to his aunt, Julia Wood, subject to be divested upon her having issue. She was then 72 years of age and unmarried. She died April 5, 1913, unmarried and without issue, and, as Hubert K. Wood survived her, he became absolutely vested as remainderman in one-sixth of said trust estate.

In *National Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846, affirmed on the opinion below, 203 N. Y. 556, 96 N. E. 1122, Mr. Justice Miller said:

"The will of Chester Billings, deceased, does contain a gift to appellant, not in express words, but in a direction to trustee to divide and pay; wherefore futurity is annexed to the substance of the gift, the same as though there were express words of gift, with futurity annexed to the substance thereof by express words. * * * The appellant then acquired, upon the death of his father, not a bare possibility merely, but the right to the possession and enjoyment of one-half of his father's estate in the event that he should attain the age of 25 years and survive his mother, and that right was not subject to the will of a third party. The question is whether such a right or interest is property within the meaning of section 1871 of the Code of Civil Procedure. * * * It has been assumed by this court in this and the Second Department that a future contingent interest in personal property is alienable, the same as a contingent remainder in real property. See *Stringer v. Barker*, 110 App. Div. 37 [96 N. Y. Supp. 1052]; *Cohalan v. Parker*, 138 App. Div. 849 [123 N. Y. Supp. 343]. * * * If the said interest was a contingent remainder in real property, there can be no doubt that it would be alienable. Real Prop. Law (Consol. Laws, c. 50; Laws 1909, c. 52) §§ 36-40, 59. * * *

"For what reason or upon what principle can it be said, then, that a future contingent interest in personal property is not assignable at law as well as in equity? Not because such right or interest does not exist, because we have seen that it is a present right, which cannot be defeated by the act of a third party, and which will ripen into an estate in enjoyment upon the happening of a contingency. * * * In this case there is no uncertainty of the person; the appellant is named as the donee; he will take only upon the contingency of his surviving his mother, but his being then in existence is no part of the description of him, as donee. His survivorship being one of the contingencies, his contingent interest is of course not transmissible to his personal representatives; whereas, if the contingency were some other event, it would be transmissible. *Kenyon v. See*, 94 N. Y. 563. But that fact does not militate against its assignability, as shown by *Woodruff, J., in Moore v. Littel*, 41 N. Y. at page 86. Surely an interest which is transmissible to personal representatives is a property interest, and should be held to be assignable as well in law as in equity. A contingent interest is always subject to be defeated, else it would not be contingent; the nature of the interest, as a species of property, is not affected by the contingency upon which it will vest in possession; there being no uncertainty as to the person. If the survivorship of the donee be the contingency, it will not be transmissible to his personal representatives, but it may still be assignable, the assignee of course taking subject to the chance that it may never vest in possession."

It is clear therefore that the interest of Wood in the trust estate created by his grandfather's will was alienable by him. It is also clear that he assigned so much thereof as was needed to pay the debt evidenced by the note, and that due notice of the assignment was given to the trustee long before the trust terminated. While alienable, the portion of the remainder assigned could not be presently reduced to possession, but, after the notice, the trustee held such portion of the remainder as trustee for the assignee, and, upon the falling in of the life estate, it was the trustee's duty to pay it to its owner, said assignee. At the time the judgment was obtained by the Nestor Manufacturing Company, execution issued, and a receiver appointed, the portion of the share of the remainder as theretofore assigned to Sill had ceased to be the property of Wood, and was owned by Sill's estate. Although being property and so owned, said estate was not, and did not need to be, in the actual possession thereof. It was in possession of the assignment, which was enough. It was not the property of Wood, and therefore his receiver did not and could not acquire any right, title, or interest therein in hostility to the assignee.

In *House v. Carr*, 185 N. Y. 453, 78 N. E. 171, 6 L. R. A. (N. S.) 510, 113 Am. St. Rep. 936, 7 Ann. Cas. 185, Chief Justice Cullen said:

"A pledgee may retain or sell the pledge, though the debt to secure which the pledge was given is outlawed. *Jones v. Merchants' Bank of Albany*, 6 Rob. 162; *Jones on Pledges*, § 582. This is not on the theory that by lapse of time title has vested in the pledgee, for the law is otherwise (*Jones on Pledges*, § 581), but because the statute bars merely the remedy by action."

[3] I cannot see how any statute of limitations can be held to have run against this claim. The assignee had done all that he was called upon to do by filing notice with the trustee. It was impossible for any one to collect during the lifetime of the cestui que trust. If we should look at the assignment as a pledge, no duty devolved upon the

assignee to sell his claim. He had a right to hold it until it was collectible.

In *Hulbert v. Clark*, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59, Judge Earl said:

"It is a general rule, recognized in this country and in England, that when the security for a debt is a lien on property, personal or real, the lien is not impaired because the remedy at law for the recovery of the debt is barred."

The plaintiff, as the administrator of the assignee, Sill, is entitled to judgment decreeing that the United States Trust Company shall pay to him the sum of \$550, without costs to any party. All concur.

(161 App. Div. 154)

ECKERT v. PAGE et al.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. WILLS (§ 324*)—CONTEST—QUESTIONS FOR JURY.

Questions of fact in will contests are to be determined the same as in other actions, and if different inferences may fairly be drawn from the testimony, the question should be submitted to the jury.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 225, 767-770; Dec. Dig. § 324.*]

2. WILLS (§ 386*)—REVIEW—FINDINGS.

The Appellate Court will not hesitate to set aside a finding by the jury of undue influence in the execution of a will, where there is no satisfactory evidence to sustain it.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 859; Dec. Dig. § 386.*]

3. WILLS (§ 163*)—UNDUE INFLUENCE—BURDEN OF PROOF.

The burden of proving undue influence in the execution of a will is upon the party who asserts it.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 388-402; Dec. Dig. § 163.*]

4. WILLS (§ 166*)—UNDUE INFLUENCE—EVIDENCE.

While undue influence in the execution of a will is seldom susceptible of direct proof, nevertheless there must be affirmative evidence of the facts from which such influence can fairly and reasonably be inferred.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

5. WILLS (§ 166*)—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

Evidence in a will contest held to sustain a finding that the will was procured by undue influence.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

6. WILLS (§ 166*)—UNDUE INFLUENCE—EVIDENCE.

Where the disposition made by a will is unnatural, less evidence is required to establish undue influence, in the absence of evidence showing the reason of such unnatural disposition.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

Appeal from Trial Term, New York County.

Action to set aside the probate of the will of Thomas T. Eckert, deceased, brought by James Clendenin Eckert against Richard G. Page

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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and another, executors, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

See, also, 156 App. Div. 935, 141 N. Y. Supp. 1117.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

De Lancey Nicoll, of New York City, for appellants executors and trustees.

Ronald K. Brown, of New York City, for appellant guardian ad litem.

Charles E. Rushmore, of New York City, for respondent.

McLAUGHLIN, J. This action was brought pursuant to section 2653a of the Code of Civil Procedure to set aside the probate of the will of Thomas Thompson Eckert, deceased, upon the ground that it was not properly executed, was the result of undue influence, and that the testator did not have testamentary capacity. The trial court withdrew from the consideration of the jury the execution and testamentary capacity, and submitted only the question of undue influence. A verdict was rendered in favor of the plaintiff, setting aside the probate, and from the judgment entered thereon declaring the will invalid two of the executors and trustees named therein, one of them individually, and a legatee represented by a guardian ad litem, appeal. They contend that the judgment is erroneous because there was not sufficient evidence to justify a submission of the question of undue influence to the jury, and if there were, the verdict is against the weight of evidence.

[1-4] Questions of fact arising in actions brought to test the validity of wills are to be determined in precisely the same way as are questions of fact in other actions. If different inferences may fairly and reasonably be drawn from the testimony or evidence, then the facts must be determined by the jury. *Hagan v. Sone*, 174 N. Y. 317, 66 N. E. 973. But the court proceeds with great caution in setting aside the probate of a will on the ground of undue influence. It requires that fact to be established by satisfactory evidence, and, if it is not, then it never hesitates to set aside the finding of a jury to the contrary. *Gardiner v. Gardiner*, 34 N. Y. 155; *Children's Aid Society v. Loveridge*, 70 N. Y. 387; *Smith v. Keller*, 205 N. Y. 39, 98 N. E. 214. The burden of proving undue influence is upon the party who asserts it; and, while it is seldom susceptible of direct proof, nevertheless, in each case, there must be affirmative evidence of the facts from which such influence can fairly and reasonably be inferred. *Hagan v. Sone*, supra; *Matter of Budlong*, 126 N. Y. 423, 27 N. E. 945; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Delafield v. Parish*, 25 N. Y. 95.

[5] Keeping these rules in mind, let us briefly consider some of the evidence for the purpose of ascertaining (a) whether the jury were justified in drawing an inference that the will under consideration was the result of undue influence, and (b) whether its finding to that effect were sufficiently sustained by the evidence.

The testator died on the 20th of October, 1910, then, in his ninety-third year, leaving him surviving as his only heirs at law and next of

kin two sons, the plaintiff, 56 years of age, and the defendant Thomas T. Eckert, Jr., 53 years of age. He made the will which is the subject of this controversy on the 30th of the preceding August, and it disposed of an estate of the conceded value of at least \$1,650,000. By it he gave to the plaintiff's daughter real property of the value of \$30,000, provided she lived to be 25 years of age, and if she died prior to that time the same to her issue; in default of issue, then the property was to become a part of his residuary estate. To his brother William and two nieces \$5,000 each. To his son Clendenin, the plaintiff, \$50,000 outright, and a life estate in \$100,000, with remainder to his children. To his other son Thomas, the residuary legatee, the balance of his estate of the value of at least \$1,470,000. The twelfth clause of his will was to the effect that if any beneficiary, either directly or indirectly, contested the validity of his will, or any part thereof, he thereby forfeited all benefits to be received thereunder. He appointed as his executors and trustees his two sons and his secretary, the defendant Page.

[8] The will, so far as the two sons are concerned, is an unnatural one, and, in the absence of proof showing why one is so much more favored than the other, less evidence is required to establish undue influence. The testator, for several years prior to his death, had two residences, one in the city of New York, and a summer residence at Elberon, N. J. The will in question was executed at the latter place. The son Thomas, unmarried, had lived with and been supported by his father since about 1890. The son Clendenin married quite early in life, and from that time did not live with the testator, and, at the time the will was executed, was living in Chicago. Notwithstanding the plaintiff had for several years lived apart from the testator, he and his family frequently visited him, and all the evidence tends to show, certainly until within a very few months prior to the execution of the will, that the testator had the same affection and regard for one son that he did for the other; that when he made a gift to one he usually made a substantially similar gift to the other; that when the plaintiff entered business, at or about the time he was married, his father loaned him several thousand dollars, and when the loan was paid, he immediately divided it between the two sons; that as late as December, 1909, Clendenin borrowed from his father \$1,000, and when, a few days later, he repaid the same, the testator sent him a check for \$500 as a Christmas present; and that Page actually prepared a draft will shortly prior to the execution of the one in question, in which both sons were treated substantially alike. The circumstances surrounding the execution of the will were, to say the least, very suspicious. Page left Elberon on August 29th, in company with the son Thomas for New York. When they arrived they separated, Thomas going to the New York residence, where he instructed one Thom, an employé, and who subsequently witnessed the execution of the will to take an early train the next morning for Elberon, which he did. Page went to the office of the attorney who drew the will. The following morning Page, Thomas, and the attorney went to Elberon together. The attorney had with him the will, ready for signature. When they

arrived they were met at the station by the testator's carriage and taken to his house. When they entered the library Thomas introduced his father to the attorney, whom he had never met before. Lunch was then served, immediately following which Thomas, Page, the attorney, and the testator returned to the library. Thomas then retired, and as soon as he had done so the attorney produced the will for execution, and the testator told Page to read it, which, according to the attorney's testimony, he did "in an ordinary tone." After it had been read, the testator expressed his satisfaction with it, and the attorney then volunteered to become one of the witnesses, and suggested to the testator he better have two others. Thereupon Page said, "General, shall I get James Miles and John Thom," to which the testator responded, "Yes"; Page then stepped into the hall and met Thomas, to whom he said, "Your father wants Thom and Miles; send them to the library." There were several servants in the house at the time, including the testator's nurse, and much nearer to the library than were Thom and Miles. Thomas immediately went to the place where Thom and Miles were, and said to them, according to their testimony, "Father wants you to come to the library to witness his will." When they arrived at the library door, Thomas showed them in. While the will was being executed Thomas called to his father through the window to hurry up; that the attorney had to catch a train to New York. After the execution the attorney took the will away with him, and a few days later gave it to Page, who put it in a safe deposit box, without giving any notice of its existence to the plaintiff until after testator's death. Three days after the will was executed the testator fell in his bedroom and sustained a shock from which he never recovered, and which practically confined him to his bed until he died, about seven weeks later. He became semiconscious on the 12th of October, and never regained consciousness after the 14th. After his injury Page frequently wrote the plaintiff, and his letters spoke very encouragingly of the testator's condition. In a letter written September 25th he stated that the testator "sat up for a short time every day or two," and on the 14th of October, while the testator was unconscious, he wrote plaintiff, saying, among other things, "To-day he has again considerably improved, and so it has been for some time." The plaintiff learned the real condition of his father from Dr. Bates, and at once left Chicago for Elberon, reaching there about the 15th of October. When he arrived his father was unconscious, and remained so until he died. The testator had a brother residing in New York and a niece in Connecticut, but the fact of his serious illness was not even communicated to them. When the will was executed and for several weeks prior thereto, the only relative of the testator who saw him was the son Thomas. During that time the inmates of the house were Thomas, Page, and his family, and several servants, including a Miss Egan, to whom Thomas was married about two months after the testator's death. Page and his family never resided with the testator until a few weeks before the will was made. Two or three days before the death of the testator, and while he was unconscious, Page took from his key ring, the key to a safe deposit box in which was kept the jewel-

ry of the testator's late wife, and had the box, with the jewelry, transferred to Miss Egan, and then delivered the key to her. This jewelry was of the value of at least \$25,000, and the testator's wife had expressed a wish that some of it be given to the church. Thomas was not on friendly terms with his brother or with any of the relatives of the testator; on the contrary had a personal dislike for them, as evidenced by his letter to his brother dated August 11, 1910, in which he said:

"Dear Sir: * * * After I have settled all I owe you, we will be as strangers absolutely, for all time, and as for me, I do not care to see either you or any of your family."

And his letter to a daughter of the testator's brother, dated September 5, 1910, in which he stated:

"Your family have been a bunch of parasites, your father included, bleeding my father of every cent they could get out of him for years, and I shall take a hand now and put a stop to it and in answer to your request I want to say that not only will I not give the help you ask for, but I shall see to it with all the power I have there shall be no more."

Substantially all of the foregoing facts were undisputed. In addition thereto plaintiff produced evidence from which the jury could find when the will was executed the testator was in a very weak condition, both physically and mentally. That he was quite deaf, and at times unable to understand or remember what was said to him; that he spoke disconnectedly, and would fall asleep while conversing; that he had to be dressed and undressed, and when put to bed at night, would insist upon immediately getting up and being dressed, because it was morning. That he would lose his way in his own house. That he insisted upon a cat eating at the table with him, for which a place and chair were reserved. That for two years preceding the execution of the will he was constantly watched and cared for by a trained nurse. That he was easily influenced, and in many ways subservient to and controlled by his son Thomas. That Thomas spoke in a derogatory manner of the plaintiff to the testator at different times, saying that plaintiff was in get rich quick schemes; would not pay his debts; wanted to borrow money of the testator, and other statements of like character. That three or four days before the will was made he was heard to say to the testator: "Father, Clen don't care anything about you; all he wants is money. See how he treated me. I would have been better in a Jew's hands. You know the reason he don't come here, because he won't eat at the table with Minnie," and that he had to pay \$900 club dues for him. That these statements were false, but nevertheless they made an impression upon and influenced the testator. That in June, 1910, when the plaintiff visited the testator, he immediately said, "I have got no money for you," to which the son replied, "I am not asking you for any, Father." That when the attorney who supervised the execution of the will voluntarily called his attention to the fact that the creditors of plaintiff could reach the \$50,000 bequest, the testator said, "That's all right; if he owes that money they ought to get it." That the plaintiff was not, at the time, in debt; so far as appears, the attorney had never been so in-

formed, and that Thomas was heard to say, before the will was executed, that he would get even with the plaintiff "some day, and I will have it all in black and white."

The jury could also have found untrue the testimony of the attorney, Page, and Thomas, to the effect that the latter did not know that the testator had executed a will until the attorney sent a copy of it after the testator's death. The attorney went from New York to Elberon in company with Thomas, by whom he was introduced to the testator. It seems quite incredible that an attorney, without ever having met the testator before, without ever having had a private consultation with him, considering his age and condition, should have permitted him to execute the will without at least mentioning the fact to the son, who was in charge of the house and the only relative present. And in this connection it is significant that he should call the testator's attention to the fact that creditors might reach the \$50,000 which he was giving to the plaintiff; also that there should be inserted in the will a clause that if any beneficiary contested its probate he should thereby forfeit his interest. Plaintiff was the only one who had any personal interest in contesting the will, and the insertion of the clause must have been meant to refer to him, and yet he was named as one of the executors.

It is equally incredible that Page, the secretary of the testator, and a member of the household, on most friendly terms with Thomas, should not have mentioned the will to the latter until after the testator's death.

Thomas told Thom, one of the witnesses to the will, to go to Elberon, and there was the testimony of one witness that Thom said, before he left New York, that he was going for the purpose of witnessing a will, and the testimony of another witness that he said, after he arrived there, that he had come down to witness a will. And both he and Miles testified that Thomas said to them, "Father wants you to come to the library to witness his will." The situation so impressed Miles that he remarked to Thom, "This seems like funny business to me," to which Thom replied, "What in —— need you care as long as you sign what they tell you to sign."

At the conclusion of the evidence it fairly showed a testator, at and for some time prior to the execution of the will, in fit condition to be easily influenced; that the opportunity was presented for the exercise of undue influence; that the inclination existed in Thomas to exercise it; and that it was so exercised by him and those assisting him.

My conclusion is that the case was properly submitted to the jury, and the verdict is sustained by the evidence. See authorities before cited, and *Tyler v. Gardner*, 35 N. Y. 599; 40 Cyc. 1164.

The judgment and order appealed from, therefore, are affirmed, with costs. All concur.

(84 Misc. Rep. 118)

In re WALKER.

(Supreme Court, Special Term, Erie County. January, 1914.)

1. THEATERS AND SHOWS (§ 3*)—LICENSES—CONSTRUCTION OF ORDINANCE.

Section 2 of a city ordinance provided that no moving picture show should be maintained in any residence district without the consent of the common council approved by the mayor, but that this should not apply to any such show located, built, or constructed and in use for such purposes prior to December 1, 1912. Section 3, after directing the mayor to issue the licenses authorized by section 2, provided that the mayor "may" also grant a permit to use any building or premises used on and prior to December 1, 1912, for the purposes of a moving picture show, that such permit should not be valid without the approval of the health commissioner and board of fire commissioners, and that such permit should not be granted nor approved by the health and fire commissioners until all laws and ordinances relating to health and public safety, and all reasonable rules and regulations of the health and fire departments, had been complied with. *Held*, that section 3 was intended to confer on the mayor the power of licensing all moving picture shows not provided for in section 2, and hence he had power to license moving picture theaters or buildings located and constructed prior to December 1, 1912, though not in actual use on that date, as otherwise the power to license such theaters would be lodged in no city official.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. THEATERS AND SHOWS (§ 3*)—LICENSES—CONSTRUCTION OF ORDINANCE.

Though section 3 used the word "may," it did not give the mayor an absolute and unqualified discretion to grant or withhold licenses, and where a theater, lawfully constructed prior to December 1, 1912, under a lawful permit, had complied with all legal requirements as to health and public safety from fire and the reasonable regulations of the city health and fire departments, it was the mayor's duty to issue the necessary permit, since the ordinance, if otherwise construed, would authorize the mayor not merely to regulate, but to destroy vested property rights.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 3; Dec. Dig. § 3.*]

3. THEATERS AND SHOWS (§ 1*)—POWER OF CITY.

Where a city authorized a building to be made into a moving picture theater, and the owner incurred expenses in reconstructing it, the city had power only to regulate and not to prohibit its use for moving picture purposes.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 1; Dec. Dig. § 1.*]

Application by Arthur P. Walker for a writ of mandamus against Louis P. Fuhrman. Writ granted.

Clark H. Hammond, of Buffalo, for relator.

William S. Rann and Harry D. Sanders both of Buffalo, for mayor.

WHEELER, J. The application is for a writ of mandamus to compel the mayor to issue a license to the applicant to operate a moving picture show at 775-777 Seneca street, in the city of Buffalo.

It appears from the papers that this building, or the ground floor thereof, was converted into a moving picture show in 1909, and was operated as such until some time about June, 1911; that about that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

time the giving of exhibitions was discontinued, although the theater itself remained unchanged until the fall of 1913, when in September of that year the relator leased the theater from its owners, with the intention of reopening it for moving picture exhibitions. He made some alterations in its arrangement; none that increased, but all of which diminished the dangers incident to the conduct of such a theater. It is alleged, and not denied, that the place has heretofore been licensed as a moving picture theater for three successive years prior to the present application. It is not claimed but that the relator has fully complied with all the building and fire laws and safety ordinances and regulations of the city. The mayor, however, has declined to license the theater, upon the ground that, in his opinion, there is danger of fire in the operation of the theater as such.

When a power or discretion is vested in a public official like the mayor of a city, this court should not interfere with the exercise of such a discretion, but let the responsibility for its proper exercise rest where the law has placed it. It is not our purpose, at this time, to substitute the discretion of the court for that of the mayor. The question, however, remains whether, under the circumstances of this case, such a discretion has been vested in the mayor.

It is contended by the relator that, having complied with all the building laws and ordinances of the state and city, he is entitled to his license as matter of right, and that the mayor has no power to withhold it. If such is the case, the mandamus asked for must issue.

[1, 2] In March, 1913, what is known as "Chapter L of the Ordinances of the City of Buffalo" was adopted. This chapter relates to moving picture shows and by section 2 of the chapter, it is prescribed, in substance, that no moving picture show shall be maintained in any residence district of the city "without the consent of the common council approved by the mayor," etc. In this case the common council had, by resolution, given its consent, but the mayor has withheld his approval for reasons satisfactory to himself, and in part, at least, on the suggestion and advice of the state fire marshal. The ordinance contains provisions as to the procedure to be followed by the applicant to obtain official action, which it is not necessary to specify here.

The requirement of the consent of the common council and the approval of the mayor, however, only applies to moving picture shows built and maintained after December 1, 1912, and not those built or constructed prior thereto; for section 2, among other things, expressly declares:

"The provisions of this section shall not apply to any moving picture show as shall have been located, built, constructed and in use for said purposes prior to December 1, 1912."

The theater for which the relator seeks a license was in fact located and built, and had been in use prior to December 1, 1912. It is manifest, therefore, that this particular theater does not require the "consent of the common council approved by the mayor," for a license.

What municipal authority was there authorized to license moving picture shows of this class? Section 3 of the same chapter undertakes to make provision for licensing of theaters located and constructed pri-

or to December 1, 1912. After directing that the mayor shall issue licenses authorized under section 2 of the chapter, section 3 provides:

"The mayor may also grant a permit to any firm or corporation to use any building or premises which are and have been used on and prior to December 1, 1912, for the purposes of a moving picture show. Such permit shall not be valid without the approval of the health commissioner and the board of fire commissioners indorsed thereon. All permits granted as hereinbefore provided may be revoked by the mayor for good cause after a fair hearing. Such permits shall not be granted, nor shall the approval of the health and fire commissioners be given or indorsed on such permits until all laws and ordinances relating to health and public safety from fire and to moving picture shows, and the reasonable rules and regulations of the health and fire departments have been complied with; nor, in the case of a moving picture show, until the requirements of chapter XXXIV of the City Ordinances, so far as applicable, shall have been complied with. All such permits shall expire on the 30th day of September next following the issuing thereof."

The corporation counsel argues that by the wording of this section of the ordinances, in order to enable the relator to take the benefit of its provisions, the building must have been in actual use for a moving picture show on the 1st day of December, 1912, and that, inasmuch as exhibitions in this particular theater had been suspended for a year or more prior to December 1, 1912, the relator does not come within the purview of the section. The court, however, is of the opinion this section should not be given the restricted meaning contended for, but that section 3 should be read in connection with section 2, and, when so read, it is manifest that it was the intention to confer on the mayor the duty of licensing all moving picture shows not provided for in the manner prescribed in section 2. Otherwise the power to license moving picture theaters or buildings located and constructed, but which happened not to have been in operation on December 1, 1912, would be lodged in no city official. Chapter L was evidently intended to cover the entire field of moving picture shows, and we can reach no other conclusion than that by section 3 the power and duty of licensing this theater and others similarly situated, located, and constructed prior to December 1, 1912, is lodged in the mayor alone. If this be true, then the question remains, Had the mayor the right to withhold a license when the applicant has complied with "all laws and ordinances relating to health and public safety from fire, and to moving picture shows, and the reasonable rules and regulations of the health and fire departments"?

It is true that section 3 of the Ordinances reads: "The mayor *may* also grant a permit," etc. The counsel for the mayor, in opposing this application, contends that the word "may" as here used, vests a large discretion in the mayor to grant or withhold a license as his judgment dictates. The relator, on the other hand, insists that when any citizen has met all lawful prerequisites of law relating to health, public safety from fire, and the reasonable regulations of the health and fire departments of the city, he is entitled to his license as a matter of right, and that the mayor cannot lawfully refuse the necessary permit, and that the issuing of such a permit is a ministerial duty plainly prescribed. Which conflicting view is the law of this case? It was said in the

case of *People ex rel. Wooster v. Maher*, 141 N. Y. 337, 36 N. E. 397, that:

"Language permissive in form is sometimes construed as imperative in meaning. It is not infrequent that a statute declares that it shall be lawful for an officer or body to do this or that, or that this or that thing may be done, using language which in ordinary acceptation imports permission, and not command, and in many such cases the duty is held to be imperative. It is a question of the real meaning of the Legislature to be ascertained from a consideration of the nature of the authority, the character of the public agency, and the public duty involved."

Applying some of these tests to the situation in hand, we may judge and determine whether it was the purpose and intent of the framers of the ordinance in question to vest in the mayor an absolute and unqualified discretion to grant or withhold a license for a moving picture show when once constructed and authorized under former competent authority. If the mayor may withhold a license, then it is within his power to destroy valuable property rights of owners who, acting under competent authority, have invested large sums in the construction of moving picture shows, by simply refusing to renew such licenses when such licenses expire. It is one thing to refuse a license to build and construct in the first instance, and quite a different thing to refuse to permit the continued use of such a theater when once lawfully constructed under a lawful permit. Beyond question it is always a legitimate exercise of authority to regulate and control, but quite a different matter to destroy by a refusal to permit its use at all. Can it be fairly said to have been the purpose and intent of the framers of the ordinance to confer upon the mayor the right to destroy vested property rights by withholding a license, so long as the owner or his lessee has complied with every legal requirement as to the construction of the theater, and the provisions of law as to the safety of the public? Is it not fair to assume that the framers of the ordinance intended that when these requirements have been complied with, the license should follow as matter of right? Can it be fairly argued that the framers of the ordinance intended that the mayor might, in his discretion, exact as a condition for the granting of a license more than the law itself exacts? If such had been the intention, would not the power to withhold have been expressed in more definite and explicit terms? The courts have repeatedly construed statutes and ordinances so as not to destroy, but to preserve, vested property rights.

In the case of *City of Buffalo v. Chadeayne*, 134 N. Y. 166, 31 N. E. 444, Chadeayne had been granted a permit by the common council to erect several frame buildings within the city of Buffalo. Afterwards, and subsequent to his entering into contracts for their erection and the starting of the work, the common council revoked the permit previously granted, but the buildings were erected, and Chadeayne was prosecuted for so doing. The Court of Appeals held that there was no power given the common council to deprive the defendant of any vested property rights in the buildings. It said:

"Having in view the purpose for which the provision was enacted, it seems to us clear that it was not intended to give to the common council the power to deprive persons of their buildings which had previously been erected, or

of those which should be thereafter erected, in whole or in part, with the permission of the common council, and that its power is limited to the prevention of the erection of wooden buildings in the future without its permit."

See, also, *People ex rel. Lodes v. Dep't of Health*, 189 N. Y. 196, 82 N. E. 187, 13 L. R. A. (N. S.) 894; *Hinman v. Clarke*, 121 App. Div. 110, 105 N. Y. Supp. 725; *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; *City of Lowell v. Archambault*, 189 Mass. 70, 75 N. E. 65, 1 L. R. A. (N. S.) 458.

[3] So we think that the city, having once given its permission that the relator's building should be made into a moving picture theater, and the owner having incurred expense in its construction, the city's power over such building extends simply to regulating, and not to prohibiting, its use for those purposes. In any event, the present ordinance (section 3 of chapter L of the City Ordinances) should be given a construction which is in harmony with these well-recognized principles of law, and where the word "may" is used in that section, it must be deemed imperative rather than merely permissive.

We reach the conclusion that the mandamus prayed for should be granted.

Of course the mayor's permit, when granted, is to be indorsed with the approval of the health and fire commissioners, as prescribed by section 3 of chapter L of the City Ordinances.

So ordered, with \$25 costs of this application to the relator.

(161 App. Div. 196)

PEOPLE v. DI PASQUALE.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

CRIMINAL LAW (§ 147*)—CONVICTION OF LESSER DEGREE—LIMITATIONS.

In view of Code Cr. Proc. § 4, requiring a crime to be prosecuted by indictment, Pen. Code, § 610, providing that, on trial of an indictment, there may be a conviction of the crime charged therein, or of a lesser degree of it, or of an attempt to commit it or a lesser degree, is a rule of pleading, merely doing away with the necessity of charging in such an indictment the lesser degree or attempt, and does not permit conviction under such an indictment, of an attempt, where, when the indictment was found, the finding of an indictment for the attempt was barred by limitations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 379, 397; Dec. Dig. § 147.*]

Appeal from Trial Term, Saratoga County.

Dominick Di Pasquale was convicted of an attempt to commit murder in the second degree, and appeals. Reversed, and new trial granted.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Leary & Fullerton, of Saratoga Springs (James A. Leary, of Saratoga Springs, of counsel), for appellant.

L. B. McKelvey, Dist. Atty., of Saratoga Springs, and J. W. Atkinson, Asst. Dist. Atty., of Waterford, for the People.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

JOHN M. KELLOGG, J. April 2, 1906, Quirrito Diaassimo died, and in October, 1913, the defendant was indicted for the crime of murder in the second degree for having caused his death and was convicted of an attempt to commit that crime.

Under section 141 of the Code of Criminal Procedure there is no limitation within which a prosecution for murder may be commenced. Section 142 requires that an indictment for a felony, other than murder, must be found within five years after its commission, except where a less time is prescribed by statute. In this case the homicide was committed more than five years prior to the indictment, and it is evident that the defendant could then be indicted for no crime in connection therewith other than murder. If the indictment had been for an attempt to commit murder, or for one of the degrees of homicide, it is clear that the lapse of time would be a perfect defense. The question is whether the defendant can be deprived of that defense by an indictment for murder.

By section 4 of the Code of Criminal Procedure a crime must be prosecuted by indictment. It would therefore seem that a conviction for an attempt to commit murder cannot be prosecuted except by an indictment obtained within five years after the commission of the offense.

It is urged that the provisions of section 610 of the Penal Law, which provide that upon the trial of an indictment the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or an attempt to commit a lesser degree of the same crime, make the defendant punishable for a crime for which the statute prescribes that he may not be indicted. In other words, that the lapse of time only bars an indictment, but is no bar to a prosecution or punishment if the defendant can be brought into court by charging him with a higher crime. I think this section fairly means that under an indictment for a crime he may be convicted of a lesser degree or an attempt to commit the crime if he is liable to be prosecuted and punished for such attempt. In other words, the indictment need not charge the crime itself and an attempt to commit the same crime, but the defendant may be found guilty of the crime or an attempt to commit it upon the main charge. Ordinarily a crime cannot be committed without an attempt to commit it; but the attempt is merged in the completed crime, and therefore ceases to be a punishable offense. The charge of murder, therefore, naturally carries with it the charge that there was an attempt to commit the murder, and if the proof falls short of proving the murder, but shows an attempt, the defendant may be convicted of the attempt in the same manner as though he had been indicted therefor. In effect the section is a rule of pleading and does away with the necessity of alleging every lesser degree of the crime or an attempt to commit the crime, evidently for the reason that if the defendant is defending himself against the charge of having committed the crime he is equally defending himself from the charge of having attempted to commit the crime. But when the defendant is absolved from prosecution for the attempt to commit the crime, this statute cannot make him liable there-

for. It only applies in a case where a defendant is liable to be indicted for an attempt to commit the crime. I think therefore under the indictment the defendant could be convicted only of murder, and that the lapse of time prevents a conviction for any other crime in connection with the death.

The case upon the facts is a peculiar one. The principal witness is the defendant's daughter, who claims to have seen the defendant commit the crime and to have concealed the fact until the complaint, many years after. She and her husband were then actuated by hatred to him and prompted by a spirit of revenge. Her evidence has no substantial corroboration, is not in itself reasonable, and is in conflict with the general facts of the case. Without going through the facts in detail, it is sufficient to say that the conviction is entirely unwarranted by the evidence and the verdict is against the evidence.

The conviction is therefore reversed upon the ground that it is against the law, and also upon the ground that the evidence does not warrant a conviction. All concur; WOODWARD, J., on the first ground stated.

(161 App. Div. 121)

FEINSTEIN v. JACOBSON.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

INJUNCTION (§ 58*)—CONTRACTS—USE OF PROPERTY.

An agreement not to rent property to competitors of the adjoining owner may be enforced by injunction, though it provides that the promisor shall "be liable in damages and breach of contract" in case of its violation.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 111-113; Dec. Dig. § 58.*]

Appeal from Special Term, New York County.

Action by Paizor Feinstein against Ignatz Jacobson. From a judgment for defendant, plaintiff appeals. Reversed.

The complaint alleges plaintiff's ownership of the premises 79 Stanton street, where he conducts a clothing business, and that defendant is the owner of the adjoining premises No. 77, which had been used for the same purpose; that, defendant's premises having become vacant, he agreed with plaintiff that for a period of three years defendant would not rent his store for use in the clothing business, and, in case he (defendant) violated the agreement, he should "be liable * * * in damages and breach of contract"; that, in violation of the agreement, defendant has let the premises to Freedman Bros. for a clothing store, they having taken the lease with knowledge of the agreement. With appropriate allegations to show that plaintiff had no adequate remedy at law, the relief demanded was that defendant and Freedman Bros. be restrained from leasing or giving or taking possession of the store for the purpose of the clothing business, and from conducting or permitting such business to be conducted on the premises.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

David L. Podell, of New York City, for appellant.

Meyer D. Siegel, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. The fact that the agreement provided, in case of its violation by defendant, he should "be liable in damages and breach of contract" does not, in view of the circumstances, deprive plaintiff of the right to equitable relief. *Lewis v. Gollner*, 129 N. Y. 227, 234, 29 N. E. 81, 26 Am. St. Rep. 516; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 486, 13 N. E. 419, 60 Am. Rep. 464. Defendant's counsel concedes that the demurrer is bad, inasmuch as it did not specify the parties failure to join whom constituted the defect. This defect in pleading could not be cured on the motion, under Code Civ. Proc. § 768.

The judgment and order should be reversed, with costs, and the demurrer overruled, with \$10 costs, with leave to the defendant to withdraw the demurrer, and to answer upon payment of costs in this court and in the court below.

NEUBURGER v. GOWAN.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

DEPOSITIONS (§ 71*)—EXAMINATION OF PARTY—REFUSAL.

Where plaintiff, upon defendant's refusal to submit to an examination, moved to strike out the answer and proceed as upon default in pleading, and defendant offered to submit to an examination in case a proper bill of particulars was filed, the motion will, upon the filing of a proper bill of particulars, be denied, with leave to renew at any time when it shall appear that defendant has refused to submit to an examination.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 132; Dec. Dig. § 71.*]

Appeal from Special Term, New York County.

Action by Louis Neuburger against Albert Y. Gowan. From an order denying plaintiff's motion to strike out the answer and proceed as upon a default in pleading, he appeals. Modified and affirmed.

See, also, 158 App. Div. 922, 143 N. Y. Supp. 1132.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Ralph Wolf, of Crestwood, for appellant.

Elihu Root, Jr., of New York City, for respondent.

PER CURIAM. In view of the statements on the argument by defendant's counsel that his client would submit to examination if a proper bill of particulars were served, and by counsel for plaintiff that such service had been, that day, made, we think the proper disposition of this appeal is to modify the order appealed from so as to permit a renewal of the motion at any time when it may be made to appear that defendant has refused to submit to examination pursuant to the commission heretofore issued for that purpose. So far as the refusal of other witnesses to submit to examination is concerned, we see no ground for punishing defendant.

As so modified, the order will be affirmed, without costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(83 Misc. Rep. 621)

ARONIVICI v. SALANT.

(Supreme Court, Special Term, New York County. January, 1914.)

1. LIBEL AND SLANDER (§ 80*)—COMPLAINT—SUFFICIENCY AGAINST DEMURRER.

Allegations of a complaint that defendant made certain false and malicious statements of and concerning plaintiff, a widely known professional social worker and a writer and lecturer on sociological subjects, to a reporter, which statements with innuendoes were that, while plaintiff was holding himself out as an opponent of the contract system of prison labor and making a part of his income in that way, he was planning to make a profit for himself through such system, were not demurrable.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 184-186; Dec. Dig. § 80.*]

2. LIBEL AND SLANDER (§ 9*)—ACTIONABLE WORDS.

Words spoken about a person in relation to his business, calculated to injure him in that business, are actionable per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 80-90; Dec. Dig. § 9.*]

3. LIBEL AND SLANDER (§ 25*)—RIGHT OF ACTION—FURNISHING LIBELOUS INFORMATION.

A civil action for damages will not lie for furnishing libelous information in violation of Penal Law (Consol. Laws, c. 40) § 1352.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 107, 108; Dec. Dig. § 25.*]

4. LIBEL AND SLANDER (§ 147*)—CRIMINAL OFFENSE—FURNISHING LIBELOUS INFORMATION.

Penal Law (Consol. Laws, c. 40) § 1352, making it a criminal offense to furnish libelous information, refers only to libels intended to be published in the state of New York.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 414; Dec. Dig. § 147.*]

Action by Carol Aronivici against Aaron B. Salant for libel and slander and violation of Penal Law, § 1352. Demurrer to the three causes of action set forth in the complaint. Overruled as to the first two causes, and sustained as to the third.

Oscar R. Houston, of New York City, for plaintiff.

Aronson & Salant, of New York City, for defendant.

COHALAN, J. [1] The defendant has demurred to each of the three causes of action set forth in the complaint, and the plaintiff asks for judgment on the pleadings. The first cause of action is for an alleged slander, the second for an alleged libel, and the third for an alleged violation of section 1352 of the Penal Law. The plaintiff asserts that he is a widely known professional social worker, a writer and lecturer upon sociological and humanitarian subjects, that he is an opponent of the contract system of prison labor, and that his income is entirely derived from these pursuits. The complaint alleges that on or about the 7th day of June, 1913, the defendant made certain false and malicious statements of and concerning the plaintiff to one Keyes, a newspaper reporter. These alleged statements, with innuendoes, are as follows: That while the plaintiff was publicly and openly holding

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

himself out as an active opponent of the contract system of prison labor and was making a part of his income in this way, he was in reality planning to make a profit for himself by the identical system which he was pretending to oppose. In a word, what while he was ostensibly bending his efforts to defeat the system he was so employed not from any sincere and humanitarian motives, but merely to gratify his personal spite. Plaintiff's contention is: (1) That these statements constituted slander because they were calculated to injure him in his business; (2) that they were made to the said Keyes by the defendant with the desire and intent that he should reduce them to writing, read them himself and present them for publication to the Providence Journal; that they were actually put into writing, read by the editor of that paper and by other persons; and (3) that by making these statements the defendant committed a misdemeanor under the provisions of section 1352 of the Penal Law.

[2] It is well settled in this state and is a generally recognized principle of the law of slander that words spoken about a person in relation to his business calculated to injure him in that business are actionable per se. *Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810; *Lynott v. Pearson*, 138 App. Div. 306, 122 N. Y. Supp. 986. A reading of the complaint shows that the defendant charged the plaintiff with certain conduct which if true, and if the facts were to become generally known, would be sufficient to injure the plaintiff in his business or calling. It must be assumed from the averments of the complaint that the work in which the plaintiff was engaged constituted a calling. It is stated that the plaintiff has been earning his living as a social worker, writer, and lecturer on various social questions, and his particular concern was the question of the contract system of prison labor. If the alleged slanderous words were used, it is unquestionable that harm would come to the plaintiff in his calling, for his usefulness in such pursuits depends upon his reputation for honesty and sincerity in espousing the causes which he publicly advocates. I am satisfied that it is sufficiently alleged in the complaint that the slanderous statements were published of and concerning the plaintiff and the demurrers as to the first two causes of action should be overruled.

[3] In the third cause of action it is stated that the defendant made the statements willfully; that such statements, if published in the Providence Journal, would have constituted libel; and that the action of the defendant was a misdemeanor. There is no provision in the Penal Law giving a civil cause of action for damages against any one who is guilty of the violation of section 1352 of the Penal Law.

[4] Moreover, the penal statute applies to the state of New York only, and must of necessity refer to libels intended to be published in the state of New York and not in the state of Rhode Island. The demurrer is sustained as to the third cause of action. Leave is granted to the defendant to answer within 20 days after the entry of the order. No costs.

Ordered accordingly.

TWIGGAR v. OSSINING PRINTING & PUBLISHING CO.

(Supreme Court, Appellate Division, Second Department. March 20, 1914.)

1. LIBEL AND SLANDER (§ 12*)—ACTIONABLE WORDS—UNSKILLFULNESS IN CALLING.

A publication that plaintiff, a dentist, had been sued for alleged negligent services, causing the patient to spend money for physicians and surgeons as result of the "unskillful and negligent" way in which the dental work was done, and that plaintiff therein alleged certain damages as a result of the "unskillful" dental work, charged only unskillfulness or ignorance in a particular case, and, in the absence of a showing of special damages, was not actionable.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 97; Dec. Dig. § 12.*]

2. LIBEL AND SLANDER (§ 12*)—ACTIONABLE WORDS—GENERAL UNSKILLFULNESS IN CALLING.

The rule that a charge of ignorance or want of skill of a dentist, etc., in a particular case is not actionable without special damage is subject to the limitation that such words may, in themselves, imply unskillfulness or general ignorance in such calling.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 97; Dec. Dig. § 12.*]

3. LIBEL AND SLANDER (§ 89*)—PLEADING—SPECIAL DAMAGES.

Where a publication is not libelous per se, only special damages are recoverable, so that they must be pleaded.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 213, 214; Dec. Dig. § 89.*]

Appeal from Special Term, Westchester County.

Action by Albert W. Twigg against the Ossining Printing & Publishing Company. Demurrer to complaint overruled, and defendant appeals. Reversed, with leave to plaintiff to amend.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Frank L. Young, of Ossining, for appellant.

T. G. Barnes, of Ossining, for respondent.

JENKS, P. J. [1] The action is libel. The defendant's demurrer that the complaint did not state sufficient facts to constitute a cause of action should have been sustained. The complaint is that Carpenter began an action against this plaintiff for negligent services as a dentist, laying his damages at \$1,000, in which this plaintiff answered by denial; that issue was joined; that the cause was noticed for trial and a note of issue was filed, but that the cause had not been reached for trial; and that the defendant thereupon, in a specified issue of its newspaper—

"seeking to injure the plaintiff, and especially to injure him in his profession and means of livelihood, and without stating the full facts, maliciously published the following partially false and libelous article of and concerning the plaintiff: 'White Plains, N. Y., July 26.—Suit against a dentist for alleged negligent services, causing the patient to spend over \$200 with physicians and surgeons as a result of the "unskillful and negligent" way in which dental work was done, was entered, to-day, in the Supreme Court of this county,

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against Dr. Albert W. Twigg, of Ossining, by J. Herbert Carpenter, Jr., of the same village. Mr. Carpenter alleges that in October, 1912, he went to Dr. Twigg to have a root removed, and that, as a result of the "unskillful" work of the dentist, three second teeth were exposed, a cavity was caused in the roof of his mouth, and he was afflicted with a disease of the gums and jaw. He sues to recover \$5,000 damages."

In *Foot v. Brown*, 8 Johns. 64, 66, it was decided that a charge of ignorance or want of skill of a lawyer in a particular case was not actionable, in the absence of pleading and of proving special damages. The opinion is per curiam but the possibility, if not the probability, is that it was prepared by Kent, Ch. J. See *Memoirs of Chancellor Kent*, by William Kent, p. 118. This rule has been affirmed in *Tobias v. Harland*, 4 Wend. at page 541; in *Lynde v. Johnson*, 39 Hun, 14; in *Mattice v. Wilcox*, 147 N. Y. at page 631, 42 N. E. 270; in *Battersby v. Collier*, 34 App. Div. 347, 54 N. Y. Supp. 363; in *Outcault v. N. Y. Herald Co.*, 117 App. Div. 534, 102 N. Y. Supp. 685; in *Gunning v. Appleton*, 58 How. Prac. 471, and in other cases.

[2] This rule is subject to the limitation that words, although directed to a single case, may, in themselves, imply general unskillfulness or general ignorance in the calling. Compare *Sumner v. Utley*, 7 Conn. 257, and *Camp v. Martin*, 23 Conn. 86; see *Cruikshank v. Gordon*, 118 N. Y. 183, 23 N. E. 457; *Folkhard's Starkie on Slander and Libel*, Wood's Notes, § 88. I think that the words in this case are within the rule. See *Gunning v. Appleton*, supra.

[3] If the publication was not libelous per se, only special damages are recoverable, and these must be pleaded. *Foot v. Brown*, supra; *McNamara v. Goldan*, 194 N. Y. 315, 87 N. E. 440. If not, then such defect is open to general demurrer. *Reporters' Ass'n v. Sun Printing & Pub. Ass'n*, 186 N. Y. 437, 79 N. E. 710; *Fagan v. N. Y. Evening Journal Pub. Co.*, 129 App. Div. 28, 113 N. Y. Supp. 62; *Langdon v. Shearer*, 43 App. Div. 607, 60 N. Y. Supp. 193; *Gunning v. Appleton*, supra.

The order must be reversed, with \$10 costs and disbursements, and the demurrer sustained, with costs, with leave to the plaintiff to plead within 20 days. All concur.

(161 App. Div. 383)

PAGE v. UNITED TRACTION CO.

(Supreme Court, Appellate Division, Third Department. March 13, 1914.)

1. CARRIERS (§ 314*)—INJURY TO PASSENGER—PLEADING—SUFFICIENCY.

A complaint, alleging that plaintiff was a passenger on the defendant's car; that she signaled the conductor that she wished to alight; that the car stopped at a point where, in the course of repairing the street, a hole had been made, and as she was about to alight from the car she stepped into the hole and received her injury; that the injury was due to the carelessness and negligence of the defendant's officers and servants in the premises, and without any negligence on her part—alleges a cause of action.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1260, 1270, 1273, 1274, 1276-1280; Dec. Dig. § 314.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PLEADING (§ 34*)—DEMURRER—CONSTRUCTION OF PLEADING.

Upon demurrer, the complaint is to be favorably construed for the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. § 34.*]

Woodward, J., dissenting.

Appeal from Trial Term, Rensselaer County.

Action by Lillian Page against the United Traction Company. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Thomas F. Powers, of Troy, for appellant.

Patrick C. Dugan, of Albany, for respondent.

JOHN M. KELLOGG, J. [1] The plaintiff alleges, in substance: That she was a passenger on the defendant's car. That she signaled the conductor that she wished to alight. That the car stopped at a point named, where, in the course of repairing the street, a hole had been made. As she was "about to alight" from the car, she stepped into the hole and received her injury. That the injury was due to the carelessness and negligence of the defendant's officers and servants in the premises, and without any negligence on her part.

[2] Upon demurrer the complaint is to be favorably construed for the pleader. It means that when signaled to stop the car made the stop at a place where there was a hole in the street, and that in alighting from the car the plaintiff, without fault on her part, stepped into the hole. I think it alleges a cause of action.

The judgment should therefore be reversed, with costs to the appellant in both courts to abide the event, and a new trial granted. All concur, except

WOODWARD, J. (dissenting). The plaintiff's complaint was dismissed upon the opening of the case, upon the ground that it did not state facts sufficient to constitute a cause of action. The complaint alleges that the plaintiff was a passenger upon one of the defendant's cars, and that "when said car upon which plaintiff was riding, as a passenger, as aforesaid, reached the corner of Twenty-Third street and Second avenue, in the city of Troy, N. Y., and as plaintiff was about to alight therefrom, having signaled said conductor in charge of said car of her intention so to do, and said car having stopped at a point about five feet north of the north side of Twenty-Third street, at a place which had been theretofore, and at the time last aforesaid, dug out and excavated by the defendant, who was at that time making repairs to the tracks and roadbed, she stepped into said hole or excavation, thereby throwing her to the pavement, spraining her right ankle," etc., and that "the said injuries so sustained by plaintiff, as aforesaid, were due to the carelessness and negligence of the above-named defendant, its officers, agents, and servants in the premises, and without any negligence or carelessness on the part of this plaintiff." The learned trial

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court dismissed the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and the question is presented on this appeal whether this was a correct determination.

There is clearly nothing of importance in the allegation, "and as plaintiff was about to alight therefrom, having signaled said conductor in charge of said car of her intention so to do," for there is no complaint that the plaintiff was injured by anything which occurred while she was upon the car. We must look for the necessary allegations further on in the complaint. We are told that:

"Said car having stopped at a point about five feet north of the north side of Twenty-Third street, at a place which had been theretofore, and at the time last aforesaid, dug out and excavated by the defendant, who was at that time making repairs to the tracks and roadbed, she stepped into said hole or excavation, thereby throwing her to the pavement," etc.

There is no allegation that this hole or excavation was negligently or wrongfully made, or that the defendant had failed to exercise due care in the work then under way. There is no allegation as to the size or depth of the excavation; no allegation that it was not properly guarded; no allegation that the defendant had landed her at an unsafe point, or that it had failed to give her warning; no allegation that the excavation extended outside of the tracks, or that it was of such a character extending outside of the tracks to a point where she must step into it in alighting from the car. From all that appears in the complaint the plaintiff may have been properly and safely landed in the street, and have walked into this excavation, for the allegation is not that she was injured in alighting from the car, but that "she stepped into said hole or excavation," and clearly the defendant is not liable to her for injuries sustained by stepping into a hole, unless the defendant had been guilty of some act of negligence in making and maintaining the hole, or in failing to give the plaintiff notice of the fact if she was obliged to alight at a dangerous point, and no averment of the complaint suggests anything of the kind.

The question then arises whether the general allegation that "the said injuries so sustained by plaintiff, as aforesaid, were due to the carelessness and negligence of the above-named defendant, its officers, agents, and servants in the premises," is sufficient to give a cause of action; whether the plaintiff, under such an allegation, is entitled to adduce proof of these facts and to recover. The case of *Catterson v. Brooklyn Heights Railroad Co.*, 132 App. Div. 399, 116 N. Y. Supp. 760, appears to have gone as far as any case in permitting a defective pleading to stand as against a motion to dismiss upon the ground that it failed to state facts sufficient to constitute a cause of action, but it is to be doubted if that case is an authority for sustaining this pleading. It is true that the complaint, under modern rules, is to be liberally construed, but it is still necessary that there should be a "plain and concise statement of the facts" upon which the plaintiff relies for a recovery, and the cases decided since the *Catterson Case*, *supra*, have laid down the rule that while the plaintiff in a negligence action may state generally a culpable breach of some duty owing by the master, the thing to which that duty attaches must be pointed out (*Pagnillo v.*

Mack Paving & Construction Co., 142 App. Div. 491, 127 N. Y. Supp. 72; Anderson v. McNulty Bros., 149 App. Div. 735, 134 N. Y. Supp. 21; and in the Pagnillo Case, *supra*, the court, after declaring that "in general or particular terms the act or omission causing the injury must be stated, as well as facts showing the defendant's breach of a duty related to it," say: "In Catterson v. Brooklyn Heights Railroad Co., 132 App. Div. 399 [116 N. Y. Supp. 760], the facts were pleaded, and it was considered unnecessary to plead details, which were matters of evidence, and the dissenting opinion, so far as it explained the decision in Oldfield v. N. Y. & Harlem R. R. Co., *supra* [14 N. Y. 310], and Edgerton v. N. Y. & Harlem R. R. Co., 39 N. Y. 227, was not inconsistent with the prevailing views."

We think the conclusion pleaded that "the said injuries so sustained by plaintiff, as aforesaid, were due to the carelessness and negligence of the above-named defendant" does not meet the requirement; it does not point out any act of negligence on the part of the defendant; it points out no fact which is in and of itself negligent, and the court properly dismissed the complaint.

The judgment appealed from should be affirmed with costs.

ELSON v. UNGERER.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

DISCOVERY (§ 38*)—SUBJECT-MATTER—NAMES OF WITNESSES.

An order for examination before trial is for the eliciting of testimony, and is not authorized for the purpose of finding out the name of a third person who will be a witness.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 51; Dec. Dig. § 38.*]

Appeal from Special Term, New York County.

Action by Benjamin Elson against William Ungerer. From an order denying a motion to vacate an order for the examination of the defendant before trial, defendant appeals. Modified and affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Nolan Bros., of New York City (Joseph P. Nolan, of New York City, of counsel), for appellant.

CLARKE, J. This is an action for slander. Plaintiff made a motion for an order for examination before trial of the defendant, which motion was granted; the order requiring the defendant to testify "concerning the matters relevant to issues in this action, and that the examination be limited until the further order of this court to the matters set forth in the affidavit of the defendant hereto annexed." (This is obviously a mistake. It should be "of the plaintiff hereto annexed.") In that affidavit is the following:

"The plaintiff is desirous of examining the defendant in reference to the issues raised herein, to wit: The presence of the defendant on or about the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

21st day of April, 1913, in a public restaurant; also of William D. Corson and other persons, and the names and residences of such persons, the statements and words uttered and spoken by the defendant concerning the plaintiff at said time and place, the statements and words uttered by the defendant concerning the plaintiff in the presence of William D. Corson and others, on or about the 22d day of April, 1913, the names and residences of the persons other than Corson present at that time and in the place where the said words were spoken, as alleged in the complaint herein, and the knowledge by defendant that said statements and words uttered by him were false."

In *Gavin v. New York Contracting Co.*, 122 App. Div. 643, 107 N. Y. Supp. 272, Mr. Justice Houghton said:

"Nor should the witness have been asked the names of other witnesses to the accident. An order for * * * examination is for the eliciting of testimony, and not to gain information as to who might be called as witnesses."

In *Nocito v. Acierno*, 122 App. Div. 45, 106 N. Y. Supp. 785, which was an action for slander, Mr. Justice Ingraham said:

"An examination before trial is not authorized for the purpose of finding out the name of a third person who will be a witness."

The order appealed from should be modified, by providing that the examination should be had concerning the matters relevant to the issues as set forth in the affidavit of the plaintiff, verified July 17, 1913, except in so far as it is sought to obtain the names and residences of the persons present upon the two occasions specified, other than William D. Corson, and, as so modified, affirmed, with \$10 costs and disbursements to appellant. All concur.

(161 App. Div. 242)

REILLY v. STEINHART.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. VENDOR AND PURCHASER (§ 18*)—OPTIONS—COVENANT TO PAY MONEY.

A covenant to pay money as consideration for an option is a contract subject to the general rules pertaining to such engagements, whether it be regarded as a binding agreement to keep an offer open, which on acceptance ripens into a bilateral contract, or a complete unilateral contract in which the obligation of the giver is subject to the condition precedent of tender of payment by the holder, in which case the latter does not become bound by mere notice of acceptance.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 23; Dec. Dig. § 18.*]

2. WORDS AND PHRASES—CIVIL LAW—"PROTOCOLIZING."

The term "protocolizing" colloquially defines a proceeding under the civil law by which a contract already formulated in the words of the parties, or as drafted by a notary, is by him entered in his notarial register in the presence of witnesses; the Spanish word "protocolo," when applied to a single paper, meaning the first draft of an instrument duly executed before a notary, it being the source from which must be taken copies to be delivered to the interested parties as their evidence of right, and also the bound book in which the notary places and keeps in their order instruments executed before him, from which copies are taken for use of the interested parties.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. EVIDENCE (§ 517*) — FOREIGN LAW — QUESTION OF FACT — CONSTRUCTION — EXPERTS.

While the law of a foreign country is a question of fact, where it involves the construction of a written statute, it may also be a question of law, but even in that case it is proper to receive the testimony of those skilled in the foreign law for the purpose of construing and ascertaining the same.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2327; Dec. Dig. § 517.*]

4. FRAUDS, STATUTE OF (§ 120*)—PAROL OPTION—FOREIGN LAW.

Cuban Civ. Code, art. 1216, provides that public instruments are those authenticated by a notary or by a competent public official, with the formalities required by law. Article 1218 declares that public instruments are evidence against the parties, their representatives, and third persons, and article 1280 provides that acts and contracts, the object of which is the creation, transmission, modification, or extinction of property rights in real property, and also all contracts in which the amount of the consideration exceeds 1,500 pesetas, must appear in a public instrument even though private. *Held*, that a parol option by which plaintiff agreed to convey to defendant all rights, concession, and lands purchased and owned by him, together with all the property pertaining to a railroad and power company in Cuba, for \$1,500,000 United States currency, was unenforceable for want of protocolization in a public instrument, as required by the Cuban Code.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 263; Dec. Dig. § 120.*]

Appeal from Trial Term, New York County.

Action by Hugh J. Reilly against Frank Steinhart. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial and granting an extra allowance, defendant appeals. Reversed and dismissed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

Morgan J. O'Brien, of New York City, for appellant.

William C. Rosenberg, of New York City, for respondent.

HOTCHKISS, J. The complaint alleged two causes of action, one for a balance of \$35,000, remaining due on an oral option, apparently assumed to have been made in this country, and the other for the recovery of a like amount on a similar option in writing, the particulars of which are hereinafter stated. The defenses were: That the contract was made and was to be performed in Cuba, and was void under the laws of that country; that it was induced by deceit; and failure of consideration. The defendant also counterclaimed for \$15,000, the down payment under the option. The learned trial justice ruled that the oral option was void under the statute of frauds, which ruling was clearly right; that the written option was a Cuban contract, and as such was valid, because under the laws of Cuba the only deficiency attributable to it pertained, not to its substance, but to the remedy for its enforcement. The court left to the jury the questions of fraud and failure of consideration. Whether or not it erred in so doing, I deem it unnecessary to determine, for I am of the opinion that the ruling with respect to the legal sufficiency of the option contract was wrong. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

material facts are as follows: Both plaintiff and defendant were citizens of the United States, domiciled and doing business in Havana; the plaintiff being a contractor and promoter of corporate enterprises, and the defendant attached to the United States Consular Service. The option contract is dated and was executed and delivered at Havana, and related to property wholly within Cuban territory. It recites that plaintiff is "the full owner of a concession * * * to build and construct a railway * * * known as the Cienfuegos, Palmira & Cruces Electric Railway & Power Company"; that there "have been issued, and are now deposited with" a firm of bankers in Havana, "bonds of the said railway and power company amounting to \$2,000,000 United States currency and 19,470 shares" of the stock of that company of the par value of \$100 each; that on or about April 22, 1906, plaintiff had verbally given to defendant an option "to purchase all rights, the concession, lands purchased and owned by me, and in fact any and everything pertaining to the said railway and power company"; that in consideration of a down payment of \$15,000 and of a further payment on April 22, 1907, of \$35,000, "I (plaintiff) hereby confirm the said verbal option in writing, said option to continue until the said 22d day of April, 1907, up to which date" defendant was given the privilege to purchase from plaintiff "all those matters heretofore mentioned, namely, the concession, lands, rights, bonds, stock, etc., meaning and indicating anything and everything pertaining to the said railway and power company, for the sum of \$1,500,000 United States currency," such purchase being subject, however, to certain outstanding contracts for engineering work and for supplying power.

[1] It little matters whether we consider an option as a binding agreement to keep an offer open (*Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703; *Linn v. McLean*, 80 Ala. 360; *Maughlin v. Perry*, 35 Md. 352), which, upon acceptance, ripens into a bilateral contract, or whether we regard it as a complete unilateral contract in which the obligation of the giver of the option is subject to the condition precedent of tender of payment by the holder, regarded in which latter light the holder does not himself become bound by mere notice of acceptance (per Prof. Langdell, 18 Harv. Law Rev. 11, 12), for, on either theory, a covenant to pay money as consideration for an option is a contract, and as such is subject to the general rules pertaining to such engagements.

In *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 543, 62 N. E. 672, 673 (57 L. R. A. 513, 88 Am. St. Rep. 614), the court extracted from the authorities what it said were "some general principles, which appear to be settled beyond controversy," to wit:

"(1) All matters bearing upon the execution, the interpretation, and the validity of contracts, including the capacity of the parties to contract, are determined by the law of the place where the contract is made. (2) All matters connected with its performance * * * are regulated by the law of the place where the contract, by its terms, is to be performed. (3) All matters respecting the remedy to be pursued * * * depend upon the law of the place where the action is brought."

See, also, *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

In support of the foregoing, the court cited *Scudder v. Union National Bank*, 91 U. S. 406, 23 L. Ed. 245. In *Pritchard v. Norton*, 106 U. S. 124, at page 130, 1 Sup. Ct. 102, at page 106 (27 L. Ed. 104), Mr. Justice Matthews examines at great length and with convincing analysis the subject of what law should determine the validity, interpretation, and enforcement of contracts, and also as affecting the sufficiency of the contract, the question of what are and what are not matters of substance. In the course of his opinion he said:

"The rule deduced by Mr. Wharton, in his *Conflict of Laws*, as best harmonizing the authorities and effecting the most judicious result, and which was cited approvingly by Mr. Justice Hunt in *Scudder v. Union National Bank*, 91 U. S. 406 [23 L. Ed. 245], is that: 'Obligations in respect to the mode of their solemnization are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law.' This, it will be observed, extends the operation of the *lex fori* beyond the process and remedy, so as to embrace the whole of that residuum which cannot be referred to other laws."

Proceeding further, Mr. Justice Matthews said:

"It is to be noted, however, as an important circumstance, that the same claim may sometimes be a mere matter of process, and so determinable by the law of the forum, and sometimes a matter of substance going to the merits, and therefore determinable by the law of the contract."

Continuing, the learned justice pointed out that, although under the common law the statute of limitation is governed by the law of the forum, under the civil law a different rule prevails. Proceeding he said (106 U. S. 131, 1 Sup. Ct. 107, 27 L. Ed. 104):

"But notwithstanding the contrary doctrine of the courts of England and this country, when the statute of limitations of a particular country not only bars the right of action, but extinguishes the claim or title itself, *ipso facto*, and declares it a nullity, after the lapse of the prescribed period, and the parties have been resident within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case, it must be held, as it was considered by Mr. Justice Story, to be an extinguishment of the debt, wherever an attempt might be made to enforce it. *Conflict of Laws*, § 582. * * * The principle that what is apparently mere matter of remedy in some circumstances, in others, where it touches the substance of the controversy, becomes matter of right, is familiar in our constitutional jurisprudence in the application of that provision of the Constitution which prohibits the passing by a state of any law impairing the obligation of contracts. For it has been uniformly held that 'any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.' [Citing cases.] * * * A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice. *Cooley, Const. Lim.* 362-369. The general rule, as stated by Story, is that a defense or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every other place where the question may come to be litigated. *Conflict of Laws*, § 331. Thus infancy, if a valid defense by the *lex loci contractus*, will be a valid defense everywhere. * * * A tender and refusal, good by the same law, either as a full discharge or as a present fulfillment of the contract, will be respected everywhere. * * * Payment in paper money bills, or in other things, if good by the same law,

will be deemed a sufficient payment everywhere. * * * And on the other hand, where a payment by negotiable bills or notes is, by the *lex loci*, held to be conditional payment only, it will be so held even in states where such payment under the domestic law would be held absolute. So if, by the law of the place of a contract, equitable defenses are allowed in favor of the maker of a negotiable note, any subsequent indorsement will not change his rights in regard to the holder. The latter must take it *cum onere*."

It remains, in the light of the foregoing principles, for us to discover what the record discloses with respect to the Cuban law as affecting the contract in question.

The system prevailing in civil law jurisdictions, by which certain classes of contracts are formulated, is familiar; the parties appear before a notary public, to whom declaration is made of the contract proposed to be entered into, which contract, as already formulated in the words of the parties themselves or as then drafted by the notary, is by him entered in his notarial register in the presence of witnesses. The instrument thus recorded by the notary becomes the original; copies being furnished to the interested parties.

[2] Colloquially the proceeding is known as "protocolizing" a contract or agreement.

"The Spanish word 'protocolo,' when applied to a single paper, means the first draft of an instrument duly executed before a notary, the matrix, because it is the source from which must be taken copies to be delivered to interested parties as their evidence of right; and it also means a bound book in which the notary places and keeps in their order instruments executed before him, from which copies are taken for use of parties interested." Per *Stayton, C. J., Downing v. Diaz*, 80 Tex. 438, 451, 16 S. W. 49, 53.

Among other articles of the Cuban Civil Code given in evidence on the trial were the following:

"Art. 1216. Public instruments are those authenticated by a notary or by a competent public official, with the formalities required by law.

"Art. 1218. Public instruments are evidence, even against a third person, of the fact which gave rise to their execution and of the date of the latter. They shall also be evidence against the contracting parties and their legal representatives with regard to the declarations the former may have made therein.

"Art. 1280. The following must appear in a public instrument: (1) Acts and contracts the object of which is the creation, transmission, modification, or extinction of property rights on (*sic*) real property. * * * (6) The assignment of actions or rights arising from an act contained in a public instrument. All other contracts, in which the amount of the prestations (consideration) of one of the two contracting parties exceeds 1,500 pesetas,¹ must be reduced to writing, even though it be private.

"Art. 1279. Should the law require the execution of an instrument or other special formality in order to make the obligations of a contract binding, the contracting parties may compel each other to comply with said formalities from the moment in which consent and the other requirements, necessary for their validity, have taken place."

[3] While the foreign law is a question of fact, where it involves the construction of a written statute it may be a question of law (*Chase, Steph. Dig. Ev.* [2d Ed.] 146, note), but even then it is customary and proper to receive the testimony of those skilled in the foreign law for the purpose of construing and ascertaining the same.

¹ Note.—A peseta is equal to about 19 cents United States currency.

In this case, without such assistance, it would be very difficult for the court to say with certainty what, as between the parties, would be the effect of their failing to protocolize the contract in question. On this point, Mr. Magoon, a member of the bar, formerly law officer of the Insular Bureau of the War Department and adviser of that Department with reference to foreign laws, and who for a period of over two years was Provisional Governor of Cuba, gave the following testimony:

"A suit to recover money, what would be termed specific performance of this contract, could not be maintained in the courts of Cuba in its present form."

In answer to further questions, the witness said:

"Possibly it would be better for me to state what would be done under this contract than what would not. Under the established usage and court decisions, as well as the Code of Cuba, Mr. Reilly, seeking to enforce or recover for the matters and things contained in Exhibit 1 (the option), would be obliged to proceed as follows: He would cite Mr. Steinhart to appear before a notary to convert this instrument into a public document; the party cited could refuse to appear, refuse to take the necessary steps to convert it into a public document, and he would then bring an action to compel what might be termed specific execution (that is, to execute the document), not to carry it out, but to execute it; and in that matter Mr. Steinhart would be heard as to his reasons for refusing to give the necessary compliance and to take the necessary steps to convert it into a public document. Without this instrument being a public document, so made with or by the consent of the parties or by operation of law (that is, of the court procedure), a suit could not be maintained upon it."

Speaking further of the rights of parties to a contract and referring to the course of the Cuban courts with respect thereto, the witness said:

"They (the courts) would give the remedy of compelling the reduction of that document into a public document, and, if that could be done, then you would have a remedy."

And again:

"It is very much like our statute of frauds. In the absence of this document, you could not enforce the contract."

[4] Accepting the analogy of the witness, and assuming the situation to be one where a contract is under the statute of frauds of the country, by the laws of which the sufficiency of its formation or solemnization is to be determined, the question is: Can such contract, if in form sufficient under the law of the forum, be there enforced? In short, does the objection go to the substance of the contract or merely to the evidence thereof? It is apparent that the difficulty goes, not to the mere evidence of the contract, but to its sufficiency. In other words, the attempt of the parties to the contract in question to privately formulate their agreement was wholly nugatory and void, and no contract whatever resulted between them, nor could one ever have been decreed to result, except after a further proceeding, the determination of which would depend upon the view of the facts to be taken by the Cuban court before which it was prosecuted.

The case seems to be clearly within the words of Mr. Justice Story (Conflict of Laws [8th Ed.] § 260), where he says:

"Another rule, * * * respecting the validity of contracts, is that all the formalities, proofs, or authentications of them, which are required by the *lex loci*, are indispensable to their validity everywhere else. * * * Thus if, by the laws of a country, a contract is void unless it is written on stamped paper, it ought to be held void everywhere, for, unless it be good there, it can have no obligation in any other country."

Among the cases cited by Mr. Justice Story, as authority for the law as stated in his text, is *Bank of Rochester v. Gray*, 2 Hill, 227, where it was held that the validity of a notarial protest of a foreign bill of exchange is to be determined by the *lex loci contractus*, and, where the latter renders a seal necessary, the protest must be under seal or it will be void elsewhere. With respect to contracts which, by the *lex loci*, are void under the statute of frauds, the same learned author says (*Id.* § 262):

"If such contracts, made by parol (*per verba*) in a country by whose laws they are required to be in writing, are sought to be enforced in any other country, they will be held void, exactly as they are held void in the place where they are made"—

although he notes that a distinction is drawn with respect to contracts affecting real property, where "the law of the place of the contract and that of the *situs rei* require different forms and solemnities to give validity to them."

For these reasons the judgment should be reversed, with costs, and the complaint dismissed, with costs. All concur.

(84 Misc. Rep. 488)

WOODCOCK v. SARTLE et al.

(Supreme Court, Trial Term, Niagara County. March 14, 1914.)

MASTER AND SERVANT (§ 318*)—LIABILITY FOR INJURIES TO THIRD PERSONS—WORK OF INDEPENDENT CONTRACTOR.

Where the owner of an automobile contracted with an experienced mechanic to overhaul or repair it, agreeing to pay him at the rate of \$20 per week for the time expended, and reserving no right to control or direct him as to the work, the mechanic was an independent contractor, and not a servant, and hence the owner was not liable for an injury to a third party caused by the negligence of the mechanic while testing the car.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 318.*]

Action for personal injury by Charles W. Woodcock against John M. Sartle and Russell G. Smith. Verdict for plaintiff against both defendants, which, on motion for nonsuit, was set aside as to defendant Sartle, and allowed to stand as to defendant Smith.

Parker & Stewart, of Niagara Falls, for plaintiff.

Payne & Lindsay, of Tonawanda, for defendant Sartle.

WHEELER, J. This action is to recover for personal injuries, and for damages to horse and wagon, sustained in a collision with an automobile owned by the defendant Sartle, and operated by the defendant Smith.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The question now before the court is that of the liability of the defendant Sartle for the consequences of the accident. This turns upon the question whether, upon the circumstances of the case as hereinafter stated, the defendant Smith is to be deemed an employé of the codefendant Sartle, or an independent contractor.

The essential facts bearing on the question stated are these: Mr. Sartle lived at North Tonawanda, and was the owner of a Thomas touring car, which had been in use for a couple of years, and was in need of overhauling and repair. The defendant Smith was an experienced mechanic, had been for years employed by the Thomas Motor Car Company (the manufacturer of the car) as a "tester" and as "trouble man"; that is, he tested new cars made by the company before placed on the market, and when cars sold failed to properly operate, Smith was the man, or one of the men, sent out to correct the trouble. Work at the factory was slack, and the car company sent Smith to Sartle, saying to him he might obtain a job. Smith went to Sartle at his residence at North Tonawanda, where the automobile in question was. He and Sartle had a talk. Sartle explained he wished his car overhauled, and put in good running order. Smith stated he could do the work on the premises. Smith stated he would do the necessary work, and charge for his services \$20 a week for the time required to do the work, or at the rate of \$20 per week. Sartle told Smith to go ahead and put the machine in shape. He also told Smith that if new parts were needed, to order them, and charge them to him. Sartle did not know what repairs were needed. He was not a mechanic, and left what repairs were to be made, and how they were to be made, entirely to the judgment of Smith. He gave no directions whatever to Smith during the progress of the work. After Smith had been at work on the "auto" for about two weeks, the repairs had so far progressed that he thought the time had come for a test. He according took out the machine to run on the road. He went from Tonawanda to Buffalo, there purchased some trifling needed parts, returned to Tonawanda, got his luncheon, and then with four friends and acquaintances started for Lewiston, with a view of further testing out the machine in climbing the Lewiston Hill, which is a favorite testing ground for automobilists. After reaching Lewiston, and making a short stay there, the party started to return, and on the way back, after having climbed the Lewiston Hill, in passing the plaintiff and his horses and wagon, collided with him, with a wagon just ahead of the plaintiff, and with another wagon on the opposite side of the highway. This resulted in personal injuries to the plaintiff, in so injuring one of his horses as to necessitate its being shot, in smashing his wagon, in killing one of the occupants of the car, and breaking the leg of the man on one of the other wagons. It is claimed these all resulted from the negligence of the defendant Smith, and that his negligence is legally attributable to the defendant Sartle as principal. Sartle on the day of the accident was absent in Virginia, gave no directions that the machine should be tested, and did not know it was to be taken out. The facts stated are all beyond controversy. At the close of the plaintiff's case, counsel for the defendant Sartle moved

for a nonsuit, and for a direction of a verdict in his favor. At the close of the defendants' case the motion was renewed. The disposition of these motions was reserved by the court, and the case submitted to the jury, who were asked to render a verdict subject to the opinion of the court, as provided by section 1187 of the Code of Civil Procedure.

The following questions were submitted to the jury under proper instructions: First, whether Smith was negligent in the operation of the car; second, whether, on the day in question, Smith was, in good faith, engaged in testing the car, or taking a "joy ride" for the pleasure of himself and of his companions; third, whether the plaintiff was free from contributory negligence. The jury ordered a verdict against both defendants, resolving the questions presented in favor of the plaintiff. Counsel for Sartle thereupon again asked for the nonsuit and dismissal of the complaint upon the questions reserved, and also moved, if such motion is not granted, for a new trial on all the grounds specified in section 999 of the Code. The question, therefore, before the court is that of the liability of the defendant Sartle.

We have reached the conclusion, after a careful consideration of the facts and authorities, that the defendant Sartle cannot be held liable for the negligence of Smith, and this upon the theory that Smith did not become an employé, but was an independent contractor engaged in repairing Sartle's automobile.

It was held in the case of *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703, that where a person is employed to perform certain work which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, with no restriction as to its exercise, and no limitation of the authority conferred in respect to the same, and no provision is especially made as to the time in which the work is to be done, such person does not occupy the relation of a servant under the control of the master.

The fact that the work to be done was such as required special skill for its proper performance is frequently referred to in cases where the contract has been held to be independent. *Lawrence v. Shipman*, 39 Conn. 586; *Morgan v. Bowman*, 22 Mo. 538; *Parker v. Season-good* (C. C.) 152 Fed. 583. In the Connecticut case the rule was applied to a mason, in the Missouri case to a roof repairer, and in the federal case cited, to a trained nurse, and in *Hexamer v. Webb*, to one engaged in the roofing and cornice business.

In *Kueckel v. Ryder*, 54 App. Div. 252, 66 N. Y. Supp. 522, affirmed in 170 N. Y. 562, 62 N. E. 1096, where merchants employed a truckman to move bundles of paper from one floor of a building to another, and in the work a bundle was dropped carelessly and a person injured, the court held the truckman an independent contractor, citing the case of *Hexamer v. Webb*, 101 N. Y. 383, 4 N. E. 755, 54 Am. Rep. 703, as authority for the decision.

It has been said that:

"Where one who contracts to perform a lawful service for another is independent of his employer in all that pertains to the execution of the work, and is subordinate only in effecting a result in accordance with the employ-

er's design, he is an 'independent contractor'; and in such case the contractor alone, and not the employer, is liable for damages caused by the contractor's negligence in the execution of the work." *Smith v. Simmons*, 103 Pa. 32, 49 Am. Rep. 113.

See, also, *De Forrest v. Wright*, 2 Mich. 368; *Harrison v. Collins*, 86 Pa. 153, 27 Am. Rep. 699.

In *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304, will be found an illuminating opinion, discussing many English cases, and holding in substance to the rule of law above expressed. A full and elaborate discussion of the rule and of many cases in various states is also to be found in a note to the case of the *Central Coal & Iron Co. v. Grider's Administrator*, reported in 115 Ky. 745, 74 S. W. 1058, 65 L. R. A. 455.

It only remains to make the application of the rule to the facts in this case. Sartle in fact reserved no right to control or direct Smith in repairing the car to be overhauled. He neither had the knowledge or experience necessary to do so. He, in fact, did not assume to direct what should be done, or how it should be done. He was only interested in the result to be accomplished. He relied upon, and trusted entirely to, the mechanical skill and experience of Smith, who undertook the job. The fact that the work was done on Sartle's premises does not change the legal relations between the parties. Had Smith had a shop of his own, and had he taken the automobile there to do the work, his duties would have been precisely the same. Nor does the fact that he was to be paid at an agreed compensation of \$20 per week, or at the rate of \$20 per week, alter the relations. It is a circumstance to be considered, but cannot control. If the "auto" had been sent to a factory, the cost of the necessary repairs might have been either for a lump sum, or if the time and extent of the repairs could not be definitely foreseen, the parties could agree that the cost be ascertained on the basis of the time necessarily expended, plus the cost of the required new parts. This was, in substance, just what the arrangement was between Sartle and Smith; all necessary parts to be charged to Sartle, and the time expended to be paid for at the rate of so much per week.

After a most careful consideration of this case, I have therefore reached the conclusion that Sartle is not liable for the consequences of Smith's negligence; that the nonsuit asked for as to him should be granted, and the complaint dismissed; the verdict as to Smith to stand. So ordered.

(161 App. Div. 815)

PEOPLE ex rel. CONDE v. MEYERS, City Comptroller.

(Supreme Court, Appellate Division, Third Department. March 13, 1914.)

ARMY AND NAVY (§ 50*)—PERSONS ENTITLED TO RELIEF—"POOR PERSON."

Poor Law (Consol. Laws, c. 45) § 2, defines a "poor person" as one unable to maintain himself, and provides that such person shall be maintained by the town, city, county, or state, according to the provisions of that law. Section 80 provides that poor or indigent soldier, sailor, or marine, or his family, or the families of any one who may be deceased,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shall be provided for at their homes, so far as practicable; that the auditing board of any city or town in which they reside shall provide such sum as may be necessary to be drawn upon by the commander and quartermaster of any post of the Grand Army of the Republic upon the written recommendation of the relief committee of such post. *Held*, that section 80 provides only for the support of poor persons as defined in section 2, and a city comptroller properly refused to draw his warrant in favor of a person who was maintaining herself with the aid of her pension from the federal government, though the relief committee of the Grand Army post had duly recommended the payment of a specified sum to her, especially as it would be contrary to the spirit of Const. art. 10, § 2, which provides that all city officers whose election or appointment is not provided for by the Constitution shall be elected or appointed by designated authorities, to permit a voluntary organization owing no responsibility to the public to take upon itself any part of the duties of superintendents of the poor.

[Ed. Note.—For other cases, see *Army and Navy*, Cent. Dig. § 98; Dec. Dig. § 50.*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5452, 5453.]

Howard, J., dissenting.

Appeal from Special Term, Washington County.

Mandamus by the People, on relation of Annie E. Conde, against John L. Meyers, as comptroller of the city of Schenectady. From an order granting a peremptory writ commanding the defendant to audit and issue warrants upon the city treasurer in favor of relator, defendant appeals. Reversed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Frank Cooper, Corp. Counsel, of Schenectady, for appellant.

Miles R. Frisbee, of Schenectady, for respondent.

WOODWARD, J. The order in this proceeding grants a peremptory writ of mandamus, commanding the comptroller of the city of Schenectady to draw his warrant upon the funds appropriated for the relief of soldiers, sailors, and marines who have done service for the United States, under the provisions of section 80 of the Poor Law (Consol. Laws, c. 45), for the sum of \$2.50, this being one of the weekly payments directed to be made to the relator by the relief committee of the Grand Army of the Republic of the city of Schenectady. The petition on which this writ has been granted alleges the necessary jurisdictional facts; shows the existence of the fund in the hands of the proper municipal officers; that her husband was an honorably discharged Union soldier, etc., and that:

"Your petitioner owns no real estate or personal property, and is not a strong, vigorous woman able to support herself by hard manual labor, and is dependent for her support upon the pension of \$12 a month which she receives from the United States government and which sum she is not now receiving because the Congress of the United States has failed to appropriate any money for the payment of pensions, and said sum is entirely inadequate to provide your petitioner with shelter, clothing, food, medicines, and other necessities of life, and your petitioner is a poor person, and is now entirely dependent, and needs the sum of \$2.50 per week which the relief committee of Horsfall

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Post, No. 90, Department of New York, Grand Army of the Republic, has duly recommended to be paid to her."

The answer of the respondent denies this allegation, and affirmatively alleges that upon an investigation on the part of the department of charities of the city of Schenectady it was found that the relator was "acting as housekeeper for a widower," and that the person making the investigation was—

"Informed by said petitioner herein that she had done so for upwards of a year; that said petitioner was, on August 8, 1912, ever since, and for a year prior hereto has been, paid \$1.50 per week, plus her full board, for her services as such housekeeper, besides her government pension of \$12 per month; that said petitioner was not on August 8, 1912, and has not, at any time since January 1, 1912, been a poor and indigent person within the meaning of the provisions of chapter 46 of the Laws of 1909, and was not on August 8, 1912, and is not entitled to the relief asked for by said relief committee; that toward the end of June, 1912, and after the discovery by said Stern of the address of the petitioner herein, the said relief committee did inform said commissioner of charities of the true address of the petitioner herein, and agreed with said commissioner that she was not at that time in need of relief, and asked the said commissioner to give her relief whenever she should be in need thereof, to which the said commissioner agreed; that said relief committee, nevertheless, continued to present vouchers for payments of money to the said petitioner herein, but no significance was attached to the presentation of such vouchers, as the circumstances of the said petitioner herein had not changed."

Obviously, if this state of facts is true, the relator had no right to the relief demanded. All taxes are levied and collected for public purposes. The only justification for a municipal tax of any character is that it is for a public purpose; the individual parts with his money, at the demand of the taxgatherer, upon the implied understanding that the money is to be used only for a public purpose, and it can never be a public purpose to contribute to the support and maintenance of one as a poor person who is able to take care of himself or herself. A "poor person" is defined by section 2 of the Poor Law, as "one unable to maintain himself," and the statute further provides that "such person shall be maintained by the town, city, county or state, according to the provisions of this chapter." This is the only authority of the statute; it is only such person as is unable to maintain himself that is to be "maintained by the town, city, county or state, according to the provisions of this chapter," and section 80 of the Poor Law is one of the many provisions of the chapter in question, and provides (as amended by chapter 102 of the Laws of 1910) that:

"No poor or indigent soldier, sailor or marine who has served in the military or naval service of the United States, nor his family nor the families of any who may be deceased, shall be sent to any almshouse, but shall be relieved and provided for at their homes in the city or town where they may reside, so far as practicable, * * * and the proper auditing board of such city or town * * * shall provide such sum or sums of money as may be necessary to be drawn upon by the commander and quartermaster of any post of the Grand Army of the Republic, * * * made upon the written recommendation of the relief committee of such post * * * and such written request and recommendation shall be a sufficient authority for the expenditures so made."

The auditing board is to provide such funds "as may be necessary to be drawn upon," not at the mere caprice of the commander and

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quartermaster, but for the purpose of maintaining such persons as are unable to maintain themselves—such persons as are “poor persons” within the law, and who would have to be taken care of whether veterans of the United States or not. In other words, there is no larger authority given to municipal corporations to take care of soldiers, sailors, or marines than is given to them for the care of poor persons generally; it merely provides that they shall be cared for differently, and the suggestion that when “a Grand Army post assumes the supervision of the relief for poor veterans, its jurisdiction becomes complete and absolute” seems to me to overlook the fact that neither the Grand Army post or the auditing board of the city has any authority whatever to deal with the funds except for “poor persons” as defined by the statute, and that the determination of the Grand Army post that some particular individual should be given a sum of money each week is not conclusive upon the comptroller of the city; that this officer has no authority to pay out the public funds for private purposes. While the written request and recommendation would, no doubt, be a protection to the comptroller in issuing his warrant, where he acted in good faith and without knowledge of the facts, I cannot believe that he is called upon to issue a warrant for the payment of a sum of money which he knows is not necessary for the maintenance of a “poor person,” as defined by law. The officers of the Grand Army post are simply made the agents of the municipality in performing a duty which the law imposes upon such municipality to take care of poor persons. Clearly if the common council of the city of Schenectady were to appropriate a sum of money to a person who was in fact taking care of himself, where there was no legal or equitable claim for the same, it would be the duty of the comptroller to refuse to consummate the diversion of public funds, and I can see no difference in the case because the common council has, upon the recommendation of the Grand Army post, set aside a particular fund to be disbursed upon the recommendation of the officers of the post. Only so much of the fund as is necessary for the maintenance of poor persons is lawfully available; there can be no warrant beyond that, and if the comptroller knows that any part of such fund is being distributed where it is not necessary, he is simply performing his duty in refusing to permit the funds to be drawn upon his warrant. Maynard, J., in writing the dissenting opinion in *People ex rel. Crammond v. City of Rome*, 136 N. Y. 489, 499, 32 N. E. 984, 986, says:

“The persons to be relieved are also specifically pointed out. They must not only be veterans or the families of veterans, but they must be such as are entitled to relief under the poor laws of the state. If relief is demanded for persons not answering this description, the moneys may be refused, and the applicants compelled to establish their right to relief in the courts.”

It was upon this ground principally that he urged that it was the duty of the common council of the city to appropriate to the Grand Army fund the amount named by that organization for the purpose of maintaining poor persons who were veterans, or members of families of veterans, a proposition which the court refused to sustain, holding that it was for the common council to exercise its own judgment

as to the amount which was necessary after the Grand Army post had made its recommendation. In that case the court, after pointing out the features of the statute, say:

"Such an extraordinary statute which thus places the public money at the uncontrolled disposal of irresponsible persons not chosen by the people or appointed by any public body, or under the control of any public officer, should, so far as possible, be limited in its operation and scope, and public policy requires that it should be strictly and narrowly construed."

While the courts have been disposed to go far in sustaining legislation designed to give preference to veterans of the Civil War, it seems to me we have no right to go beyond the language used by the Legislature, and to attempt to give away the money of the people to persons who have no claim in law or equity upon such funds. It is an encroachment upon the spirit at least of section 2 of article 10 of the state Constitution, popularly known as the "home rule" provision, to permit a mere voluntary organization, owing no responsibility to the public, to take upon itself any part of the duties of superintendents of the poor (*People ex rel. Met. St. Ry. Co. v. Tax Com'rs*, 174 N. Y. 417, 435, 67 N. E. 69, 63 L. R. A. 884, 105 Am. St. Rep. 674, and authorities there cited), and I am clearly of the opinion that it is not the duty of the courts to rebuke a public official, charged with the duties commonly belonging to a comptroller, for having refused to issue his warrant for the payment of a sum of money for which the law has not provided, assuming, of course, that it is true that the relator was at the time maintaining herself with the aid of the federal government—that she was not, under the statute, a "poor person."

The order, in my opinion, should be reversed, and the issue of fact should be tried out upon return of an alternative writ.

HOWARD, J. (dissenting). Sections 80 and 81 of the Poor Law make special provisions for the relief of soldiers, sailors, and marines and their families. These sections provide, in substance, that no old soldier or sailor shall be sent to any poorhouse, nor any member of his family, whether the veteran be dead or alive, but that they shall be taken care of at home. The person so provided for must have been a resident of the state for one year. In executing this purpose to segregate the old Civil War veterans and the Spanish War veterans and their families from the ranks of the common poor and relieve them from the stigma of pauperism, sections 80 and 81 have undertaken to remove them completely from the jurisdiction of the poor authorities. It, therefore, directs that the proper city authorities shall provide such sums of money as may be necessary for their relief, and that their wants shall be looked after by a committee of veterans instead of the ordinary poor authorities. A written request from the commander and quartermaster of any Grand Army post or Spanish War camp shall be sufficient authority for the expenditure of the money. Before such post or camp can act, it is required to file with the clerk of the municipality where it is situated a written notice of its purpose to undertake the supervision of the relief for poor veterans and their families; it must also comply with certain other formalities.

In the city of Schenectady the sum of \$2,500 was set apart, under

the authority of section 80, in the year 1912 for the relief of veterans and their families. In that city Horsfall Post gave the notice and complied with all the prerequisites and formalities necessary to entitle it to supervise the relief for veterans and their families. Annie E. Conde, the relator herein, resides in Schenectady, and is the widow of an honorably discharged soldier of the United States. She draws a pension of \$12 a month. The relief committee of Horsfall Post investigated her case, and recommended that she be allowed from the veteran's fund, \$2.50 a week. This was paid to her for some time, but finally the commissioner of charities of the city made an investigation of the cause, and reached the conclusion that the woman was not in need of the money, and disapproved of the voucher presented August 8, 1912, by the Grand Army post. The comptroller accordingly refused to audit the voucher or issue a warrant for its payment. A peremptory writ of mandamus has been issued to compel the comptroller to audit and allow and issue a warrant for the payment of the voucher in question, and for all unpaid vouchers in arrears. Certain immaterial issues were presented by the answer of the comptroller, but only one question calls for discussion here; that relates to the right of the commissioner to supervise and investigate and pass upon recommendations for relief presented by Grand Army posts or Spanish War camps.

The whole scheme of the law contemplates the complete removal of veterans and their families from the ordinary ranks of the poor and from the jurisdiction of the poor authorities. Consideration for the services which these veterans have rendered to the Republic has led the Legislature to treat their indigence with more delicacy and concern than is accorded to the ordinary citizen in want. They are not to be subjected to that humiliation and annoyance which comes from an application to the public authorities for help. They are not to be forced to gather in company with other destitute persons at the office of the commissioner of charities, begging for alms, nor to herd together in almshouses with common paupers. Neither are the public officials having charge of the poor permitted to pry into their affairs or visit their homes or become familiar with their destitution. All this is to be attended to by the posts and camps. It is their friends and acquaintances and brother veterans to whom this duty is delegated. They are to be maintained in the privacy of their own homes, and no commissioner of charities or other official of the poor has any right to intrude himself upon them. This is the scheme of the law.

Sections 80 and 81 are not altogether specific and definite. These sections are not particularly well framed but their intent is very evident. When a Grand Army post assumes the supervision of the relief for poor veterans, its jurisdiction becomes complete and absolute. Of course it cannot be permitted to abuse the authority delegated to it, but there is no allegation of abuse here. It follows in this case that the commissioner of charities of the city of Schenectady had no right to inquire into the matter in question, or jurisdiction to reject or pass upon the voucher of August 8, 1912, and that it was the duty of the comptroller to audit the same and issue a warrant for its payment.

The order should be affirmed, with costs.

(161 App. Div. 897)

EWING v. FARLEY.

(Supreme Court, Appellate Division, Third Department. March 13, 1914.)

NEGLIGENCE (§ 136*) — CONDITION OF PREMISES — ACTIONS — QUESTIONS FOR JURY.

Where a doorway in defendant's store, close to a settee used by customers in trying on shoes, and leading to a stairway with an immediate fall from the doorway, was covered by a curtain, and not otherwise guarded, it was a question for the jury whether defendant was negligent, and whether a customer, whose two year old child fell down the stairway, was negligent in letting go of the child's hand for a moment while she examined a pair of shoes.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Smith, P. J., dissenting.

Appeal from Trial Term, Rensselaer County.

Action by E. Dakin Ewing, an infant, against James H. Farley. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Shaw, Bailey & Murphy, of Troy (H. D. Bailey, of Troy, of counsel), for appellant.

John F. & William H. Murray, of Troy, for respondent.

WOODWARD, J. The plaintiff is an infant, and, at the time of the accident for which he seeks recovery, was something over two years of age. In company with his mother and grandmother he visited the defendant's store, in the city of Troy. The store is one devoted to a miscellaneous retail line of goods, including shoes, and the grandmother was there for the purpose of purchasing shoes, and the plaintiff's mother accompanied her to advise in the purchase, the child accompanying them. The plaintiff was led by the hand, and at a point in the store the party stopped to look at the shoes. A clerk handed one of a pair of shoes to the grandmother and the other to the plaintiff's mother, who had her other hand full of parcels. She released her hold on the child's hand, and started to examine the shoe which had been handed her, and while so engaged she heard the plaintiff scream, and, running to a curtain-covered opening in the wall, immediately adjacent to a settee which was used by the customers in trying on shoes, resting, etc., she found that the opening led to a stairway which reached the cellar some distance below, and that the child had fallen to the bottom of these stairs. She gathered the plaintiff up and brought him to the store, and it developed that he had sustained two fractures of the leg. It appears from the evidence that this doorway opened onto a flight of stairs with an immediate fall from the doorway, and there was no barrier or obstruction, with the exception of a loose cloth curtain, and this opening was immediately in the presence of the place where customers were in the habit of coming for their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shoes. The evidence is that a person sitting upon the settee could reach out and touch this curtain, and the negligence relied upon is the fact of maintaining this unguarded pitfall in its close relation to the point where customers were invited to come upon the defendant's business, and without giving any warning.

The case, we believe, was properly sent to the jury. There was evidence that a previous manager of the store had recognized the danger, and had caused this opening to be barricaded, and it seems clear to us that a reasonable degree of care on the part of the manager of a retail store would have suggested the very danger which the accident has brought conspicuously to our attention. Persons trading at a retail store must, in the nature of things, be accompanied more or less by children of immature years, and it certainly is not negligence, as a matter of law, for a mother to let loose of the hand of her child for a moment in a store of this character; she has a right to presume that there are no hidden traps—no dangers not obvious to the sight. Nothing could be more natural than that a child of the inquiring age of two years should be attracted by the curtain and peer behind it, or that in its immaturity it should stumble and fall, and there was nothing to guard against just such a fall as came to the plaintiff. The defendant offered no testimony, but relied wholly upon his theory that the plaintiff had failed to establish a cause of action. The learned trial court reduced the verdict of \$1,000 to \$600, which the plaintiff has stipulated to accept, and we are of the opinion that the judgment ought not to be disturbed.

It is very likely that if a mature man had fallen through this trap-door a different question would have been presented, and yet it is not at all certain that there might not be circumstances which would permit a recovery even in such a case. Merchants inviting people into their stores are bound to use reasonable care to protect them against injury, and it might be fairly questioned, and reasonable men might fairly disagree upon the question of, whether the maintaining of a curtain over a dangerous flight of stairs, obscuring it from view and affording no barrier, was in harmony with this obligation. It would seem to be upon substantially the same ground as that of one maintaining an open trench so near to a sidewalk as to endanger persons passing in the darkness, and cases of that general character, and we believe the jury very properly found the defendant liable for the injuries resulting to this plaintiff.

The judgment and order appealed from should be affirmed, with costs. All concur, except

SMITH, P. J. (dissenting). Plaintiff is a child three years old non sui juris. She was in the shoe store of the defendant with her mother. While the attention of her mother was diverted in looking at some shoes she strayed away from her mother and fell down a stairway leading out of the room, and which was protected only by a curtain. This stairway was not used by the customers of the store, and was at the end of a passageway, which passageway was apparently used only by the clerks, who had full knowledge of the situation. The construc-

tion was not in any way negligent in failing to guard against the acts of any one *sui juris*. The defendant has been charged with damages for negligence in failing to guard against the wanderings of a three year old child, whom the mother allowed to stray away from her while she was looking at shoes. In my judgment this imposed a duty upon a storekeeper far beyond the requirement of the law, and I recommend that the judgment and order be reversed, and complaint dismissed, with costs.

(160 App. Div. 851)

HALL v. O'BRIEN.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

1. PAYMENT (§ 65*)—PRESUMPTION.

The law assumes that an evidence of debt given by one person to another will be found in the possession of the creditor, and when it is in the possession of the debtor, there is a strong presumption that the debt has been canceled by payment or gift.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 162-175, 196, 197, 199-201; Dec. Dig. § 65.*]

2. MORTGAGES (§ 319*)—FORECLOSURE—ACTIONS.

In an action to foreclose a mortgage which was in the possession of the defendant, evidence *held* insufficient to rebut the presumption that the mortgage had been canceled and to show that the mortgagor had, by way of gift, released defendant from the obligation.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 855-863, 875, 913, 1356, 1366; Dec. Dig. § 319.*]

Smith, P. J., and Lyon, J., dissenting.

Appeal from Trial Term, Clinton County.

Action by Ida M. Hall against John T. O'Brien. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Patrick J. Tierney, of Plattsburgh, for appellant.

John B. Riley, of Plattsburgh (Ernest C. Gorden, of Plattsburgh, of counsel), for respondent.

HOWARD, J. The parties to this litigation became acquainted in 1890. At that time the husband of the plaintiff was assistant manager of the Chateaugay Ore & Iron Company; the defendant was employed as a station agent by that company. After a time the plaintiff's husband was called away from Clinton county permanently to San Domingo, where he became employed. He seems to have made money rapidly in a modest way. He sent it home to his wife, and she managed his financial affairs and invested his money skillfully. The defendant assisted the plaintiff with this work, drawing mortgages, assignments, satisfaction pieces, figuring interest, and other such work. They became, in course of time, very friendly. The plaintiff supplied the defendant with many passes on the railroad and passes to the theater. They went to the theater together a great deal. They went together, on passes furnished by the plaintiff, to the Pan-American Exposition at Buffalo; the plaintiff paying the expenses of the trip.

*For other cases see SAME topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

She visited much at his house, frequently in the evening. She visited the defendant at night, frequently at the railroad office where he was employed, and stayed late. After the defendant was discharged from the employ of the railroad company and became engaged elsewhere, the plaintiff visited him at his new place of business, and was with him much there, at his home and on the streets. In 1902 the defendant purchased a house to be occupied by himself as a home. He gave \$3,500 for the property. Mrs. Hall, the plaintiff, loaned him the entire amount of the purchase price, and took a bond and mortgage on the house for its full value. For some years after this transaction the parties continued their friendly relations. About five or six years ago there came a rupture, not abrupt, perhaps, but the parties ceased to be friendly. On February 18, 1913, the day before the defendant was to be married, the plaintiff began this suit to foreclose the mortgage which she had taken on the defendant's home.

No interest has ever been paid on this mortgage, and by the terms of the instrument the whole amount is due. The only defense to the action is the allegation of a gift of the bond and mortgage, and a remission of the debt which they represent by the plaintiff to the defendant. The plaintiff disputes this allegation; she denies that she ever made the defendant a present of these securities, or ever absolved him from the debt. Was there a gift? This is the only question to be determined by us. There was no witness to the alleged gift, and hence we find the version of one litigant pitted absolutely against the version of the other. It becomes necessary, therefore, to consider more closely than usual the circumstances of the case and the probabilities arising therefrom; also such presumptions as the law says arise in such cases.

[1, 2] It is well to note, first, that the law assumes that an evidence of debt given by one person to another will be found, not in the possession of the debtor, but in the hands of the creditor. Therefore, when the reverse is the case, that is, when the evidence of debt is found in the possession of the debtor, a strong presumption arises that the debt has been canceled either by payment or gift. *Bergen v. Urbahn*, 83 N. Y. 49. In the case before us Mrs. Hall, the creditor, failed to produce the bond and mortgage. She could not produce them, for they were in the possession of O'Brien, the debtor, where they had reposed for more than a decade—reposed in quiet, unmolested, paying no interest. From these circumstances a presumption arises that the debt is no longer alive, no longer due and owing to the plaintiff. She must explain away these circumstances, or the presumption remains and becomes conclusive against her. She has attempted to make such explanation, but is it sufficient? She says that her clerk, whom she had befriended, took advantage of her, and after she had intrusted him with the possession of the documents, he refused to give them back to her, but upon one excuse or another retained them. This is her only explanation. For some five years after the execution of the papers she and O'Brien remained friendly; for some five years they were estranged. In the varying moods of these ten years she has never demanded payment but once; she never, until the eve of the defendant's

wedding, began suit at all. Does her explanation convince the unbiased mind?

The defendant comes into court with the bond and mortgage in his hands. He gives his explanation of this circumstance. He says that he and the plaintiff became intimately friendly, so much so that she, being wealthy, and he having had some misfortunes on her account, she undertook to square herself for the trouble she had caused him and to relieve his embarrassments and worries by making him a present of the bond and mortgage. The defendant's attitude here is said to be unchivalrous; but we are not to be guided here by the code of chivalry, it is the truth we are after.

That the attitude of these parties towards each other was more than a business relation is entirely apparent. They were intimately friendly. It is not necessary to determine, nor even to intimate, that this friendship was improper; but in order to analyze the situation presented here, the relationship of the parties is a dominant consideration, and it becomes necessary to refer to it. What was the plaintiff's frame of mind? Would she be likely to make the alleged gift? She wrote letters to the defendant. Let us look at them. The letters which she wrote while she was away in New York were not business letters. While they contain nothing improper, they disclose plainly the keen, constant interest which Mrs. Hall had in Mr. O'Brien. She writes to him of personal matters, of her teeth, and how well they look, of her going to the theater, of the weather; she addresses him as "My dear John"; she tells how glad she is to hear from him. It would be idle to attempt to force upon the court the conclusion that these communications were the mere letters of a wealthy business woman to an employé. Every circumstance about these missives stamp them with a different character.

The whole history of the event negatives the idea of a business transaction. The bond and mortgage are delivered to the mortgagor; no interest is ever paid, but it is allowed to accumulate until the original debt of \$3,500 becomes \$5,757.50; the foreclosure suit was instituted on the evening before the defendant's wedding day. The whole amount of the purchase price was advanced by the plaintiff; this is significant; it bespeaks friendship rather than business. The plaintiff was not an ordinary housewife, ignorant of bonds, mortgages, securities, and affairs; she was a business woman; she has been called a shrewd business woman; evidently that was so. She could not have been imposed upon by her hireling in this particular; she knew what she was doing. She must have known that to suffer the defendant to retain these securities for so long a time jeopardized their validity.

In weighing the evidence in this case and in considering the probabilities, the court is forced to take cognizance of human nature. A careful survey of the evidence adduced and of the peculiar circumstances disclosed leads us to the conclusion that the version of the transaction given by the defendant is well corroborated by circumstances and that the plaintiff's version is wholly uncorroborated, and that the plaintiff intended to, and did in fact, give the defendant the bond and mortgage in question and absolve him from the debt which he owed her.

The judgment should be reversed on the law and the facts, and judgment rendered for the defendant with costs.

We disapprove of the sixth, seventh, and eighth findings of fact made by the trial court, and we find that nothing is due and owing to the plaintiff from the defendant on the bond and mortgage; that the plaintiff did give to the defendant the bond and mortgage and the indebtedness represented thereby; also that plaintiff was not at the time of the commencement of this action the owner and holder of the bond and mortgage. All concur except SMITH, P. J., and LYON, J., dissenting.

(83 Misc. Rep. 624)

BERUS v. BERUS.

(Supreme Court, Special Term, New York County. January, 1914.)

MARRIAGE (§ 59*)—ANNULMENT—DEFENSES.

Where, in an action to annul a marriage because defendant concealed the fact that he was an ex-convict, and falsely represented that he was a duly licensed attorney, the evidence shows that plaintiff's pregnancy, and not any misrepresentations, was the inducing cause for the marriage, the complaint will be dismissed.

[Ed. Note.—For other cases, see Marriage, Dec. Dig. § 59.*]

Action by Blanche Berus against Herman Berus, to annul marriage. Complaint dismissed.

Towne & Spellman, of New York City, for plaintiff.

Elias Rosenthal, of New York City, for defendant.

COHALAN, J. Action, on the ground of fraud, for the annulment of a marriage. Plaintiff alleges that the defendant represented himself to her as an honest and law-abiding citizen, and as a duly licensed practitioner at the bar, and that in consequence of these representations she married him. After the marriage, she asserts, she learned that he had been convicted of crime, and had served a term of 30 days in a penal institution, that he was not a member of the bar, and that, in fact, because of his conviction, he was ineligible for such membership. There is nothing creditable in the character and record of the defendant, and his frame of mind and his conduct toward the plaintiff, as revealed by his own testimony, best substantiate this assertion. Yet the plaintiff cannot recover in this action unless she has conclusively established her cause of action. While the trial of the case was long and the issues many and involved, in its decision only two propositions require serious attention: First, was the plaintiff induced to enter into the marriage by false representations made to her by the defendant as to his record and character? and, second, did she, after the marriage, condone the alleged false representations, or waive the fraud by voluntarily cohabiting with the defendant?

It is conceded that the alleged misrepresentations of the defendant that he was a lawyer would not afford a ground for annulling the marriage. In considering the first proposition, it may be said that the marriage was not the result of a sudden impulse. The defendant met the plaintiff more than two years before the marriage occurred, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for more than a year he called regularly upon her in her own home. She had an opportunity, therefore, to appreciate and study his character. The mother and the father of the plaintiff evidently did learn of his bad reputation and his unworthiness, because the mother testified that she informed the plaintiff that she had heard that the suitor had been convicted of a crime, and for that reason had forbidden him to come to her home. The plaintiff herself testified that she had been told by her father—long before the marriage—that the defendant had been a convict. It was in spite of this parental warning and advice that the plaintiff clandestinely continued to meet the defendant. She had been put upon inquiry as to the type of man he was, and as to whether or not he had in reality been a convict. She did not avail herself of the suggestions thus made to her to find out for herself the truth of the situation, but on the contrary, without the presence of any of her relatives, married him on August 10, 1911. The defendant asserts that not only did he tell the plaintiff of his conviction, but that the real reason for the marriage was the fact of their improper intimacy prior to the date of the marriage.

The testimony of the defendant, naked and alone, is despicable and unworthy of belief. However, he is corroborated by two reputable physicians, both of whom testify to having, with her full consent, made a physical examination of the plaintiff. This evidence of the plaintiff's condition as found not long after the marriage stands in the case unchallenged, and no medical testimony of any description has contradicted it. If it be true, there is presented an inducing cause for the marriage much stronger than the representations of good reputation and prosperity in business claimed by the plaintiff to have been made to her by the defendant. If the marriage occurred under these circumstances, it seriously affects the credibility of the plaintiff, and casts doubt, with respect to the false representations, upon the truth of her story. With this medical testimony standing alone in the case, I do not see how I can hold that prior to the marriage the plaintiff was in a condition of pregnancy, and at the same time hold that the marriage was induced by false representations made to her by the defendant. This would seem to be an anomalous situation and one irreconcilable with any reasonable point of view. Hence I am bound to hold that these alleged misrepresentations were not the inducing cause for the marriage. The disposition of the first question renders a discussion of the second proposition scarcely necessary. It is my view that the evidence of the alleged condonation was insufficient, and that the alleged fraud was not waived. The animus displayed in the letter written by the plaintiff from Windsor, Ont., the evidence taken in the Magistrate's Court, and the uncertainty of identification, as testified to by the respective witnesses in the Hotel Gerard, all seem to resolve themselves against the defendant's contention. It appears that this is an unhappy alliance, begotten under unfortunate circumstances, and that the plaintiff is the sufferer therefrom. Yet, viewing all the circumstances, I do not think that she has made out a sufficient case for an annulment. The complaint is dismissed, without costs.

Complaint dismissed, without costs.

PEOPLE ex rel. CECERE v. SLOCUM, County Treasurer, et al.

(Supreme Court, Appellate Division, Second Department. March 20, 1914.)

1. COURTS (§ 37*)—OBJECTIONS TO JURISDICTION.

An objection to the jurisdiction of a court may be taken at any time.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147-149, 151, 156; Dec. Dig. § 37.*]

2. INTOXICATING LIQUORS (§ 76*)—LICENSES—CERTIORARI—JUDGE—COURT.

Liquor Tax Law (Consol. Laws, c. 34) § 27, subd. 1, providing for a writ of certiorari to be issued by a county "judge," gives no authority to the county "court" to issue such a writ.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 80; Dec. Dig. § 76.*]

Appeal from Dutchess County Court.

Certiorari by the People on the relation of Girolomo Cecere against Charles H. Slocum, County Treasurer, and Bernard Smith. From an order granting the writ, Bernard Smith appeals. Order reversed, and writ of certiorari dismissed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

James E. Carroll, of Poughkeepsie, for appellant.

CARR, J. The respondents have filed no briefs on this appeal. The order appealed from purports to be a final order in a certiorari proceeding brought by the relator to review the action of the county treasurer of Dutchess county in refusing to issue to him a liquor tax license. The petition is addressed "To the County Court of Dutchess County." The order directing the issuance of a writ of certiorari is entitled in the "County Court Dutchess County." The writ as issued is entitled likewise in the "County Court Dutchess County," and directs return pursuant to its provisions to the "County Court of Dutchess County." The final order is entitled in the "County Court Dutchess County."

[1, 2] By section 2123 of the Code of Civil Procedure, a writ of certiorari can issue only out of the Supreme Court, except "in a case where another court is expressly authorized by statute to issue it." This writ of certiorari was provided for by subdivision 1 of section 27 of the Liquor Tax Law, but that statute provides that it—

"may be issued by, returnable to, and heard by a county judge of the county, or a justice of the Supreme Court of the judicial district in which the premises are situated in which the applicant desires to carry on the business of trafficking in liquors."

So we have here, apparently, a proceeding of which the county court had no jurisdiction. This objection may be taken at any time, as is well settled.

The appellant cites, in support of his contention that the county court as such had no jurisdiction of this matter, the following authorities, all of which are in point: *Heisohn v. Knickerbocker Life Ins.*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Co., 77 N. Y. 278; *Wiechers v. New Home Sewing Machine Co.*, 38 App. Div. 1, 56 N. Y. Supp. 235; and *Matter of Wright, Peters & Co.*, 73 App. Div. 75, 76 N. Y. Supp. 775. There are numerous other authorities pointing out the distinction between a statutory power given to a judge and that given to a court.

The order of the county court of Dutchess county should be reversed, with \$10 costs and disbursements, and the writ of certiorari dismissed. All concur.

(161 App. Div. 511)

SWAN v. PACKER.

(Supreme Court, Appellate Division, Second Department. March 20, 1914.)

WILLS (§ 634*)—CONSTRUCTION—ESTATE CONVEYED—VESTED REMAINDER.

Testator devised to his son a specified piece of land, and then provided that at the son's death the premises should go to and immediately vest in testator's three grandchildren named and to their heirs and assigns forever. He further provided that all of such premises devised to the grandchildren should be equally divided between them when they should respectively arrive at the age of 21, but if any one or more of them should die before arriving at that age, or "at any other time," leaving no living descendant or descendants, then his, her, or their share or shares should immediately vest in and go to the survivor, or survivors, of them. *Held*, that the words "at any other time" were merely substitutionary, and meant at any other time during the life of testator, so that the grandchildren acquired a vested remainder in fee free from condition, under the rule that, where there is a devise to one person without restriction, and, in case of his death, to another, the contingency referred to is the death of the first-named devisee during the lifetime of the testator, so that if he survives the testator he takes an absolute fee.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

Submission of controversy between Alden S. Swan against Flavius Packer. Judgment for plaintiff.

Argued before JENKS, P. J., and THOMAS, RICH, STAPLETON, and PUTNAM, JJ.

John F. Couch, of New York City, for plaintiff.

George C. Austin, of New York City, for defendant.

STAPLETON, J. Pursuant to the provisions of section 1279 of the Code of Civil Procedure, the parties herein have submittted, upon agreed facts, the question in difference between them for the determination of this court. The agreed facts are:

The defendant obtained from the plaintiff, with an option of purchase, a written lease of certain farm lands situate at Pawling in Dutchess county, this state. The defendant exercised the option, but refused the title tendered. The sole ground of his refusal was that one William Dodge, one of plaintiff's predecessors in title, was never seised of an alienable estate in fee in certain parcels of the lands.

The said William Dodge was one of three grandchildren of Joseph Dodge, who died in 1846, leaving a will that was made in 1843, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

admitted to probate in the Surrogate's Court of Dutchess county on the 4th day of June, 1846. Of that will the clauses here pertinent are:

"Also I give and devise to my son Elijah Dodge the certain piece of land [describing it], and at the decease of the said Elijah Dodge, the above described premises with the appurtenances shall go to and immediately vest in my three grandchildren hereinafter named and to their heirs and assigns forever. Also I give and devise to my three grandchildren the children of my son Newel Dodge, 2nd, viz.: Mary E. Dodge, William Dodge and Ann Dodge, all the residue and remainder of the said pond farm not hereinbefore effectually disposed of, also one other piece of land [describing it], all of which land as above described I give to them, their heirs and assigns forever (with the privilege of going to and from said land, * * *), all of which premises I devise to my three above named grandchildren in manner following, viz.: to be equally divided between them when they shall respectively arrive at the age of 21 years but if any one of [sic] more of them shall die before arriving at that age or at any other time leaving no living descendant or descendants, then his, her or their share or shares shall immediately vest in and go to the survivor or survivors of them as aforesaid."

Elijah Dodge, the life tenant, having survived the testator, died prior to the execution and delivery of the deeds by which William Dodge undertook to convey the real estate.

All of the three grandchildren survived the testator and all of them arrived at the age of 21 years.

Mary E. married and had two children. She sold her interest in the parcel, conveying the same by a quitclaim deed.

Ann married and had one child. She died intestate, leaving the child and husband her surviving. Thereafter, by infancy proceedings, the interest of the child, as the heir of Ann, was sold, and the surviving husband also disposed of his interest.

William survived Mary E. and Ann. He died leaving no living descendant. By various mesne conveyances he had acquired one-half the share devised to his sister Mary, and subsequently, by a full covenant and warranty deed, he sold an undivided half of the two parcels last described in the quoted clauses of the will.

In the quoted clauses it will be observed that three separate parcels are devised. The first is devised to Elijah Dodge for life, with remainder over to the three grandchildren. The plaintiff asserts, the defendant in his brief does not dispute, and we are of the opinion, that the effect of that provision was a devise to the grandchildren of a vested remainder in fee, free from any condition which might attach to the testamentary disposition of the other two parcels which were the subject of the second clause, and that William Dodge's deed passed a good and marketable title to his share in the first-mentioned parcel. *Washbon v. Cope*, 144 N. Y. 287, 297, 39 N. E. 388.

The defendant contends that by the second clause quoted, disposing of the other two parcels, William Dodge took a fee subject to a conditional limitation in favor of both or either of his sisters who should survive him, in the event of his death without a living descendant, or, in the event of the death of both sisters before his death without leaving a descendant, that the testator died intestate as to that share, or it went to testator's residuary estate.

We are not required to determine who are the owners of the real

property secondly described in the clause quoted, if we decide that William Dodge was not the owner at the time of his conveyance to plaintiff's predecessor in title.

As all the devisees attained the age of 21 years, it is not necessary to discuss or determine what would have been the result of the death of William Dodge, or either or both of the other devisees, before arriving at that age, either before or after the death of the testator.

A rule of construction is: Where there is a devise to one person absolutely and without restriction, and in case of his death to another, even where the alternative devise is made to depend upon the death of the first-named devisee "without children," "without issue," "without descendants," the contingency referred to is the death of the first-named devisee during the lifetime of the testator, and if such devisee survives the testator he takes an absolute fee. This rule is well settled, and is uniformly applied unless there is some expression in the will indicating a different intention on the part of the testator. *Matter of N. Y., L. & W. R. Co.*, 105 N. Y. 89, 92, 11 N. E. 492, 59 Am. Rep. 478; *Stokes v. Weston*, 142 N. Y. 433, 437, 37 N. E. 515; *Benson v. Corbin*, 145 N. Y. 351, 40 N. E. 11.

The defendant professes to find in the words "or at any other time" a provision that qualifies the effect of the rule. We believe the words to be no more than declaratory of the ordinary import of the words upon which the rule to which we have adverted is formulated. In *Mead v. Maben*, 131 N. Y. 255, 259, 30 N. E. 98, 99, the court said:

"The rule must yield if, upon consulting the other provisions of a will, we can find a warrant for importing into the language used by the testator the natural and an ordinary significance. It cannot be denied that the ordinary import of the words, 'if any of my children shall die,' is that of a death of any of them at any time."

The words "at any other time," therefore, are not efficient, in contemplation of the rule and the reason for its establishment, to indicate a testamentary intention to fix the death of the first-named devisee (whose devise was expressed in language purporting to give him an estate in fee) as the particular event which would satisfy the contingency upon which the vesting of the estate depended. We require a more definite expression by the testator to induce us to reject his words purporting to devise an estate of inheritance, and to hold that, despite them, he intended that the first-named devisee should take only a conditional fee defeasible by his dying leaving him surviving no living descendant. The words are merely substitutionary, and mean at any other time during the life of the testator, and were used for the purpose of preventing a lapse of the devise in case the first devisee named should not be living at the death of the testator. The general scheme betrays a general purpose in the mind of the testator: (1) To dispose of all his estate by will; (2) to devise separate parcels to divers family branches of his descendants. It would be doing violence to that scheme to adopt a construction which would throw the real property involved into a residuary estate in which no member of that branch to which the first-named devisee belonged had any right of participation, or which would declare that if the devise of the residue

were inoperative, the testator died intestate as to the estate of inheritance in the parcels of property involved, upon the happening of the events referred to in the agreed statement of facts. It is our opinion that the general rule must be applied, and that the will contains nothing to indicate an intention which interferes with its operation. Upon the death of the testator an absolute estate in fee to an undivided one-third interest in the parcels of real property last described in the clauses quoted was vested in William Dodge.

Judgment should be ordered for the plaintiff, with costs. All concur.

(161 App. Div. 516)

In re SNITKEN, Justice.

(Supreme Court, Appellate Division, First Department. March 13, 1914.)

JUDGES (§ 11*)—REMOVAL—EVIDENCE—MISCONDUCT.

In proceedings brought by the Association of the Bar of New York City against respondent, a justice of the Municipal Court, evidence held to sustain a finding of the official referee that respondent was not guilty of any violation of his duty as a judicial officer, and that his conduct and temperament generally did not unfit him for the office.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 42, 43-45; Dec. Dig. § 11.*]

Proceedings by the Association of the Bar of New York against Leonard A. Snitken, Municipal Court Justice, for official misconduct. Proceedings dismissed.

See, also, 152 App. Div. 885, 136 N. Y. Supp. 1148.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Henry W. Taft, of New York City, for petitioner.

Austen G. Fox and Henry M. Goldfogle, both of New York City, for respondent.

PER CURIAM. The Association of the Bar of the City of New York presented charges against the respondent, alleging that the respondent had failed in his duty as a judicial officer, and had so conducted himself in office as to demoralize the administration of justice and bring his court into public contempt, with further general charges of unfitness for the office which he held. The respondent answered, and the matter was referred to the official referee, who has heard the parties and after a most painstaking and thorough investigation has filed his report, in which, after fully discussing the testimony, he has come to the following conclusion:

"On the whole case, it appears to me that while respondent at various times used unjudicial language, for which he is censurable, and perhaps went somewhat beyond the bounds of discretion in trying to get more time for unfortunate tenants, yet this latter action did not spring from improper motives or arbitrary prejudice. It is apparent that the Municipal Court justice must frequently have his sympathy excited, his patience unduly tried, by the conditions of his courtroom and the character of those appearing before him.
* * * I conclude that while the respondent's language in certain instances

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was unjudicial, and therefore to be censured, it has not been shown that he is guilty of violation of his duty as a judicial officer, nor that his conduct and temperament generally are such as to render him unfit to hold judicial office, and consequently I find that the general and specific charges of unfitness and violation of duty are not sustained by the evidence adduced before me."

With this conclusion of the official referee we agree. The Municipal Courts of the city of New York occupy a rather unique position in the judicial system of this state. The nature of the business brought before the court depends largely upon the character of the neighborhood in which the court is located. These courts perform the extremely important function of providing a tribunal in which small claims can be brought and promptly determined without the elaborate and technical procedure that is necessary in the disposition of more intricate and difficult litigation. It is especially essential in these courts that the judicial officers should conduct themselves with dignity and impartiality, and that their sole object in the transaction of the business before them should be the prompt, dignified, and impartial administration of justice. We would not hesitate to remove a justice of that court whose conduct satisfied us that he failed in the performance of these duties, even though such failure resulted only from the lack of such a judicial temperament or appreciation of the duties of his office as would enable him to administer justice without respect to persons or the nature of the actions he was called upon to determine. While there are isolated instances in the testimony before us in which the respondent failed to preserve the dignity of the court over which he was called to preside and acted in an improper manner, taking the testimony as a whole, we cannot find that the respondent as to his general judicial conduct has displayed such a temperament or such character as would justify his removal. There are no charges of corruption, or that in the great mass of the litigation before him he failed to properly perform his duties. While therefore we approve the conclusion of the official referee that the respondent is censurable for the language employed by him, and in the instances specified by the official referee in the methods he adopted in the administration of justice, we also approve the general conclusion of the official referee that:

"It has not been shown that he is guilty of violation of his duty as a judicial officer, nor that his conduct and temperament generally are such as to render him unfit to hold judicial office."

It is proper to add that the Association of the Bar of the City of New York has performed an important public duty in bringing this matter before the court, and that it is entitled to the commendation of the profession and the public.

The proceedings are therefore dismissed.

(83 Misc. Rep. 636)

WAHLE-PHILLIPS CO. v. FITZGERALD et al.

(Supreme Court, Special Term, New York County. January, 1914.)

1. MECHANICS' LIENS (§ 30*)—PROPERTY SUBJECT—FIXTURES IN OFFICE BUILDING.

Under Lien Law (Consol. Laws, c. 33) § 3, authorizing a lien against the fee interest of the owner for improvement of real property, there can be no lien for fixtures furnished an office building in process of construction by virtue of a lease from the owner, where the fixtures of standard make were not distinctive about their finish or construction, and no injury would be caused by their removal, and there was no scheme or decoration in relation to which the fixtures were designed, and there was no provision in the lease that the fixtures would become the property of the owner.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 35; Dec. Dig. § 30.*]

2. MECHANICS' LIENS (§ 30*)—PROPERTY SUBJECT—THEATER FIXTURES.

Under Lien Law (Consol. Laws c. 33) § 3, authorizing a lien against the fee interest of the owner for improvement of real property, a lien existed for fixtures installed in a theater erected by virtue of a lease from the owner, where the fixtures for the most part were made from special designs to harmonize with the interior construction and decoration of the theater.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 35; Dec. Dig. § 30.*]

3. MECHANICS' LIENS (§ 73*)—CONSENT OF OWNER—LEASE.

A requirement in a lease that a tenant shall make improvements upon the premises is sufficient consent of the owner to charge his property with liens for labor and material supplied in making such improvements.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 87, 88, 90-102; Dec. Dig. § 73.*]

4. MECHANICS' LIENS (§ 75*)—CONSENT OF OWNER.

Where a lease, authorizing the construction of a theater building, expressly called for lighting fixtures, and the attorney in fact of the owner, while the latter was abroad, represented her and employed an inspector to supervise the work, the consent of the owner is sufficiently shown so as to authorize a lien against the fee interest of the owner for installing such fixtures.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 103-107; Dec. Dig. § 75.*]

Action by Wahle-Phillips Company against Mary A. Fitzgerald and others to foreclose a mechanic's lien. Judgment rendered.

John A. Dutton, of New York City, for plaintiff.

Winthrop E. Dwight, of New York City (Thomas A. Thatcher, of New York City, of counsel), for defendant Fitzgerald.

COHALAN, J. The plaintiff sues to foreclose a mechanic's lien against the fee interest of the defendant Fitzgerald. Other defendants, who were tenants, under a lease from the owner of the land, defaulted on the trial. On the 20th day of September, 1909, the owner leased the corner plot of land at Broadway and Forty-Third street to Frank R. Tate and the Broadway & Forty-Third Street Building Company. Tate thereafter assigned his interest in the lease to the defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant company. A substantial fireproof building, under the terms of the lease, was to be erected thereon, and a theater was to occupy the entire rear portion of the land. A building loan agreement, secured by a bond and mortgage, was executed at the same time. The mortgage covered the tenants' interest in the leased premises, including whatever personal property they might thereafter install in the structure. The owner, under the terms of the building loan agreement, was to advance in installments, as the work progressed, the sum of \$500,000. An office and theater building was thereupon completed by the C. L. Gray Construction Company, the general contractors for the work. A contract was made in August, 1910, between the C. L. Gray Construction Company and the plaintiff for furnishing and installing lighting fixtures in the respective theater and the office parts of the building. Fixtures to the value of \$1,331.50, for which no claim in this action is made, were installed under that contract. On the 1st day of December, 1910, the plaintiff entered into a contract with the Broadway & Forty-Third Street Building Company and the C. L. Gray Construction Company. It also made a further contract with the Broadway & Forty-Third Street Building Company which modified the contract to which the C. L. Gray Construction Company was a party. The plaintiff asserts a lien for materials furnished and labor performed under these respective contracts. It claims that there is due from the Broadway & Forty-Third Street Building Company the sum of \$2,329.28, that of this amount the sum of \$329.28 is due for fixtures actually installed in the theater, and that the balance is due for fixtures in the office portion of the building. The subject for consideration is whether or not the fixtures installed in the office building, within the meaning of sections 2 and 3 of the Lien Law, were permanent improvements upon the real property.

[1] The defendant Fitzgerald contends that none of these fixtures constituted such an improvement to the realty. Section 3 of the Lien Law (Consol. Laws, c. 33; Laws 1909, c. 38) provides as follows:

"A contractor, subcontractor, laborer or materialman, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, shall have a lien for the principal and interest of the value, or the agreed price, of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this article."

An examination of the fixtures, which were introduced in evidence, shows that they were of standard make, and were sold by other manufacturers and in the trade by wholesale and retail dealers. There was nothing distinctive or peculiar about their finish or construction. It would seem (a) that there was no scheme of interior decoration in the office building with relation to which the fixtures were designed; (b) that there would have been no injury, either to the fixtures or to the office building, in the removal of fixtures of this type; and (c) that there was no provision in the lease, upon the termination thereof, that the fixtures would become the property of the owner of the fee. I am satisfied, from the authorities, that the office fixtures in this case are not a permanent improvement to the real estate. Caldwell v.

Glazier, 138 App. Div. 826, 123 N. Y. Supp. 622; Wahle-Phillips Co. v. Fifty-Ninth St.-Madison Ave. Co., 153 App. Div. 17, 138 N. Y. Supp. 13; McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471. In the case of Caldwell v. Glazier, *supra*, the test adopted was whether or not the fixtures would pass upon the termination of the lease to the owner of the real property. The majority of the court held that, unless this were true, the installation of lighting fixtures was not a permanent improvement to the real property within the purview of the statute. The fixtures in evidence, under that decision, would not become a part of the real estate.

[2] While it is manifest that these office fixtures were not specially designed with reference to the general decorative scheme and architecture of the building, the same thing cannot be said of the fixtures placed in the theater part of the building. The theater fixtures, for the most part, were made from special designs to harmonize with the interior construction and decoration of that part of the building. These fixtures in any event fall within the decision of Wahle-Phillips Co. v. Fifty-Ninth St.-Madison Ave. Co., *supra*. It is stipulated that the lien claimed against the theater portion of the building amounts to the sum of \$329.28.

[3] The defendant Fitzgerald further asserts that the plaintiff is not entitled to a lien because the knowledge and consent of the owner had not been shown. The rule of law is that a requirement in a lease that a tenant shall make certain improvements upon the premises is sufficient consent of the owner to charge his property with liens for labor and materials supplied in making such improvements. *Burkitt v. Harper*, 79 N. Y. 273; *Otis v. Dodd*, 90 N. Y. 336; *Wahle-Phillips Co. v. Fifty-Ninth St.-Madison Ave. Co.*, *supra*.

[4] The lease in evidence expressly called for lighting fixtures such as were subsequently installed in the building by the plaintiff. Furthermore, while the defendant Fitzgerald was abroad, her attorney in fact represented her in matters relating to the construction of the building, and employed an inspector to supervise such work. Through these conceded agents and the authority contained in the lease and the specifications, the consent of the owner to the installation of the fixtures has been sufficiently established. The plaintiff is entitled (1) to a personal judgment for the full amount of the unpaid purchase price of all of the fixtures against the defendant Broadway & Forty-Third Street Building Company, and (2) to a lien against the fee interest in the premises of the defendant Fitzgerald for the unpaid price of the fixtures installed in the theater part of the building. Decision and judgment may be submitted on notice.

Judgment accordingly.

(161 App. Div. 215)

COFFIN v. COFFIN.

(Supreme Court, Appellate Division, First Department, March 6, 1914.)

1. CONTEMPT (§ 20*)—ORDER OF COURT—SUFFICIENCY.

Before one can be punished for contempt in not complying with a direction of the court, the precise thing to be done by the party proceeded against must be definitely stated.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 58-62; Dec. Dig. § 20.*]

2. CONTEMPT (§ 20*)—ORDER OF COURT—SUFFICIENCY.

An order that the plaintiff is entitled to judgment against the defendant directing her to pay to the plaintiff after a service of a copy of this judgment a sum of money, if treated as an order for a judgment, is not such a specific judgment as can be made the basis of contempt proceedings for failure to comply therewith.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 58-62; Dec. Dig. § 20.*]

3. CONTEMPT (§ 20*)—ORDER OF COURT—NONPAYMENT OF MONEY BY GUARDIAN.

Failure of a guardian to comply with a judgment directing her to pay a sum of money to the ward cannot be made the basis of contempt proceedings under Judiciary Law (Consol. Laws, c. 30) § 753, subd. 1, providing that proceedings to punish for contempt may be brought against an attorney or other person, selected or appointed to perform a judicial or ministerial service, for misbehavior in his office, or for disobedience to a law mandate of the court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 58-62; Dec. Dig. § 20.*]

4. CONTEMPT (§ 20*)—ORDER OF COURT—NECESSITY OF EXECUTION.

In view of Code Civ. Proc. § 1240, authorizing execution on final money judgments in favor of either party on a judgment directing the payment of a sum of money, a guardian, failing to obey an order directing her to pay over money to the ward, cannot be punished for contempt under Judiciary Act (Consol. Laws, c. 30) § 753, subd. 3, providing that contempt proceedings may be brought against a party to an action for the nonpayment of a sum of money ordered by the court to be paid in a case where by law execution cannot be awarded for the collection of such sum, or Code Civ. Proc. § 1241, subd. 1, authorizing contempt proceedings to enforce a final judgment which cannot be enforced by execution.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 58-62; Dec. Dig. § 20.*]

5. CONTEMPT (§ 20*)—ORDER OF COURT—FAILURE OF GUARDIAN TO PAY OVER MONEY.

A guardian failing to obey a judgment directing her to pay over money to the ward cannot be punished for contempt under Code Civ. Proc. § 1241, subd. 4, authorizing contempt proceedings to enforce a final judgment requiring the payment of money into court, or to an officer of the court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 58-62; Dec. Dig. § 20.*]

Appeal from Special Term, New York County.

Action by Everett S. Coffin against Cora A. Coffin. From an order adjudging defendant guilty of contempt, and directing her imprisonment, defendant appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John V. Judge, of New York City (John T. Fenlon, of New York City, on the brief), for appellant.

Chester Mayer, of New York City, for respondent.

McLAUGHLIN, J. The defendant appeals from an order adjudging her guilty of contempt of court, fining her \$8,491.22, and directing her imprisonment until such fine is paid. The plaintiff, by the defendant as his guardian ad litem, brought an action to recover damages for personal injuries sustained by him. He had a recovery of upwards of \$12,000, and thereupon this defendant was appointed his general guardian, and as such received the amount recovered, less the expenses of the litigation. After he became of age he instituted this action to compel her to account. The matter was sent to a referee, who reported that the general guardian was chargeable with a balance of \$8,491.22. The report was confirmed, and there was entered what is claimed to be a judgment directing the payment of such sum to the plaintiff, or his attorney, within five days after a service of the copy of the same.

[1, 2] It may well be doubted whether this is anything more than an order directing the kind of a judgment to be entered. It reads:

"Ordered that the plaintiff is entitled to judgment against the defendant directing her to pay to the plaintiff or his attorneys within five days after service of a copy of this judgment the sum of * * * \$8,491.22."

If treated as an order directing the kind of a judgment to be entered, then clearly the defendant was not guilty of contempt of court in not paying the amount found to be due. The rule is well settled that before one can be punished for contempt in not complying with a direction of the court, the particular or precise thing to be done by the party proceeded against must be clearly and definitely stated. *Ketchum v. Edwards*, 153 N. Y. 534, 47 N. E. 918; *German Savings Bank v. Habel*, 80 N. Y. 273; *Rowley v. Feldman*, 66 App. Div. 463, 73 N. Y. Supp. 385; *Ross v. Butler*, 57 Hun. 110, 10 N. Y. Supp. 444. The provision above quoted does not direct the defendant to pay, but simply provides that the plaintiff "is entitled" to a judgment directing her to pay.

[3-5] But, assuming that it is a judgment and not an order, and that it does direct the plaintiff to pay within five days the amount specified, then the order appealed from must be reversed. Judiciary Law, section 753, provides that proceedings to punish for contempt may be maintained against:

"1. An attorney * * * or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a willful neglect or violation of duty therein; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge. * * * 3. A party to the action or special proceeding, * * * for the nonpayment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum."

The defendant's alleged contempt consisted in a failure to obey directions given to her "as a party to the action," and not as a person who had been appointed to perform some judicial or ministerial act.

The first subdivision of the section of the Judiciary Law, therefore, has no application. The third subdivision is also inapplicable, because an execution may be issued to collect the amount directed to be paid. The Code of Civil Procedure provides (section 1240):

"In either of the following cases, a final judgment may be enforced by execution: 1. Where it is for a sum of money, in favor of either party; or directs the payment of a sum of money."

And section 1241:

"In either of the following cases, a judgment may be enforced, by serving a certified copy thereof, upon the party against whom it is rendered, or the officer or person, who is required thereby, or by law, to obey it; and, if he refuses or willfully neglects to obey it, by punishing him for a contempt of court; (1) where the judgment is final, and cannot be enforced by execution, as prescribed in the last section. * * * (4) Where the judgment requires the payment of money into court, or to an officer of the court. * * *

The defendant could not be punished under subdivision 1 of section 1241 of the Code of Civil Procedure, because execution could be issued to enforce the judgment. She could not be punished under subdivision 4 of the same section because she was not directed to pay the money into court, or to an officer of the court.

There are numerous authorities to the effect that an execution can be issued upon a judgment of this character, and, if so, a failure to pay as directed does not constitute a contempt of court. Thus in *Matter of Amerman*, 3 N. Y. St. Rep. 356, proceeding was brought in the Supreme Court to remove a trustee under a will and for an accounting. The plaintiff had an order removing the trustee and directing him to pay a specific amount found due to his cotrustees. He failed to pay, and proceedings were taken to punish him for contempt. It was held he was not guilty of contempt for failing to make the payment because execution would lie for its collection.

In *Matter of Hess*, 48 Hun, 586, 1 N. Y. Supp. 811, the judgment directed defendants to pay a certain amount found due. It was held contempt proceedings would not lie because execution could be issued for its collection.

The sections of the Code of Civil Procedure above referred to, and also what was then section 14 (now section 753 of the Judiciary Law), were considered in *Harris v. Elliott*, 163 N. Y. 269, 57 N. E. 406, and it was held that where an execution would be issued, one could not be punished for contempt in failing to make the payment directed.

The order appealed from is therefore reversed, with \$10 costs and disbursements, and the motion to punish for contempt denied, with \$10 costs. All concur.

SAM et al. v. MOHAWK CLOTHING CO., Inc.

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

PLEADING (§ 358*)—MOTIONS TO STRIKE OUT—FRIVOLOUS PLEADING.

In an action against a corporation on a contract attached to the complaint and purporting to be signed by the corporation by its president, an answer, which, after denying knowledge or information sufficient to form a belief as to the making or breach of the contract, for a separate

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defense, denied that defendant ever executed any such agreement and alleged that if defendant's name was signed to such agreement, it was signed without authority of the board of directors, and was not defendant's act, should not have been stricken as frivolous, as it raised a direct issue as to the want of authority to execute the agreement.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1096-1101; Dec. Dig. § 358.*]

Appeal from Special Term, New York County.

Action by William Sam and another against the Mohawk Clothing Company. From an order striking out the answer as frivolous, defendant appeals. Reversed and motion to strike denied.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Loucks & Alexander, of Schenectady (William Dewey Loucks, of Schenectady, of counsel), for appellant.

Arthur Rosenberg, of New York City, for respondents.

PER CURIAM. The complaint alleges that the plaintiffs are co-partners, and that the defendant is a domestic corporation. The cause of action set forth is a breach of a written contract of employment, by which defendant employed the plaintiffs for three years as selling agents, with privilege of renewal of two years, agreeing to pay 5 per cent. commission on all orders, to advance \$200 per month for a drawing account, and to pay office expenses not exceeding \$600 per year.

For their first cause of action plaintiffs allege that they entered upon the performance of said contract on May 1, 1913, and were discharged August 7, 1913, and that no part of their office expenses were paid, except \$30, and that by reason of the premises they have been damaged in the sum of \$25,150.

For a second cause of action, that under and by the terms of said agreement the plaintiffs became entitled to receive the sum of \$200 in advance for the month of July, and the further sum of \$200 for the month of August, of which no part has been paid. Wherefore they demand judgment for \$25,500. The alleged agreement is attacked to the complaint and is signed, "The Mohawk Clothing Co., by James F. Hooker, Pres., William Sam, Jacob Levine."

The answer to the first cause of action admits the allegation set forth in the first paragraph of the complaint; that is, that the defendant is a corporation. Second. This answering defendant has no knowledge or information sufficient to form a belief as to any of the other allegations in said amended complaint, and therefore denies the same.

As to the second cause of action it admits the allegation of the first paragraph of the complaint. Second. This answering defendant has no knowledge or information sufficient to form a belief as to any of the other allegations in said amended complaint contained, and therefore denies the same, except this answering defendant admits that no part of any alleged claim has ever been paid.

For a further and separate defense to each cause of action set forth in the amended complaint, this answering defendant denies that it

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ever executed any agreement of any kind, name, or nature with the plaintiffs in this action, and if the name of this answering defendant was signed by anybody to any paper purporting to be such agreement, it was signed without authority of the board of directors of said defendant, and was not the act of this answering defendant.

We think this answer should not have been stricken out as frivolous. The defendant flatly denies that it ever executed any agreement with the plaintiffs, and if its name was signed to any paper purporting to be such agreement, it was signed without authority, and was not the act of the defendant. This raises a direct issue, and puts the plaintiffs to their proof.

The order appealed from should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs.

(161 App. Div. 521)

FAVERSHAM v. FAVERSHAM.

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

1. DIVORCE (§ 83*)—ABATEMENT—DEATH OF PARTY.

Code Civ. Proc. § 757, providing that when a sole party plaintiff or defendant dies and the action survives, the court must allow or compel the action to be continued by or against his representatives, has no application to an action for divorce, since it abates with the death of either party to it.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 269-272; Dec. Dig. § 83.*]

2. DIVORCE (§ 247*)—CLAIM FOR ALIMONY—ABATEMENT AND SURVIVAL.

A wife's claim for alimony, under a decree of divorce awarding its payment, being unassignable, and not being a debt, the decree only admeasuring and making specific the husband's general duty to support, dies with her, and no right to enforce the payment, even of any sum which had accrued before her death, survives her.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 689, 697-700, 733, 736; Dec. Dig. § 247.*]

3. DIVORCE (§ 231*)—RIGHT TO ALIMONY—NATURE OF RIGHT.

The right to alimony is merely a personal right arising out of the domestic relations, and is not a property right.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 658-661, 664; Dec. Dig. § 231.*]

Appeal from Special Term, New York County.

Action for divorce by Marian M. Faversham against William Faversham. From an order entered after decree of divorce, substituting the executors of Marian M. Faversham, deceased, as party plaintiff, defendant appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

John Ewen, of New York City, for appellant.

Bartholomew B. Coyne, of New York City, for respondent.

SCOTT, J. The action is one for a divorce. Judgment was entered therein on March 24, 1902, awarding a divorce to plaintiff, and requiring defendant to pay alimony at the rate of \$3,200 per annum.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] Plaintiff died on April 6, 1911, at which time some amount of alimony remained unpaid. Respondent, having been appointed and qualified as her executor, now seeks to be substituted as plaintiff in place and stead of the deceased plaintiff, his avowed purpose being to enter a judgment for said unpaid alimony, under the authority of *Thayer v. Thayer*, 145 App. Div. 268, 129 N. Y. Supp. 1035. The authority for substituting a new party in place of one who has died is found in section 757 of the Code of Civil Procedure, which reads as follows:

"Sec. 757. When Sole Party Dies and Action Survives. In case of the death of a sole plaintiff or a sole defendant, if the cause of action survives or continues, the court must, upon a motion, allow or compel the action to be continued, by or against his representative or successor in interest."

Passing, without discussing the question whether the foregoing section applies to an action which has gone to final judgment leaving nothing to be done except to enforce it (sections 763, 1376, Code Civ. Proc.), an action for divorce is pre-eminently one of a personal nature which, in the absence of statutory provision, abates with the death of either party to it (*Matter of Crandall*, 196 N. Y. 127-130, 89 N. E. 578, 134 Am. St. Rep. 830, 17 Ann. Cas. 874). Therefore section 763 of the Code of Civil Procedure has no application to such an action. *Matter of Crandall*, supra; *Robinson v. Govers*, 65 Hun, 562, 20 N. Y. Supp. 571, affirmed on this point 138 N. Y. 425, 34 N. E. 209.

[2] But even if it were allowable to grant respondent's application for substitution, it would avail him nothing, because the original plaintiff's claim for alimony died with her, and no right to enforce the payment, even of alimony which had accrued before her death, survived her. It is true that this court in *Thayer v. Thayer*, supra, spoke of alimony as "in the nature of a judgment debt," but those words were used with reference to the particular case then before the court, which was that of a living divorced wife against a living defendant. The question of the nature of alimony was not then before the court. *West v. Washburn*, 153 App. Div. 460, 138 N. Y. Supp. 230.

[3] It is well settled that alimony, although its payment be enjoined by a decree of divorce—

"is not strictly a debt due to the wife, but rather a general duty of support, made specific and measured by the court." *Romaine v. Chauncey*, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. Rep. 544.

"It is an admeasurement by the court of the marital obligation of support, which obligation is made specific, and the allowance becomes a debt only in the sense that the general duty over which the husband previously had discretionary control has been changed into a specific duty." *Maisner v. Maisner*, 62 App. Div. 288, 70 N. Y. Supp. 1107.

Hence, although the decree allows alimony to the wife "so long as she shall live," the obligation to pay ceases on the death of the husband, and any lien given by him to secure the payment of the alimony terminates at the same time. *Wilson v. Hinman*, 182 N. Y. 408, 75 N. E. 236, 2 L. R. A. (N. S.) 232, 108 Am. St. Rep. 820; *Johns v. Johns*, 44 App. Div. 533, 60 N. Y. Supp. 865, affirmed on opinion below 166 N. Y. 613, 59 N. E. 1124. For the same reason the right to receive alimony cannot be reached by creditors of the wife, except

possibly upon a claim for furnishing necessities which it was the duty of the husband to supply, which is not the case here. *Romaine v. Chauncey*, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. Rep. 544; *Andrews v. Whitney*, 82 Hun, 117, 31 N. Y. Supp. 164; *West v. Washburn*, 153 App. Div. 460, 138 N. Y. Supp. 230. A judgment for alimony, whether payable in future installments or in a liquidated sum, is not discharged in bankruptcy. *Audubon v. Shufeldt*, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009; *Wetmore v. Markoe*, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390, 2 Ann. Cas. 265; *Matter of Williams*, 208 N. Y. 32, 101 N. E. 853, 46 L. R. A. (N. S.) 719. Nor can the husband set off against his obligation to pay alimony a valid debt due to him from his wife (*Locke v. Locke*, 71 Hun, 363, 24 N. Y. Supp. 1129), and, finally, a wife's claim for alimony is so far personal that it cannot be assigned (*Matter of Bolles*, 78 App. Div. 180, 79 N. Y. Supp. 530; *Matter of Brackett*, 114 App. Div. 257, 99 N. Y. Supp. 802). A decree for alimony therefore does not create, but rather defines and makes specific, the husband's original obligation, which continues notwithstanding the divorce. It does not therefore create a debt in the ordinary sense of the word. It measures and makes specific and certain his obligation, but it does not change the character of that obligation, which is purely personal, and solely for the support and maintenance of the wife. In its very nature, therefore, it is unassignable, and upon the death of the wife, when the obligation of support and maintenance ceases, the obligation of payment likewise ceases, and it makes no difference whether alimony has accrued at the time of death or not, for, the right to receive alimony being unassignable, it is unsurvivable. A familiar test as to whether a claim or a cause of action survives the death of the person in whose favor it existed is to ascertain whether or not it was in its nature assignable by such person during lifetime.

"The assignability and survivability of things in action have frequently been held to be convertible terms, and perhaps furnish as clear and intelligible a rule to determine what injuries to property rights or interests are meant by the statute, as it is possible to lay down [citing cases]. The rights of property only which are in their nature assignable and capable of enjoyment by an assignee are those referred to in the statute. Such rights as arise out of domestic relations clearly do not possess the attributes of property, and are not assignable by the possessor." *Hegerich v. Keddle*, 99 N. Y. 266, 1 N. E. 792, 52 Am. Rep. 25.

The right to receive alimony, as it is understood in this state, is clearly a personal right, arising out of the domestic relations, and is not a property right. This peculiar nature of the obligation to pay alimony under a decree of divorce awarding alimony has been repeatedly recognized by the Supreme Court of the United States in the cases above cited. In *Wetmore v. Markoe*, supra, that court said:

"The precise question therefore is, Is such a judgment as the one here under consideration a *debt* within the meaning of the act? The mere fact that a judgment has been rendered does not prevent the court from looking into the proceedings with a view of determining the nature of the liability which has been reduced to judgment. * * * We think the reasoning of the *Audubon Case* recognizes the doctrine that a decree, awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a

judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty, not because of any contractual obligation, or as a debt due from him to the wife, but because of the policy of the law which imposes the obligation upon the husband."

It is true that the estate of a deceased husband may be held, at the suit of his wife, for alimony which had accrued prior to his death (Matter of Williams, supra), but this is because the necessity for her support and maintenance continued down to the time of his death, as did his marital obligation to furnish support and maintenance. That, however, is the very opposite of the case now under consideration.

We are aware that it has been held in Indiana and Illinois that the right to collect accrued alimony from a husband survives the death of the wife, and passes to her legal representatives (Miller v. Clark, 23 Ind. 370; Dinett v. Eigenmann, 80 Ill. 274), but in both of these cases the courts took a different view of the nature of alimony from that which is entertained in this jurisdiction. As was said in the Illinois case, "The legal liability of the husband for alimony was in the nature of an obligation or duty to a stranger," which is a view precisely opposite to that which obtains in this state.

The order appealed from must therefore be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs.

INGRAHAM, P. J., and McLAUGHLIN and CLARKE, JJ., concur. LAUGHLIN, J., concurs in result.

(161 App. Div. 230)

SOMERS v. HARRIS.

(Supreme Court, Appellate Division, Third Department. March 13, 1914.)

1. PARTNERSHIP (§ 327*)—DISSOLUTION—ACCOUNTING—GOOD WILL—PLEADING AND PROOF.

In proceedings for the dissolution of a partnership, plaintiff alleged that the assets, exclusive of such sums as might be found due from defendant, were of the value of about \$274,257.56, and consisted of "securities, cash in bank, bills receivable, and office furniture"; that the liabilities, exclusive of any liabilities which might be found due from the firm to plaintiff, amounted to about \$58,223.40, etc. The complaint prayed that the partnership be dissolved, that a receiver be appointed, with power to dispose of the same and collect the debts for the benefit of the parties, and that an accounting be had and the proceeds of the assets divided after payment of debts, etc. The answer denied defendant's knowledge of the value of the assets or the extent of the liabilities, and joined in asking that the firm be dissolved, and that an accounting be had and the assets divided. *Held*, that the pleadings did not present an issue as to plaintiff's right to recover from defendant the alleged good will of the business on the theory that, after the dissolution of the firm, defendant had appropriated such good will by taking over the New York office and organizing a corporation to operate it.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 769-778; Dec. Dig. § 327.*]

2. PARTNERSHIP (§ 310*)—DISSOLUTION—ACCOUNTING—GOOD WILL.

Plaintiff and defendant for many years prior to January 1, 1911, had operated a large and successful wholesale coal business as a firm under

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the name of H. & Co., with main office in Albany, where the records were kept, and branch offices in New York and Pittsburg. Plaintiff had, for several years prior to dissolution of the firm, exclusive charge of the Albany office, was advertised on the firm's stationery as a member of the firm, and was in close touch with its customers. On dissolution plaintiff retained the Albany office and the business connected therewith, the Pittsburg office was discontinued, and defendant organized a corporation composed of himself and his sons under the name of H. & Co. to operate the New York office. *Held*, that such facts did not warrant a finding that defendant had thereby appropriated any part of the good will of the old firm so as to render him liable to account therefor to the firm's receiver in dissolution.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 712; Dec. Dig. § 310.*]

Appeal from Trial and Special Term, Washington County.

Action by Henry W. Somers against George D. Harris. From a judgment in partnership dissolution proceedings, directing defendant to pay to the receiver of the firm \$54,201.85 as the value of the good will of the partnership, and from an order granting plaintiff an extra allowance of costs, defendant appeals. Reversed and new trial granted.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Louis H. Rowe, of New York City (Charles F. Brown and Grant C. Fox, both of New York City, of counsel), for appellant.

Edgar T. Brackett, of Saratoga Springs, for respondent.

WOODWARD, J. [1] The complaint in this action alleges: That the plaintiff and defendant entered into a copartnership in the year 1887, under the firm name and style of "Geo. D. Harris & Co.," for the purpose of engaging in the business of buying and selling coal, under an agreement which provided that the partners should co-operate in carrying on the business, and should divide the net profits upon the basis of four-ninths to the plaintiff and five-ninths to the defendant, and that upon a dissolution of the said partnership, after the payment of liabilities, the assets should be divided between them upon the same basis. That the plaintiff and defendant continued this arrangement until about the 1st day of January, 1903, when the defendant, over the protest of the plaintiff, ceased to co-operate in the management of the business, and he—

"did not thereafter materially assist in the conduct thereof. That the plaintiff continued to manage and conduct said business until on or about the 1st day of January, 1911, when, by the agreement of the parties, the said partnership was terminated. That at the time of the termination of the partnership, as above stated, the assets of the partnership, exclusive of such sums as may be found due it from the defendant, were of the value of about \$274,257.56, and consisted of securities, cash in bank, bills receivable, and office furniture. That at that time the partnership liabilities, exclusive of any liabilities which may be found due from it to the plaintiff, amounted to about the sum of \$58,223.40; that since the termination of the partnership as above stated, and prior to the commencement of this action, all the liabilities of said partnership, except such as may be found due from it to the plaintiff, have been paid, the defendant has received assets of said partnership of the value

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of \$98,612.18, and the plaintiff has received assets of said partnership of the value of \$50,368.13. That there remain undistributed, besides such sums as may be found due it from the defendant, assets of said partnership of the value of about \$31,000, consisting of about \$26,000 cash in bank, and office furniture, and accounts receivable of the value of about \$5,000, and an accounting is necessary to state and settle the affairs of said partnership, and to ascertain accurately the interests of the parties. That the plaintiff's interest in the remaining assets of said partnership is of the value of more than \$25,000, and the defendant's interest in the remaining assets of said partnership is of the value of less than \$6,000."

The relief demanded, so far as it has any bearing upon the questions here involved, was that the—

"partnership be adjudged dissolved; that a receiver of the property of said partnership be appointed, with power to dispose of the same, and to collect all debts for the benefit of all parties entitled thereto; that an accounting be had of the partnership affairs; that the proceeds of the partnership assets be divided, after the payment of all just debts of said partnership, and the costs of this action and of such receivership, between the parties hereto, according to their respective rights."

The answer substantially admits the allegations in reference to the organization of the partnership, though putting it in the form of a denial; denies that the defendant ceased to co-operate in the conduct of the business between the years 1903 and 1911, and admits that the partnership was continued down to about the 1st day of January, 1911, "at which time said partnership was terminated by agreement between the parties"; denies that he has knowledge or information sufficient to form a belief as to the value of the assets, or the extent of the liabilities of the firm at the time of the dissolution; denies knowledge or information sufficient to form a belief as to the amount of the assets which the defendant or the plaintiff has received since the dissolution of the partnership, but admits that both have received some portion of the assets; and denies in a like manner knowledge of the amount of the assets due to the plaintiff or to the defendant. The defendant then joins in asking that the partnership be adjudged dissolved, that an accounting be had of the partnership affairs, and that the proceeds of the partnership assets be divided in the manner asked for by the plaintiff.

Where is the justification, under these pleadings, for finding that the defendant owes to the receiver of this copartnership the sum of \$54,201.85 for the alleged good will of such partnership? The principle still remains that the judgment to be rendered by any court must be *secundum allegata et probata*; and this rule cannot be departed from without inextricable confusion and uncertainty and mischief in the administration of justice. Parties go to court to try the issues made by the pleadings, and courts have no right *impromptu* to make new issues for them, on the trial, to their surprise or prejudice, or found judgments on grounds not put in issue and distinctly and fairly litigated. *Wright v. Delafield*, 25 N. Y. 266, 270. The complaint alleges that, at the time of the termination of the partnership on the 1st day of January, 1911, "the assets of the partnership, exclusive of such sums as may be found due it from the defendant, were of the value of about \$274,257.56, and consisted of securities, cash in bank, bills re-

ceivable and office furniture," and the express mention of these items excludes the idea that the assets consisted of anything other or different from those mentioned, under the well-known maxim of "*Expressio unius est exclusio alterius*" (*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57, 57 N. E. 168, 79 Am. St. Rep. 565), or that they were substantially in excess of the amount named. Certainly up to the time of the dissolution of the partnership the defendant had taken no part of the good will. It is true that he had organized a corporation on the 22d day of December, 1910, for the purpose of dealing in coal, but the undisputed evidence is that this corporation did not commence doing business until the 1st day of January, 1911, at which time the plaintiff alleges, and the defendant admits, that "by the agreement of the parties the said partnership was terminated." It follows, therefore, that the clause of the complaint which declares the assets "exclusive of such sums as may be found due it from the defendant" cannot be construed as an allegation that there was anything due from him as for good will on the 1st day of January, 1911, for at that time, whatever of assets there were were in the custody and control of the partnership, the defendant had taken none of them away, nor had he appropriated any element of good will. The only fair and honest construction of the complaint is that it alleges that the assets of the partnership at the time of dissolution were "of the value of about \$274,257.56, and consisted of securities, cash in bank, bills receivable and office furniture," and such other amounts as the defendant might be found to be owing the partnership upon an accounting not for good will, but for any sums which he might have withdrawn, and which were not included in the account. Indeed, it practically appears from the record that the plaintiff did not contemplate that his action involved any question of good will, for the learned trial court, in its findings of fact, finds that "the plaintiff did not know that he had any rights with respect to the good will of the partnership of Geo. D. Harris & Co. until in or about the month of January, 1913," and the complaint is verified on the 7th day of January, 1913, and makes no mention of the alleged good will, or of its constituting any part of the assets of the partnership, and the defendant, testifying upon the trial of the action on the 20th day of March, 1913, being asked when he first heard of the question of good will being raised, replied: "Very recently. I think it was day before yesterday, in fact."

Clearly the defendant in this action was not called upon to account for anything more than the assets of the partnership at the date of dissolution. Whatever the partnership owned at that time constituted the assets, and the plaintiff elected to say in his verified complaint that those assets, "exclusive of such sums as may be found due it from the defendant," were of the value of about \$274,257.56, and consisted of securities, cash in bank, bills receivable, and office furniture; and, without any amendment of the pleadings, so far as we can discover, he has a judgment against the defendant for the sum of \$54,201.85, besides several items of costs and extra allowances, and this principal item is made up of an alleged asset which was not even hinted at in the complaint, and which is arrived at by finding the alleged annual

profits of the copartnership for the last five years of its existence at \$10,840.37, and then multiplying this by five. In other words, the learned court finds, entirely outside of the pleadings, that the good will of this partnership, which was unknown to the plaintiff from the 1st day of January, 1911 (although at about that time he consulted counsel in reference to the dissolution of the same), down to the month of January, 1913, is worth the average annual profits of the business for a period of five years. Of course, if the plaintiff were an infant, a court of equity might owe an obligation to inform him of his rights, but we are at a loss to understand how it can be held that a mature business man, at the close of a partnership extending from 1887 to 1911, can come into a court of equity, after two years of acquiescence, and procure an accounting for assets which he never claimed to have an interest in until after his complaint was served and issues were joined. It is entirely evident that the defendant had no intimation from the complaint that he was sought to be charged with the alleged value of any good will of the partnership; the language did not suggest it, and the defendant's answer, asking the identical relief sought by the plaintiff, aside from the appointment of a receiver, indicates clearly that no such issue was understood to be tendered; it involved, under any fair reading, a demand for an accounting of the assets of the copartnership, consisting "of securities, cash in bank, bills receivable and office furniture," and the court, after counsel have rummaged the past, has gathered up an entirely new asset, and has charged the defendant with having confiscated that to his own purposes, thus impromptu making new issues to the surprise and prejudice of the defendant. Modern thought has gone far in the direction of paternalism, but the courts have, as a rule, been content to let full-grown and experienced business men make their own business arrangements and abide by them.

[2] But, assuming that the pleadings might be deemed to have been amended to conform to the proofs in support of the judgment, is there anything in the evidence fairly tending to support the judgment? Putting aside as entirely technical the fact that the alleged good will was taken, if at all, by the corporation known as "Geo. D. Harris & Co." rather than by the defendant, and not until after the copartnership of "Geo. D. Harris & Co." had been dissolved, we will consider the evidence in the light of the complaint, and discover, if we may, if there was in fact any survival of this so-called good will for which the defendant may be properly charged upon an accounting of the copartnership of Geo. D. Harris & Co. It will be conceded that the firm of Geo. D. Harris & Co. had established a good reputation in the wholesale coal trade, and it will be assumed that this good reputation had a certain good-will value to the firm as a going concern, and which it would have been the duty of a surviving partner to account for had one of them died during the continuance of the partnership. The firm had offices at Albany, at Pittsburg, and New York, and it had traveling salesmen on the road, and it solicited business by telegraph, telephone, and mail, and, while it is in evidence that few of the customers visited the Albany office, and that a considerable number did call at the New

York office, there is not a particle of evidence that the customers calling at the New York office added materially to the volume of the business, and it was probably due to the fact that more wholesale coal dealers throughout the country drop into New York than do into Albany, and that they would very naturally call at the office of the company with which they were doing business, though they might not have any immediate business to transact, which accounts for this fact appearing in the record. Indeed, it is conceded that the fact of the location of the company's office in the city of New York, at a particular location, is not, in view of the character of the business being carried on, and which did not require the display of goods, of any great importance, and the evidence wholly fails to disclose either that the New York office commanded a profitable share of the company's business, or that the Albany office did not have all of the names of the customers, and all of the facilities for doing business which were available to the New York office. In fact it is in evidence that the Albany office was the record office, and that it had been in operation for a period of five years before the New York office was opened, and this office had all the time been in the direct charge of the plaintiff, so that he had the key to the business, as it were; and, while he testified that there was no such person as Henry W. Somers known in the coal trade, and the learned trial court has found as facts that "the plaintiff, when he commenced business as Henry W. Somers, was without credit in the coal trade," and that "no such person as Henry W. Somers was known in the coal trade," we are of the opinion that the plaintiff's pleadings and evidence do not warrant any such conclusions.

The plaintiff alleges in his complaint that "on or about the 1st day of January, 1903," the defendant "over the protest of the plaintiff, ceased to co-operate in the management of the business, and he did not thereafter materially assist in the conduct thereof; that the plaintiff continued to manage and conduct said business until on or about the 1st day of January, 1911, when by the agreement of the parties the said partnership was terminated." The plaintiff admitted on his direct examination that his name appeared upon the corner of the stationery as one of the members of the firm of Geo. D. Harris & Co., and such name appears upon the printed letter heads submitted to the court; he claims to have had the management and conduct of the business from 1903 to 1911; that he was in charge both of the New York and the Albany offices a greater part of the time after the defendant took up his residence in New York in 1900, and for this man to say that he was unknown in the coal trade, that he was without credit in the coal trade, after all these years of active management of a business which had established the high reputation which is claimed for Geo. D. Harris & Co. is absurd. Geo. D. Harris & Co. held out to the world as the members of that firm Geo. D. Harris and H. W. Somers; these were the names appearing at the opposite corners of the stationery directly over the firm name. No other names appeared, and the only intelligent understanding of the stationery used is that these two men constituted the firm of Geo. D. Harris & Co., and the clearly identified "Co." of the partnership cannot be heard to say that he had no

standing in the coal business, except in the most highly technical sense. He had for years been coming into direct personal contact with the trade. Taking his own version for it, he was much closer to the developing business of the firm than his partner; he was the man who managed and conducted the business from 1903 to 1911. His stationery was announcing to every one of his customers that he was a member of the firm which was doing business on sound principles, meeting its obligations and fulfilling its contracts, and it may be assumed that those customers who came to the office knew Mr. Somers personally, and that they understood that he was the active manager of this prosperous business; and, while it is true that the transactions were in the name of the firm of Geo. D. Harris & Co., and this firm technically had the high credit given it by the commercial agencies, it cannot be said with any fair degree of intelligence that the active partner in a firm of this character is unknown or without credit in the business in which he is engaged, after long years of actual contact with the people with whom he trades, during all of which time he is held out prominently as a partner. Geo. D. Harris might just as well say that he had no standing or credit with the coal trade, for it was not Geo. D. Harris but Geo. D. Harris & Co. who had the technical standing, but if Mr. Harris should attempt to deny that he had standing and credit with the people with whom his firm has been doing business for the past 20 years, more or less, he would hardly be credited with sincerity.

It is evident that just prior to the 1st of January, 1911, the plaintiff was in much closer touch with the business of the firm than Mr. Harris. He knew that he was better acquainted with the business and with the trade than Mr. Harris; he testifies that as far back as November, 1910, he had his first conversation with Mr. Harris about dissolving the partnership; that:

"I went to Mr. Harris and told him that the condition of affairs as they had been could not exist any longer, so far as I was concerned; that they must pay me a salary, inasmuch as I was devoting my entire time to the affairs of the company, and had been for years, while Mr. Harris was not doing so; that they must pay me a salary. Mr. Harris said, 'I would have to consider that I was no good; that my services were worth nothing to the firm.' He asked me if I didn't think his services were worth as much as mine, and I said 'No.'"

And soon after this the plaintiff tells us that the notice of dissolution was prepared at the Albany office and submitted to Mr. Harris, and by him approved, and this is the notice as it appears in the record:

"The firm of Geo. D. Harris & Co., doing a wholesale coal business in the Albany Trust Company Building, Albany N. Y., No. 1 Broadway, New York City, and Oliver Building, Pittsburg, Pa., will be dissolved by mutual consent on January 1, 1911. All existing contracts will be completed by the old firm of Geo. D. Harris & Co. The New York office will be carried on by Geo. D. Harris & Company, Incorporated, and the Albany office by Henry W. Somers."

Can there be any doubt that in this dissolution by mutual consent the parties, with a full understanding of all the facts, made their own division of the good will of the business; that the plaintiff, of his own

choice, took the Albany office—the record office—with which he had been identified from the first, and gave to Mr. Harris the New York office, leaving the Pittsburg office to be discontinued? Is there any doubt that Mr. Somers in December, 1910, in formulating this notice and in bringing about the dissolution, believed that as a well-known and active partner in the firm of Geo. D. Harris & Co. he would be prepared to reap all of the benefits to which he was entitled? Did he not, upon the facts as they then appeared, have rather the best of the bargain in the matter of good will? He was taking over the older and the better established office, the office containing all of the records of the firm which was about to disappear from the business world, and the office which had been under his personal charge since 1895, while he was leaving to Mr. Harris (or rather to his corporation) the New York office established in 1900, and which appears to have been little more than desk room at No. 1 Broadway. There is absolutely no evidence that Mr. Somers lacked anything essential to the carrying on of his business; that he had any difficulty in getting credit or in holding onto the customers which he had come to know through his connection with the firm of Geo. D. Harris & Co. From all that appears in the evidence he may have had all of the customers of the old firm, each of whom was notified of the dissolution and of the distribution of the good will of the firm, showing Mr. Somers, one of the partners, as continuing the Albany office. The change was purely voluntary on his part; he appears to have elected to discontinue business as Geo. D. Harris & Co., and to take up the business at the old office of that company in his own name, telling each of his old customers of such change, and just how he can be permitted, in a court of equity, to now claim against the defendant because a corporation, taking on the name of Geo. D. Harris & Co., and giving notice in its stationery that it is incorporated, and publishing the names of its officers, has conducted a similar business in the city of New York does not occur to us. The business is that of a wholesale dealer in coal; largely that of a broker, and Mr. Somers, having had all the advantages of the acquaintance growing out of his active management of the business for many years, during all of which time he has been publicly proclaimed as one of the partners of the firm of Geo. D. Harris & Co., and having been permitted to give notice to each of the firm's customers, and to the public generally, of the fact that he is continuing the business at the Albany office, he is in no better position to complain of the defendant taking the good will than the defendant is of charging him with having appropriated the good will to his own use, for he had all of the advantages of an established business with which he was identified as a partner and which was builded up by Geo. D. Harris & Co., and he has told the customers of that firm that he has displaced Mr. Harris, and is conducting the business at the old stand in Albany. If the firm name had been Harris & Somers, and the name of George D. Harris and of Henry W. Somers had appeared upon the letter heads under exactly the same circumstances, and the plaintiff had consented that a corporation known as Harris & Somers should have the New York office, while he retained the Albany office, conduct-

ing it under the name of Henry W. Somers, no one would have thought of suggesting that there was any element of good will surviving for which Mr. Harris could be charged; and the matter is not different because the firm name happened to be Geo. D. Harris & Co., where it appears that Mr. Somers' name was always put forward as constituting one of the members of the firm. It was in fact Harris & Somers who constituted the firm; that fact was known to every customer of the firm if he took any pains to know with whom he was dealing, for it appeared upon all of the stationery, and Mr. Somers was the man who managed and conducted the affairs of the company during the last eight years of its existence, if he is to be credited. While good will in a sense attaches to a firm name, it more literally attaches to the personality of the men who make up the firm, where they are actively identified with the business; and, if Mr. Somers, at the end of the eight years, in which he claims to have practically controlled the affairs of the company, did not retain the good-will value of the business under the circumstances disclosed, he could not have contributed much to it during the time of his management, and equity ought not to give him the benefit of a value which he did not help to create while thus in charge.

The more the matter is analyzed the more it appears that there was an implied agreement between the members of this firm to divide the good-will element of this business, and that Mr. Somers was at least in a position to get by far the best end of the bargain. Of course the parties did not call the matter under consideration good will; it did not occur to either of them that in dissolving a partnership there was any good will involved, but the practical construction of what they did leads inevitably to the conclusion that they took into consideration the desirability of each one continuing in the same line of business in which each of them had achieved some considerable degree of success, and that they mutually agreed upon a division of the opportunities which belonged to them as a firm, by the plaintiff continuing the business of the Albany office, with whatever advantages had come to it through the business of the firm, while the defendant was to make the most of his opportunities through the New York office. He was at perfect liberty to organize a new partnership with his sons or any one else, and do business as Geo. D. Harris & Co., for the plaintiff had voluntarily relinquished the use of that name, and had elected to do business at the old stand under a new name, with all of the advantages which accrued from the possession of the names and the personal acquaintance of the wholesale coal trade, and he had an equal right to incorporate; and when he changed the form from "Geo. D. Harris & Co." to "Geo. D. Harris & Company," and gave notice in his stationery that it was incorporated, and that the officers consisted of himself and his sons, instead of the members of the old firm, he clearly excluded himself from all that part of the good will which attached to Mr. Somers and his relations to the firm. He who seeks equity must do equity, and before Mr. Somers is entitled to any relief from the defendant other than an accounting for the property of the firm set forth in the complaint, he should account to Mr. Harris for the

good will which he took in connection with the old and established Albany office, with its records and its associations with the wholesale coal trade long before the New York office was established.

We are satisfied from the whole of the evidence that the profits for the last few years of the business came not from the business itself, but from favorable investments previously made. The evidence does not show any value to the good will.

The court disapproves of the findings of fact numbered 5, 6, 10, 14, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29.

The judgment, in so far as appealed from, should be reversed, with costs, and the order granting an additional allowance should be reversed, with costs, and a new trial granted.

HOWARD, J., concurs. KELLOGG and LYON, JJ., concur in the second and third grounds. SMITH, P. J., concurs on ground last stated.

PEOPLE ex rel. KELLY v. WALDO, Police Commissioner.

(Supreme Court, Appellate Division, Second Department. March 20, 1914.)

1. MUNICIPAL CORPORATIONS (§ 185*)—POLICEMEN—REMOVAL—SUFFICIENCY OF EVIDENCE.

On the trial of a policeman for receiving a fee or gratuity for services while detailed as an inspector of boilers, in violation of a rule of the police department, evidence held insufficient to support the police commissioner's determination, removing the policeman from the force.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492-509; Dec. Dig. § 185.*]

2. EVIDENCE (§ 60*)—PRESUMPTIONS—INNOCENCE.

A policeman, charged in a proceeding for his removal from the police force with receiving a fee, while detailed as an inspector of boilers, from a party whose boiler he inspected, was entitled to the presumption of innocence, which should prevail if the proof was otherwise evenly balanced, since the act charged was a misdemeanor under Penal Law (Consol. Laws, c. 40) § 855, providing that a public officer, asking or receiving a fee or other compensation for his official services in excess of that allowed by statute, or where no fee is allowed by statute, is guilty of a misdemeanor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 81; Dec. Dig. § 60.*]

3. MUNICIPAL CORPORATIONS (§ 185*)—POLICEMEN—REMOVAL—REVIEW BY CERTIORARI.

On certiorari to review a police commissioner's determination in removing a policeman, the court was not bound to credit the testimony of a witness against the policeman, though no reason appeared why he should have fabricated the testimony.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492-509; Dec. Dig. § 185.*]

Certiorari by the People, on relation of Owen Kelly, against Rhineland Waldo, as police commissioner of the city of New York, to review his determination in dismissing the relator from the police force. Determination annulled, and relator reinstated.

Argued before JENKS, P. J., and BURR, CARR, RICH, and STAPLETON, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William Adams Robinson, of Brooklyn, for relator.

James D. Bell, of Brooklyn (Frank Julian Price, of Brooklyn, on the brief), for respondent.

JENKS, P. J. [1] The relator, a member of the police force of the city of New York, was found guilty of a violation of section 1, rule 30, of the police department, and dismissed from the force. The pertinent part of the section reads as follows:

"No member of the police force or employé of the police department shall, under any pretense whatsoever, share in, for his own benefit, any present, fee, gift or emolument for police services or for services of the police department or any member thereof, additional to his regular salary, pay or compensation."

The relator, who was detailed as an inspector of boilers, is charged with receiving \$10 after his inspection of boilers in the House of the Good Shepherd, from Bogle, who was the engineer. Bogle testifies that when the inspector called upon a week day for the purposes of inspection, the inspection was postponed until Sunday. The proof of the offense depends upon the personal testimony of Bogle. There are no corroborative circumstances that support him. The only suggestion of reason for the payment of what Bogle admits was a voluntary gratuity is that the inspection was made on Sunday. But Bogle testifies that before the relator called on a week day for the inspection, the lieutenant of the squad had acceded to Bogle's request that the inspection be made on Sunday; that he so informed the relator; that he gave an apparently good reason to the relator for the postponement; and that the relator thereupon acquiesced without demur or complaint—all before Bogle said he would pay him for his time. The relator denies absolutely his receipt of any money.

[2] The alleged act was a misdemeanor (section 855 of the Penal Law), and the relator was entitled to—

"the presumption that he was innocent of the charge, * * * so that even if the proof was otherwise evenly balanced, this presumption might properly prevail with the police commissioner in favor of the complainant." *People ex rel. Callan v. Partridge*, 87 App. Div. 573, 575, 84 N. Y. Supp. 487.

[3] It may be asked, in weighing the probabilities, what reason moved Bogle, who so far as it appears was an entire stranger to the relator, to fabricate testimony. We are not bound either to seek out a reason or to credit his testimony if we cannot find one or suggest one. But it may be noted that Bogle testifies he had secured the \$10 from his employer for the purpose of paying it to the relator.

We think that the determination should be annulled, with \$50 costs and disbursements, and the relator reinstated. All concur.

(161 App. Div. 148)

SULLIVAN v. KNAUTH et al.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. BANKS AND BANKING (§ 190*)—TRAVELER'S CHECKS—RELATION OF PARTIES.

Where bankers issue traveler's checks agreeing to pay a specified sum through their correspondents on the countersigned signature of the person to whom the checks have been issued, corresponding to his signature originally written in another place on the checks, the relation between the holder and the issuing bankers is similar to that of a banker and depositor; and hence, where certain such checks, not countersigned, were lost or stolen, and the holder's signature was forged, the bankers, having paid the checks on the forged signature, were liable to refund to the owner, and were entitled to recover reimbursement against their immediate indorser, and each indorser in turn was entitled to recover against his prior indorser.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 733-735, 737; Dec. Dig. § 190.*]

2. BANKS AND BANKING (§ 190*)—TRAVELER'S CHECKS—FORGERY—"LOST."

Where traveler's checks, after having been lost or stolen, were presented and paid under a forged countersignature of the owner, and in an action by him for reimbursement they were produced by the drawee, they were not "lost" within a provision of the agreement that the bankers would refund the amount of lost checks on the execution of a suitable bond of indemnity, so that the owner was not required to execute the bond as a condition to his right to recover.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 733-735, 737; Dec. Dig. § 190.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4237, 4238.1

Appeal from Appellate Term, First Department.

Action by James Sullivan against Wilhelm Knauth and others. A judgment for plaintiff was reversed by the Appellate Term (81 Misc. Rep. 148, 142 N. Y. Supp. 307), and plaintiff appeals by permission. Reversed, and judgment of Municipal Court reinstated.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Harold G. Aron, of New York City (Mornay Williams and Stephen L. Vanderveer, both of New York City, on the brief), for appellant.

Briesen & Knauth, of New York City (George T. Hogg, of New York City, of counsel), for respondents.

CLARKE, J. On September 5, 1911, the plaintiff purchased from the Lyon County Bank at Yerington, Nev., seven traveler's checks issued by the defendants, four \$100 checks and three \$50 checks, and thereupon signed all the said checks with his signature in the presence of the cashier of the said bank. Thereafter he cashed \$300 worth of the checks, \$50 and \$100 at Yerington, \$50 at Reno, and \$100 at San Francisco, and in each instance he obtained the proceeds of said check by presenting the same and signing his signature thereon at the place marked "Countersign here." While on board the S/S San Juan en route to Ancon, Panama, from San Francisco, having in his possession said checks to the amount of \$250 on the 15th of October, he discovered, when near Corinto, Nicaragua, that the said checks were lost

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or stolen. They had not been countersigned. He testified that after he discovered the loss he asked all the ships officers to inquire amongst the crew and put up a reward; that he was not allowed to go ashore at Corinto because the place was quarantined because of yellow fever. He testified that when he arrived at Panama:

"I gave notice to a man with their sign out in Panama; * * * gave notice to a man claiming to be their agent; I told him of the lost checks, and he asked me the numbers. I didn't know the numbers. I gave notice to the banks in Panama; to three banks at Panama, to stop payment on the checks. I gave notice to a man claiming to be their agent, with their sign on the front door, or a small bank and general store combined."

He also testified that he never authorized any one to sign those checks. He did not send any direct notice to New York; he was at Panama about the 21st or 28th of October; he went down to Peru and returned to the United States about the 21st of December, 1911. When he lost the checks he lost the numbers and the address of the defendants; that the first chance he had to give notice was at Panama.

The checks which had been paid by the defendants were produced upon the trial. They bore the words "James Sullivan" in the space marked "Countersign here." There is no contention that said purported signature of plaintiff is not a forgery. The defendant testified through their manager that the first date at which they heard of these lost traveler's checks was on January 3, 1912, and the notice came from the Lyon County Bank at Yerington about a month after the checks were all paid. They testified that they had no notice or knowledge that these checks were not presented by a holder in due course at the time they paid them, and that the defendants had no agent in Panama. The sample of check Exhibit 1 reads as follows:

K. N. & K. Traveler's Check. \$100.
New York [date]

Good within one year from date
when countersigned below
with the opposite signature

Sold by Lyon County Bank
Yerington, Nevada.

Holder's signature:
James Sullivan

Knauth, Nachod & Kuhne, New York,

through their correspondent will pay against this check out of their balance to the order of *T. P. Bingham & Hejos* one hundred dollars or equivalent as follows.

* * * * *

Countersign here:

James Sullivan.

This signature must correspond with above.

Knauth, Nachod & Kuhne.

This bears the indorsement:

Paguese a la orden do Cortes Commercial and Banking Co., Ltd. Valor recibide. *T. P. Bingham & Hejos.*

Pay to the order of Amsinck & Co.

Value in account Managua Oct. 21, 1911.

Cortes Commercial Banking Co., Ltd., A. N. Menpedier, Agente en Nicaragua.

Pay to the Bank of New York, U. S. A., or order. *G. Amsinck & Co.*

Received payment. The Bank of New York National Banking Association. Nov. 14, 1911. *Charles Olney, Cashier.*

Plaintiff testified:

"I asked for Wells Fargo traveler's checks, and he [referring to the officer in the Yerington Bank] recommended them [referring to the checks of defendant] to me, just handed me a red book. Did not give me any directions. Q. What, if any, descriptive matter bearing the name of Knauth, Nachod & Kuhne was shown to you in connection with these checks? A. Nothing; only when I was leaving, he gave me this red book, a book with a red cover. European directory of that firm, I think."

Page 4 of the folder was admitted in evidence:

"If you have already traveled extensively, you probably know the difficulties which, at times, arise in regard to arrangements for carrying money. Then, you will appreciate the safety, economy, and convenience of our letter of credit and traveler's checks. If this is your first long trip, we can assure you that the various facilities which we offer will prove equal if not superior to those provided by any other system."

The defendants offered in evidence the following from inside the cover of book:

"Our traveler's checks are cashed by banks and bankers all over the world; they are also accepted in settlement of accounts by the principal hotels and numerous stores and in payment of tickets by steamship companies and many railroads.

"We sell traveler's checks for a commission of one-half of one per cent., and guarantee payment of the face amount, less stamp tax, if any. * * *

"In order to insure himself against loss, the traveler is required at the time of purchase to sign his name to the checks in the space reserved for 'holder's signature.' Our traveler's checks cannot be cashed unless they are countersigned, and then only if 'holder's signature' and 'countersignature' correspond. Wrongful holders would find it difficult to commit forgery as the countersignature is to be affixed to the checks in the presence of our correspondents. We refund the amount of lost checks against execution of a suitable bond of indemnity. Particulars of such checks should, however, be promptly reported."

Another excerpt offered by the defendant:

"We wish to call attention to the fact that the countersignature should be affixed to the checks only in the presence of the person to whom they are presented for payment. Checks already countersigned can only be cashed with difficulty, and in case of loss they are open to misuse."

Plaintiff recovered judgment for the amount of said checks, \$250. On appeal the judgment was reversed by the Appellate Term, and the complaint dismissed. Plaintiff appeals.

The business of issuing and selling traveler's checks similar to those issued by the defendants is of comparatively modern origin. By reason of their convenience the business has grown to be very considerable. The exact relationship between the parties has not been settled by judicial determination. The case, by reason of the widespread interests affected, is therefore of importance.

[1] The plaintiff procured these checks from the defendants' agents, hence, from them. In my opinion a relation cognate to that of depositor and banker should be considered to have been established between the plaintiff and these defendants. If that is not the effect of the transaction, the traveler obtains little advantage from these so-called traveler's checks, and might as well carry bills or gold. The basis of his purchase is protection by reason of the double signature.

Safety is the thing impressed upon him. The paper is not effective as a draft, or check, or order for the payment of money, until the purchaser, who, in the presence of the agent of the defendant has signed his signature in the space "holder's signature," has countersigned it. The promise is to pay "when countersigned below with the *opposite signature*," not the opposite name, and below "Countersign here" is engraved, "This *signature* must correspond with above," not this name, and in this booklet defendants call attention to the difficulty of successful forgery when the countersignature is made in the presence of the person who, as the agent of the defendant, pays the check. It seems to me, therefore, it must be held that it is the second signature which gives the paper final currency. It is in the precise situation of a check payable to the order of a designated payee unindorsed by said payee. That being so, the countersigned signature must be treated as the ordinary indorsement of a payee upon an ordinary check; that is, the bank is responsible if it pays on a forgery. Treating it in this way, those defendants have their remedy over against prior indorsers as in an ordinary case of forgery of payee's signature on any other negotiable instrument. Unless it be so held, the whole scheme seems likely to fail.

[2] The defendants make a point about "lost" check and their representation that they will pay the amount thereof on receiving a bond of indemnity. These checks are not lost. They are in existence. They were offered in evidence upon the trial. They were obtained from the possession of the defendants who had paid them. They are now in no sense of the word lost, and no bond of indemnity can be required. They are checks upon which the true owner's name, which gave them negotiability, that which would be equivalent to the payee's name, has been forged. The defendants received the plaintiff's money upon the agreement to pay it out on his order, evidenced by his countersignature upon this document. They breached their agreement by paying it out upon a forged simulation of his signature, and should be held, it seems to me, as they would have been under similar circumstances upon an ordinary check.

The only case on the subject called to our attention is *Samberg v. American Express Co.*, 136 Mich. 639, 99 N. W. 879, where plaintiff sued as holder of an instrument delivered to him by one A. J. Townsend, whose signature appeared in the upper space, but who had drawn a line through the date and the countersignature. The court said:

"Checks of a like character to this one have come into very general use, especially by travelers. They are an ingenious, safe, and convenient method by which the traveler may supply himself with funds in almost all parts of the civilized world, without the hazard of carrying the money on his person. The company has the right to refuse to pay the check when the check does not bear the countersign agreed upon. The owner of the check also has the right to insist it shall not be paid when it is not countersigned as agreed. This check was not so countersigned, and for that reason defendant was entitled to a judgment in its favor."

The determination of the Appellate Term should be reversed, and the judgment of the Municipal Court reinstated, with costs to the appellant in this court and at the Appellate Term. All concur.

(161 App. Div. 518)

MEIXEL v. MEIXEL et al.

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

1. DOWER (§ 38*)—RELEASE—POWER OF HUSBAND.

A wife cannot be deprived of her right of dower in the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, given her by Real Property Law (Consol. Laws, c. 50) § 190, without her consent.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 89, 94, 95, 132; Dec. Dig. § 38.*]

2. DOWER (§ 38*)—RELEASE—POWER OF HUSBAND.

A wife's right of dower was not affected by the husband's oral agreement, several years after the land was purchased, that a third person would be given a mortgage for the amount of advances for taxes, water charges, etc.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 89, 94, 95, 132; Dec. Dig. § 38.*]

3. MORTGAGES (§ 28*)—EQUITABLE MORTGAGE—AGREEMENT TO GIVE MORTGAGE.

A lien cannot be created on land by an oral agreement to give a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 44, 56-58, 153; Dec. Dig. § 28.*]

4. CONTRACTS (§ 9*)—CERTAINTY—AGREEMENT TO GIVE MORTGAGE.

An agreement to give a "proper and sufficient mortgage" on land to secure a person for advances made by her for taxes, water charges, etc., was too indefinite to be enforced, as the terms and conditions of the mortgage were not stated.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 10-20; Dec. Dig. § 9.*]

Appeal from Special Term, New York County.

Action by Walburga C. Meixel against Elizabeth Meixel and others. From a judgment in favor of the defendant named entered on a decision after a trial at Special Term, plaintiff appeals. Reversed, and judgment ordered for plaintiff.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Alexander Thain, of New York City, for appellant.

Isaac Dobroczyński, of New York City, for respondent.

McLAUGHLIN, J. This appeal is from a judgment which adjudges that the plaintiff's dower rights in the premises described in the amended complaint, and her interest as mother and one of the heirs at law of Charles L. Meixel, deceased, are subordinate to an equitable mortgage of Elizabeth Meixel, the respondent. On March 25, 1894, plaintiff married Anton Meixel, who died on the 27th of August, 1911, leaving him surviving the plaintiff and two infant children, Elizabeth W. and Charles L. (now deceased) as his only heirs at law and next of kin. The premises described in the amended complaint were conveyed on the 3d of January, 1899, to Anton Meixel and his mother, Elizabeth Meixel. On the 24th of July, 1902, the respondent conveyed to Charles A. Meixel, a brother of Anton, her interest in the premises.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In June, 1904, Anton and Charles A. executed and delivered to the defendant Petrie a mortgage, in which plaintiff joined, for \$7,000. The court found, as a fact, that on or about the time the respondent conveyed her interest to Charles A., he and Anton agreed that, in consideration of her paying the taxes, water charges, insurance premiums and other necessary expenses attendant upon keeping up the property, they would pay her, when the same was sold, what money she had theretofore or might thereafter advance, and to secure such payment "would acknowledge and deliver to the said Mrs. Elizabeth Meixel, a proper and sufficient mortgage" upon the property; that in pursuance of the agreement she advanced, over and above the rents received, \$8,-662.92; and, as conclusions of law, that she had a lien upon the premises for this amount which was superior to the plaintiff's right of dower or her interest as the mother and one of the heirs at law of her son Charles L. Judgment was entered to this effect, from which the appeal is taken.

[1] The judgment, in so far as it affects the plaintiff, is erroneous. (No question is raised as to the Petrie mortgage being a first lien upon the premises.) The statute gives to a widow a "third part of all the lands whereof her husband was seised of an estate of inheritance, at any time during the marriage" (section 190, Real Property Law), and of this she cannot be deprived without her consent.

[2-4] The plaintiff's husband acquired a half interest in the property in 1899. The agreement was not made until something like three years thereafter, and she was not a party to it. Obviously, under such circumstances, it had no effect upon her dower rights. Indeed, had a mortgage been given at that time, and she had not joined in it, the same result would have followed. Nor did this oral agreement have any effect upon the interest which the son Charles L. took as heir at law of his father, and which passed to the mother, the plaintiff, upon the son's death. A lien upon land cannot be created by an oral agreement to give a mortgage, and, if it could, the agreement as found by the court is so indefinite that it could not be enforced. It was to give "a proper and sufficient mortgage." What its terms and conditions were to be were not stated. For this reason specific performance of the agreement could not be decreed.

The judgment, in so far as it adjudges that there was an equitable mortgage, and that the plaintiff's right of dower and her interest as mother and one of the heirs at law of Charles L. Meixel are subordinate to the claim of the respondent, is reversed, as are the findings of fact to that effect and conclusions of law based thereon, and judgment directed, subject to the Petrie mortgage, in favor of the plaintiff for the relief prayed for in the amended complaint. All concur.

In re WAGENER.

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

ATTORNEY AND CLIENT (§ 42*)—MISCONDUCT OF ATTORNEY—COURT PROCEEDINGS—IMPROPER AFFIDAVITS.

Respondent, as attorney for a wife in divorce, presented affidavits of his client on a motion for alimony and counsel fees, in which she swore that she had no means to pay counsel, and that she had not paid him any money. When the affidavits were prepared, respondent knew that his client had a savings bank deposit of upwards of \$2,400, which on respondent's advice she had drawn from the bank. The client, or some one on her behalf, had paid respondent \$300 for services which he was to render her, but he claimed that this was for services in bringing certain actions against the husband in relation to money which he had on deposit, and which she claimed had been deposited for her benefit. *Held*, that respondent was guilty of misconduct in presenting such affidavits to mislead the court, and should be suspended for three months.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 54; Dec. Dig. § 42.*]

Application to discipline August P. Wagener, an attorney, for professional misconduct in proceedings for alimony and counsel fees in a divorce action. On report of official referee. Report confirmed, and respondent suspended from practice for three months.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, DOWLING, and HOTCHKISS, JJ.

Laurence Arnold Tanzer, of New York City, for petitioner.

August P. Wagener, of New York City, in pro. per.

INGRAHAM, P. J. The charges in this case grow out of a proceeding between one Josephine Speck and her husband, and relate specifically to the respondent submitting to the court, on a motion for alimony and counsel fee, an affidavit of his client which was false and misleading and calculated to deceive the court in obtaining such alimony and counsel fee. The charges were referred to one of the official referees, who has reported, sustaining the charges to the extent that the respondent submitted affidavits to the court that his client had no means to pay her counsel, and that she had not paid him any money, without explanation or qualification, but further reporting that the other charges against the respondent were not sustained by the evidence.

The respondent practices law with his wife as his managing clerk. They were both examined before the referee, and the respondent also produced his stenographers and clerks to sustain his defense. If the testimony produced on behalf of the petitioner was sustained, the respondent would be guilty of serious professional misconduct; but as the referee has seen these witnesses, and has been able to judge of the credibility of their testimony and the frankness with which they testified, we have concluded to adopt his conclusion. We agree with the referee, however, that the respondent was lacking in the perform-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ance of his obligation to the court in regard to this whole proceeding. It is difficult to accept the statement of the respondent that he was ignorant of the contents of the affidavits which he submitted to the court, and upon which the motion for alimony and counsel fee was to be decided. In the papers upon which the motion was based his client had expressly sworn that she had paid no fee to the respondent, and that she was without means to compensate him for his services to her. At the time these affidavits were prepared the respondent knew that his client had a deposit in a savings bank of upwards of \$2,400, and that while that deposit stood in the name of herself in trust for her husband, in some way indicating that her husband had an interest in the money, she claimed that the money belonged to her or to her daughter, and that on his advice, or the advice of some one connected with his office, she had drawn that sum from the savings bank; and he certainly must be charged with knowledge of the fact that either his client or some one on her behalf had paid him the sum of \$300 for the services which he was to render to her. He claims now that this sum of \$300 was paid for his services in bringing three actions against his client's husband in relation to some moneys that her husband had on deposit, and which she claimed he had agreed to deposit for her benefit; but the amount of those deposits was small, and it was certainly remarkable that this fee of \$300 was paid in relation to the actions in regard to the savings bank deposits, and had no relation to the separation suit, which was brought at the same time. At any rate, as the referee quite justly says in his report, when his opponent directly charged him with having received a fee in the separation action, it was certainly due to the court that he should make some explanation of the payment of this fee he received, rather than to allow his client to swear positively to an affidavit that she had paid him no fee, and to make no explanation himself. We think the respondent's conduct was reprehensible. It was his duty to know what statements were contained in the affidavits of his client which he presented to the court, and on which he asked judicial action, and it could only be with the intent of deceiving the court that this replying affidavit of his client was submitted, without making any statement to the court as to the receipt of the fee that he did receive and the circumstances under which it was paid to him. And this is assuming that his evidence before the referee is accepted. His conduct before the referee is itself deserving of censure. It is quite clear from an examination of the testimony that he was not frank with the referee, and it is difficult to accept all of his testimony as a true statement of the facts involved in these charges.

The respondent was admitted to practice in the year 1870, and has now been for more than 40 years an attorney of this court. He seems to have had an active practice during a great portion of that time. He certainly does not seem to realize his duty to be frank with the court, and to see to it that affidavits presented are true statements of the facts, and that it was a serious breach of professional obligations to allow an affidavit to be submitted that was false and misleading, especially when the question presented is whether a sum of money should be paid to him from his client's opponent. The result of this application to the

court was to obtain a fee for himself, and, to obtain such a fee, he submitted an affidavit from his client which was at least misleading.

For this conduct the respondent cannot be too severely censured, and respondent is suspended from practice for three months, with leave to apply for reinstatement at the expiration thereof, upon proof that he has actually abstained from practice during that period and has otherwise properly conducted himself. All concur.

STEM v. WARREN et al.

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

DISCOVERY (§ 40*)—EXAMINATION BEFORE TRIAL—EXTENT.

Where, on the death of one of a firm of architects, the contract between it and a railroad to erect a depot was canceled according to the contract, and a new contract made with associate architects, in an action for an accounting against such associate architects, an order for examination before trial should be limited to the facts as to the contract and the new agreement.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. §§ 52, 53; Dec. Dig. § 40.*]

McLaughlin and Clarke, JJ., dissenting.

Appeal from Special Term, New York County.

Action by Allen H. Stem, individually, and as surviving partner, against Whitney Warren and others. From an order vacating an order for defendants' examination before trial, plaintiff appeals. Reversed and modified.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Harold Swain, of New York City, for appellant.

Charles F. Mathewson, of New York City, for respondents.

INGRAHAM, P. J. The order appealed from should be reversed, with \$10 costs and disbursements, and the order for examination modified so as to limit the examination to the facts and circumstances leading up to and attendant on the cancellation of the contract between the railroad company and the associated architects, and the making of the new agreement with Warren & Wetmore; and the order for the examination as thus modified is reinstated.

LAUGHLIN and SCOTT, JJ., concur.

McLAUGHLIN, J. (dissenting). I am unable to concur with the other members of the court that the order appealed from should be reversed and the motion for an examination granted in so far as to permit the defendants Warren & Wetmore to be examined concerning the facts and circumstances leading up to and attendant upon the cancellation of the contract between the New York Central & Hudson River Railroad Company and the associated architects, and the making of the new agreement by the Railroad Company with Warren & Wetmore.

On February 8, 1904, two firms of architects, Warren & Wetmore and Reed & Stern, entered into a written agreement by which they

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

associated themselves together as firms, and not as individuals, for the purpose of preparing plans and supervising the construction of certain buildings in connection with the improvement of the Grand Central Terminal. On the same day, as associated architects, they entered into a contract with the New York Central Railroad Company which provided, among other things, as follows:

"The railroad company reserves, and the architects covenant and agree that the railroad company shall, at all times, have the right to terminate the employment of the architects upon the work or any part thereof herein provided for, by giving notice in writing to the architects or their executive head of intention so to do; and the employment of the architects under the provision hereof shall be terminated and ended accordingly, upon such date as may be specified in any such notice in writing."

On the 12th of November, 1911, Mr. Reed, who was the principal member of the firm of Reed & Stem, and the executive head of the associated architects, died, and a few days thereafter the railroad company, acting under the provision of the contract quoted, notified Stem, as survivor of the firm of Reed & Stem, and Warren & Wetmore, of the termination of the employment of the associated architects, and that such termination would become effective on December 31, 1911. On the day the notice was given it entered into another contract with Warren & Wetmore to take charge of and complete the work from and after December 31, 1911.

Warren & Wetmore are to be examined as to the facts and circumstances leading up to the cancellation of the contract with the associated architects and the making of the new contract. Testimony upon these subjects is not material or relevant to any legal claim of the plaintiff. The railroad company had the right to cancel the contract, and, having that right, it could then make a new contract with Warren & Wetmore. Upon the face of the complaint, as I read it, the plaintiff is not in a position to complain of the cancellation of the old contract, or the making of the new one. It is suggested, not by counsel, that on an appeal from an order directing the examination of a party before trial, the court will not examine the complaint for the purpose of ascertaining whether it states a cause of action. As a general proposition this may be true, but before an adverse party can be examined after issue has been joined in an action, it must affirmatively appear that such examination is material and necessary for the person applying therefor in the prosecution or defense of such action (Code Civil Proc. § 872, subdiv. 4; General Rules of Practice, 82; *Del Genovese v. Del Genovese*, 149 App. Div. 266, 133 N. Y. Supp. 765; *Oakes v. Star Co.*, 119 App. Div. 358, 104 N. Y. Supp. 244); and for the purpose of ascertaining that fact, not only the moving affidavits, but the pleadings as well, will be examined. Unless it does appear that the testimony sought to be elicited is material and necessary, the examination will be denied. This court so held in *Oakes v. Star Co.*, supra, saying:

"While this court has somewhat relaxed the strict rules which have heretofore so operated as to greatly restrict the right of a party to examine his adversary as a witness before trial, it has not been our purpose to permit the disregard of the provisions of law relative to the facts necessary to be shown in order to obtain an order for such examination, or to permit such an examination to be had when it is apparent that no useful purpose can

be served. It is still necessary to show by the recitation of appropriate facts and circumstances that the testimony sought to be elicited is material and necessary for the party making the application."

Here, it clearly and conclusively appears, as I read the record, "that no useful purpose can be served" by the examination. The railroad company, as indicated, had a right to cancel the contract with the associated architects and make a new one with Warren & Wetmore. What induced them to do so is no concern of the plaintiff.

I, therefore, dissent from the decision about to be made by the other members of the court, and vote to affirm the order.

CLARKE, J., concurs.

(161 App. Div. 400)

WHITE et al. v. MOORE.

(Supreme Court, Appellate Division, Second Department. March 13, 1914.)

1. DEDICATION (§ 33*)—ACCEPTANCE.

An offer of dedication may be accepted by a municipality created after the offer was made.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 66; Dec. Dig. § 33.*]

2. DEDICATION (§ 32*)—ACCEPTANCE.

A formal acceptance of a dedication is not required, even if the statute provides therefor, unless it declares such form of acceptance exclusive.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 64; Dec. Dig. § 32.*]

3. EASEMENTS (§ 61*)—ACTIONS—PARTIES.

Grantees of lots, conveyed by deeds implying a covenant of easement in land dedicated for a park by platting a map and sales under it, may unite with the municipality in a suit to enjoin interference with the public use of the land.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. § 61.*]

4. DEDICATION (§ 38*)—REVOCATION.

Grantees in deeds implying a covenant of easement in land dedicated to public use by platting a map and sales under it have such an interest in the land that the dedication cannot be revoked without their consent.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 77, 78; Dec. Dig. § 38.*]

5. APPEAL AND ERROR (§ 1071*)—REVIEW—HARMLESS ERROR—FINDINGS AND CONCLUSIONS.

Conflict in conclusions of law is not ground for reversal, where the findings of fact and other conclusions of law support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

Appeal from Special Term, Nassau County.

Action by Georgianna B. White and others against Florence A. Moore. From a judgment for plaintiffs (73 Misc. Rep. 96, 132 N. Y. Supp. 441), defendant appeals. Affirmed.

Argued before JENKS, P. J., and BURR, CARR, RICH, and STAPLETON, JJ.

Harry W. Moore, of Mineola, for appellant.

Benjamin F. Spellman, of New York City, for respondents.

CARR, J. In 1880, Henry Du Bois, who was then the owner of a tract of land situated in the town of Oyster Bay, in the county of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Queens, filed in the office of the county clerk of said county a map of the land as a "Map of Clifton Park," etc. The tract was irregular in shape, but in the center, as near as may be, he platted out a square plot which he described as "Park," and through the same map, in various directions, he likewise platted out a number of proposed streets. Lots were likewise platted out and numbered, every one of which fronted on some of the platted streets and a large number of which faced the square plot marked "Park." He started out to sell these various lots by conveyances, each of which referred to the platting map of 1880, and in which each lot was described simply by its number on said map. In 1885 he conveyed to his wife, Martha Du Bois, through a duct or intermediary of title, all the lots numbered on said map, of which he had not previously disposed, and she in turn conveyed to purchasers practically all of the remainder of said lots by deeds which referred to the map of 1880 and in which the premises conveyed were described by the respective lot numbers shown on said map. Long before the beginning of this action, every lot shown and numbered on the map of 1880 had been conveyed to purchasers by either Du Bois, husband or wife, and every proposed street had been accepted by the public. According to well-settled rules of law, when Du Bois, either husband or wife, conveyed any of the lots platted on said map of 1880, as to their grantees, at least, there was an implied covenant of easement in the plot marked on said map as a "Park." Unquestionably this was so as to every lot conveyed which fronted on the "Park," and as the tract in question was but small, and every lot numbered on the map was located but a short distance from the "Park," said easement was a beneficial right to each of said lots, and a strong inducing cause of purchase. In addition to this, the platting and the sales under and according to said map constituted an offer of dedication to public use, in furtherance of the implied covenants of the respective grants. The public acquired no rights in the "Park" so offered for public use, until there was a public acceptance of the offer, either by formal action or by common-law method of acceptance, and until either happened the offer was subject to revocation. Some little time before the beginning of this action, Mrs. Du Bois made a conveyance of the "Park" plot to the defendant, and she through her agent attempted to exclude the public in general and in fact everybody else, including the grantees from the Du Bois owners, from using the tract in question. Thereupon this action was brought in equity to enjoin the defendant from interfering with a public use of this "Park" plot. The plaintiffs herein embrace a large number of the grantees from the Du Bois grantors, and likewise the village of Sea Cliff. The defense is that the offer of dedication was revoked by the Du Bois owners before the village of Sea Cliff had accepted it.

[1] The fact that at the time the offer was made originally, in 1880, the village of Sea Cliff had not been incorporated, is of no importance. When that village came into legal existence subsequently, it could accept the offer of dedication for public use. *City of Cincinnati v. Lessees of White*, 6 Pet. 431, 8 L. Ed. 452.

[2] If it made such acceptance, it was not required to do so by for-

mal act, even if there was a statute providing for formal acceptance, unless said statute declared such form of acceptance exclusive. *Matter of Hunter*, 164 N. Y. 365, 58 N. E. 288; s. c., 163 N. Y. 542, 57 N. E. 735, 79 Am. St. Rep. 616.

[3] Both the grantees under the Du Bois deeds and the village itself could unite in maintaining this action. *Trustees of Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80.

[4] It is indisputable on the record before us that for some years prior to the beginning of this action the village of Sea Cliff had exercised acts of regulation and control of this "Park" plot, and that it was treated as public property on the assessment maps. There is a controversy in the record as to whether either or both the Du Bois owners had revoked their offer of dedication before the village attempted acceptance of the offer, and much time was given to this controversy in the evidence, the learned opinion of the trial court, and the various findings on which the judgment was based. It is not necessary for this court to enter into any extended consideration of this controversy, for it is plain that, if the Du Bois grantors ever attempted to revoke the offer of dedication of the "Park" to a public use, they were not joined in such attempt by all, or in truth by any, of their grantees. While it is stated in various text-books and in the opinions in various decided cases that an offer of dedication of land to public use does not become consummate until there has been an acceptance by the public, either formally, or by user, or by some public act indicating acceptance, and that the offer may be revoked pending such acceptance, yet it is well and universally recognized that the revocation must be made by all the parties who have a legal interest in the lands subject to the offer of dedication to public use. Here the Du Bois grantees had acquired such legal interest. Without their consent, the Du Bois grantors had no power to revoke, and their attempts to do so were of no avail. *Holdane v. Cold Spring*, 21 N. Y. 474, 478; *Bridges v. Wyckoff*, 67 N. Y. 130, 132; 13 Cyc. 489; *Elliott, Roads & Streets*, p. 165.

[5] It is argued, however, that the learned trial court has made some conclusions of law inconsistent with this view, on the request of the defendant-appellant. But, as long as its findings of fact and other conclusions of law support the judgment, it must be affirmed, notwithstanding some apparent conflict in conclusions of law made by the trial court. *McNally v. Georgia-Florida Lumber Co.*, 146 App. Div. 456, 131 N. Y. Supp. 295, affirmed in Court of Appeals, 104 N. E. 1134 (February 24, 1914).

We find no conflict between the opinion above indicated and that declared in *Reis v. City of New York*, 188 N. Y. 58, 80 N. E. 573, and *Foerster v. Eilers*, 60 Misc. Rep. 453, 113 N. Y. Supp. 480; s. c., 140 App. Div. 893, 124 N. Y. Supp. 1115; s. c., 204 N. Y. 631, 97 N. E. 1104. In these cases the question was as to the extent of an easement in proposed streets, and it did not involve the question of a dedication of a "park" or "square."

The judgment should be affirmed, with costs. All concur.

REDICAN v. INTERCHANGEABLE MAGNETIC SIGN CO., Inc.

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

INJUNCTION (§ 59*)—TEMPORARY INJUNCTION—GROUNDS FOR DENIAL—DOUBTFUL RIGHTS.

In an action for an accounting under a contract by which defendant gave plaintiff the exclusive sales agency for its products for four months, with a provision for an exclusive agency for five years if he sold specified quantities during the four months, in which it appeared that defendant during such period refused to furnish plaintiff with products and refused to renew the contract, plaintiff was not entitled to an injunction pendente lite restraining defendant from selling the products itself, since he had an adequate remedy at law; and, even if entitled to an injunction, it should not be granted until he obtained his contract, or established his right to one giving him the exclusive agency, especially as the five-year contract alleged was unilateral and imposed no obligation upon plaintiff.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 114-116, 128; Dec. Dig. § 59.*]

Appeal from Special Term, New York County.

Action by George B. Redican against the Interchangeable Magnetic Sign Company, Incorporated. From an order granting an injunction during the pendency of the action, defendant appeals. Reversed, and motion for injunction denied.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Milton Mayer, of New York City, for appellant.

Harland B. Tibbetts, of New York City, for respondent.

McLAUGHLIN, J. This appeal is from an order granting an injunction during the pendency of the action. The action is brought to procure an accounting under a contract between the parties and to compel defendant to execute a new contract. On July 9, 1913, the parties entered into a contract, copy of which is annexed to and made a part of the complaint, from which it appears that the defendant gave the plaintiff the exclusive sales agency for the United States of America of all products manufactured or to be manufactured by it under certain letters patent for a period of four months. The contract further provided that at the expiration of the four months the defendant would enter into a contract giving the plaintiff the exclusive agency for the sale of the same products, for a period of five years, with an option to him to renew for an additional five years, provided, during the four months specified in the contract sued on, the plaintiff had employed at least five salesmen to sell the products referred to, outside of New York City, and also during the first month sold goods of the value of at least \$1,000, and increased such sales at least 20 per cent. each month thereafter. The complaint alleges that the plaintiff entered upon the performance of the contract and duly performed the same, except in so far as he was prevented from so doing by defendant; that the sales the first month amounted to \$1,000; the second to \$1,200,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and there would have been an increase during the third month of more than 20 per cent. if defendant had not interfered with and stopped him; that he did interfere and cancel his contract, and refuse to furnish him with any of the products specified, or to renew the contract. The answer admits the contract and the amount of sales for the first two months, also the cancellation and refusal to execute a renewal, and that the defendant is now selling its own products. After issue had been joined the plaintiff moved for an injunction restraining defendant from selling the products during the pendency of the action. The injunction was granted upon the condition that the respondent furnish an undertaking for \$1,000 and faithfully perform the contract sued on. Defendant appeals.

I am of the opinion the order should be reversed. The four months specified in the contract had expired when the action was commenced. If plaintiff were unlawfully discharged, or has any claim under that contract, he has an adequate remedy at law. The contract having been terminated, he was not entitled to an injunction enjoining defendant from selling its own products; certainly not until he had obtained a contract, or established that he had a right to one giving him the exclusive agency to sell. It may be upon the trial of the action he can show he was entitled to such a contract, but it does not so appear in this record. The five-year contract to which plaintiff in his complaint alleges he is entitled is unilateral. It imposes an obligation on one party and no obligation whatever on the other. By this contract, as pleaded, plaintiff did not agree to sell any of the products, to employ any agents, or in fact to do anything at all. *Goodyear v. Koehler*, 159 App. Div. 116, 143 N. Y. Supp. 1046.

The order appealed from, therefore, is reversed, with \$10 costs and disbursements, and the motion denied with \$10 costs. All concur.

(83 Misc. Rep. 627)

THEOBALD v. UNITED STATES RUBBER CO. et al.

(Supreme Court, Special Term, New York County. January, 1914.)

1. PLEADING (§ 350*)—MOTION FOR JUDGMENT ON PLEADINGS—ISSUES OF FACT.

The issues of fact raised by the pleadings cannot be determined on a motion for judgment on the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1053, 1054, 1070-1077; Dec. Dig. § 350.*]

2. CORPORATIONS (§ 320*)—ACTION BY STOCKHOLDER—MOTION FOR JUDGMENT ON PLEADINGS—ISSUES OF FACT.

Where the complaint, in a stockholder's action to compel the return of a certain sum to the corporation, alleges that its president, the defendant C., and his associate directors, through the form of a contract, did unlawfully retain such sum belonging to the corporation, and that the other directors permitted C. so to do, and the amended reply alleges that the contract, as well as its approval and ratification, were part of a scheme whereby C., aided by other directors, was enabled to appropriate to himself and his associates in an alleged syndicate the said sum, and denies the allegations of the answer that the entire transaction was conducted in a proper manner, and the alleged ratification at the annual meetings

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the defendant corporation, defendant's motion for judgment on the pleadings will be denied.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.*]

Action by Caroline De Wolf Theobald against the United States Rubber Company and others. Motion for judgment on the pleadings. Denied.

See, also, 157 App. Div. 446, 142 N. Y. Supp. 187.

Samuel F. Hyman, of New York City, for plaintiff.

Stetson, Jennings & Russell and William B. Hornblower, all of New York City, for defendants.

COHALAN, J. Application for judgment on the pleadings. Plaintiff, as a stockholder, brings this action to compel the defendant Samuel P. Colt, the president of the defendant United States Rubber Company, and his associate directors to return to the corporation the sum of \$731,289.10, alleged to have been wrongfully and unlawfully taken therefrom. No other stockholder has intervened or has become a party to the action. The defendant Colt in his answer sets up three defenses: (1) He denies the allegations of the complaint with regard to the matters complained of; (2) he pleads that the moneys paid to or retained by him were so paid or retained pursuant to an alleged contract, which was duly authorized by the board of directors of the defendant company; and (3) he asserts that there was a subsequent ratification thereof by the stockholders of the corporation. The plaintiff was directed to reply to the second and third defenses of the answer, and a further order was made by the Appellate Division requiring the plaintiff to make her reply more definite and certain. Thereupon an amended reply was served, which, with the complaint and the answer of the defendant Colt, comprise the pleadings before the court. The complaint alleges in brief that the defendant Colt and his associates, through the form of a contract—

"did wrongfully and unlawfully take and retain the said sum of \$731,289.10, the property of the United States Rubber Company, and the other defendant directors willfully and knowingly permitted the said Colt to do so."

[1] These charges in terms are restated in the amended reply; and, while the reply may be subject to criticism, I am of opinion that there is not such a material variance in the allegations stated therein from the allegations of the complaint as to conclude the plaintiff. This application requires the consideration of the respective allegations of the pleadings, and not the facts to be proven thereunder; there may be in the proof a broad variance thereof from the allegations set forth in the pleadings, and I am inclined, from the learned statement of the facts as outlined by the counsel for the defendant on the argument, to consider that such may be the case. However, if there are issues of fact raised by the pleadings, these issues of fact cannot be determined on this motion. *National Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] The defendant Colt in his defense alleges that the entire transaction was conducted in a proper and lawful manner and in accordance with the forms of law. It is claimed that the transaction was one that involved merely the exercise of the discretion vested in the board of directors of the corporation. This is put in issue by the direct allegations in the plaintiff's amended reply. In paragraph 5 thereof it is alleged—

"that the said alleged contract, * * * as well as the approval and ratification of the same, were part of a scheme or device whereby the said Colt, aided and abetted thereto by divers members of the board of directors of the United States Rubber Company, who were interested in and were members of the said alleged syndicate, and who were interested in the consummation of the said scheme, was enabled to and did take and appropriate to the use of himself and his associates in the said alleged syndicate the sum of \$731,289.10 * * * which rightfully and lawfully belonged to and was the property of the United States Rubber Company."

In the third defense in his answer the defendant Colt sets forth what purports to be a ratification at the annual meetings of the corporation of the acts complained of by the stockholders. This is likewise denied in the reply. The complaint of the plaintiff is not based upon a charge that the acts of the board of directors were merely unwise or impracticable; graver questions than that of policy or expediency are raised. It is asserted that acts involving a misuse of corporate funds for personal purposes and private gain cannot be ratified by vote, even if every shareholder other than the plaintiff were favorable to a ratification thereof. *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 99 N. E. 138; *Pollitz v. Wabash R. R. Co.*, 207 N. Y. 113, 127, 100 N. E. 721. It is conceded that the stockholders of a corporation may ratify an act of the directors that is not void, but merely voidable. In *Continental Securities Co. v. Belmont*, *supra*, it was held:

"No such authority exists in case of an act of the board of directors which is prohibited by law, or which is against public policy. *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159. In any case where action is taken by stockholders confirming and ratifying a fraud and misapplication of the funds of the corporation, by the directors or others, the action is binding only by way of estoppel upon such stockholders as vote in favor of such approval."

That case further held:

"The direct or indirect misappropriation of assets of the corporation to his own use or benefit by an officer is incapable of being authorized or ratified by a vote or any act or omission of the majority of the stockholders. *Continental Securities Co. v. Belmont*, 206 N. Y. 7 [99 N. E. 138]; *Von Arnim v. American Tube Works*, 188 Mass. 515 [74 N. E. 680]; *Russell v. Patterson Co.*, 232 Pa. 113 [81 Atl. 136, 86 L. R. A. (N. S.) 199]."

In the case of *Pollitz v. Wabash R. R. Co.*, *supra*, in which it was held that a complaint alleging misconduct by the defendants, acting as members of a syndicate, stated a cause of action on behalf of stockholders of the corporation, the court said:

"Questions of policy of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to their honest and unselfish decision, for their powers therein are without limitation and free from restraint, and the exercise of them for the common and general interests of the corporation may

not be questioned, although the results show that what they did was unwise or inexpedient. It is, however, the inflexible rule that they cannot exercise the corporate powers for their private or personal advantage or gain. The law stringently and rigorously forbids to them the use or disposition of the funds or assets of the corporation for their individual enterprises or acquisition; and, for any misfeasance or breach of duty or trust resulting in damage to the corporation, they are subject to be called to account by the corporation in the appropriate action. These principles, based upon a sound public policy and morality, are so firmly fixed in our jurisprudence that they are not open to discussion, and so familiar that authorities declaring them need not be cited."

It is true that the interest of the plaintiff in the transaction is apparently inconsiderable, but she did not ratify or consent to it. An analysis of the reply may raise no important issues of fact, but, in my opinion, they are sufficient to deny the application for judgment on the pleadings.

Motion denied, with \$10 costs.

IN re WEST FARMS ROAD IN CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

1. PUBLIC LANDS (§ 192*)—GRANT—CONSTRUCTION—EFFECT.

A grant by the Governor of the province or colony of New York to Q. and others, as patentees for and on behalf of themselves and their associates, the freeholders and inhabitants of Westchester, vested ownership of the lands in the town in its corporate capacity, and not in the patentees named in the grant, nor in the freeholders and inhabitants individually.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 615, 617, 618; Dec. Dig. § 192.*]

2. NAVIGABLE WATERS (§ 37*)—LAND UNDER WATER—CONVEYANCE—GRANT BY MUNICIPAL CORPORATION.

Where a deed by a municipal corporation described the land as commencing at a point marked on the causeway by Westchester creek, thence running along the creek for a distance "thence by and with" the creek for a distance, and "thence still along by" the creek to a slip, and thence "by and with said slip" to a turn in a wall, it appearing that the creek was navigable, the deed did not convey the land under water to the center of the creek, under the rule that where a municipal corporation owns land under navigable water in its governmental capacity, a deed of the uplands will not pass the adjacent land under the water, unless precise words are employed in the conveyance which clearly indicate the intent to convey such land.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 235; Dec. Dig. § 37.*]

3. EMINENT DOMAIN (§ 295*)—DAMAGES TO LAND—RIPARIAN RIGHTS.

Where the owner of land bordering on a navigable stream had certain riparian rights in the stream, but did not own the land under water in front of the upland, it would be presumed that the value of such riparian rights was considered and allowed in awarding damages for the value of the upland.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 803; Dec. Dig. § 295.*]

McLaughlin, J., dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from City Court of New York, Special Term.

Application of the City of New York to acquire title to certain lands required for opening the West Farms Road. From a final order confirming the report of a referee as to certain awards made to unknown owners, the City of New York and the Comptroller thereof appeal. Reversed, and motion to pay awards as to two certain lots to Mary C. Clark, as administratrix of Thomas S. Ryan, deceased. Denied.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Joel J. Squier, of New York City, for appellants.

Benjamin Trapnell, of New York City, for respondent.

SCOTT, J. The commissioners of estimate and assessment in this proceeding made a substantial award to Thomas S. Ryan for damage parcel No. 234 as shown on the commissioners' map, and also made smaller, but still substantial awards to "unknown owners" for damage parcels Nos. 235 and 236 as shown on said map. The awards for said last-mentioned parcels were claimed both by the city of New York and by Mary C. C. Clark as administratrix with the will annexed of Thomas S. Ryan, deceased. These conflicting claims were referred to a referee who has reported that Mary C. C. Clark, as administratrix, etc., is entitled to receive the awards, and his report to this effect has been confirmed at Special Term. From the order of confirmation this appeal is taken, and the question involved is as to the ownership of the parcels for which the awards were made.

Lot 234 consists of upland fronting on Westchester creek; lots 235 and 236 lie in the bed of said creek in front of said lot 234. Directly to the north of the last-mentioned lot is an ancient causeway crossing said creek. South of that causeway Westchester creek is, and from time immemorial has been, navigable. Parcels 235 and 236 lie under water of that part of the creek which is navigable. The question we have to determine is whether title to those parcels lying thus under the waters of a navigable stream passed to Thomas S. Ryan, under the deed hereinafter mentioned, from the trustees of the town of Westchester.

[1] In 1667 Richard Nicoll, Governor of the province or colony of New York, conveyed to John Quimby and others, as patentees, for and in behalf of themselves and their associates, the freeholders and inhabitants of the town of Westchester, a large tract of land, embracing the lands in question here, and by a description sufficiently comprehensive to include title to the bed of Westchester creek. The effect of this grant undoubtedly was to vest ownership of the lands in the town in its corporate capacity, and not in the patentees named in the grant, nor in the freeholders and inhabitants individually. *Lawrence v. Town of Hempstead*, 155 N. Y. 297, 49 N. E. 868.

[2] Ryan's title is derived from a deed made to him on August 14, 1878, by the trustees of the town of Westchester, in which the property conveyed is described as follows:

"All that certain lot being and situated in the town of Westchester and known and distinguished as lot No. 20 on a certain map made by William

G. Livingston, surveyor, and dated June 25th, 1878, bounded and described as follows: Beginning at a point on the road leading from Westchester village to Throggs neck at a marked stone, thence running north eighty degrees and forty-five minutes east (N. 80° 45' E.) along the said road or causeway (so-called) fifty-five and one-half feet (55½ ft.) to a point on said causeway or road, thence running north eighty-five degrees and thirty minutes east (N. 85° 30' E.) forty-six and one-half feet (46½ ft.) to a point marked on the causeway by Westchester creek thence running along said Westchester creek south four degrees and forty-five minutes east (S. 4° 45' E.) twenty-four and one-quarter (24¼ ft.) thence by and with Westchester creek *and a certain stone wall sixteen and one half feet (16½ ft.)* thence still along by said Westchester creek *and by said wall south forty-four degrees east (S. 44° E.)* thirty-nine and one-quarter feet (39¼ ft.) to a slip thence by and with said slip south eighty-five degrees and thirty minutes west (S. 85° 30' W.) thirty feet (30 ft.) thence south sixty-seven and one-half degrees east eighteen and one-half feet (S. 67½° 18½ ft.) to a turn in the wall of the aforesaid mentioned slip thence still along by said wall south eighty-five and one-half degrees west (85½° W.) fifty feet (50 ft.) to the first above mentioned road leading from the town dock thence along the easterly side of said road north six degrees east sixty-six feet (N. 6° 66 ft.) to a marked stone the point and place beginning containing within said bounds fourteen hundredths of an acre (14/100) together with all the right to the water of Westchester creek which lies north of the causeway and the right to dam the same and in keeping floodgates and maintaining a dam across said Westchester creek, where the causeway or road is now located, for the purpose of furnishing water from said pond to drive and work a mill. Together, with all the singular and tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof."

Ryan conveyed the same property by the same description to William H. Corrigan in 1880, but ultimately, through a series of mesne conveyances all containing identical descriptions, the property was again vested in said Ryan in 1887. The question of his ownership of the lands under water therefore depends upon the terms of the conveyance to him by the trustees of the town of Westchester. It will be observed that so far as Westchester creek is concerned the description of the property conveyed commences at "a point marked on the causeway by Westchester creek"; thence it runs "along said Westchester creek" for a distance; thence "by and with Westchester creek" for another distance; thence "still along by said Westchester creek" to a slip; and thence "by and with said slip" to a turn in the wall.

It is clear that no part of the bed of Westchester creek is explicitly and in terms included within the lines of the descriptions which are all indicated as "by" and "along" the creek and slip. The respondent in effect concedes this much, but she rests her claim to ownership by her testator upon the proposition that by operation of law title to the land under water in front of the upland passed under the descriptions quoted. We may assume for the purposes of this case that this would have been so if the grantor, instead of being a municipal corporation, had been an individual who owned the tideway, and who had bounded the land conveyed by the creek (*Smith v. Bartlett*, 180 N. Y. 360, 73 N. E. 63; *Archibald v. N. Y. C. & H. R. R. Co.*, 157 N. Y. 574, 52 N. E. 567; *Matter of the Mayor*, 182 N. Y. 361, 75 N. E. 156), or if Westchester creek had been merely a nontidal fresh-water stream, even though navigable in an actual, but not legal, sense (*Fulton Light*,

Heat & Power Co. v. State of New York, 200 N. Y. 400, 94 N. E. 199, 37 L. R. A. [N. S.] 307).

A different rule, however, obtains where, as in the present case, the conveyance is made by a municipal corporation of land under navigable water, granted to and held by it in its governmental capacity. Such land it holds as trustee for the use of the public and of commerce, and it will not be presumed to have intended to include in its deed of the uplands the adjacent land under water in a navigable stream, unless precise words are employed in the conveyance which clearly indicate the purpose and intent to convey the lands under water and to pass the title thereto. *Matter of Mayor, etc., supra*; *Trustees of Brookhaven v. Strong*, 60 N. Y. 56; *Sage v. Mayor, etc.*, 154 N. Y. 61, 47 N. E. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592; *Mayor, etc., v. Hart*, 95 N. Y. 443.

[3] Applying this very well-settled rule to the case at bar we are forced to the conclusion that the deed from the trustees of the town of Westchester to Ryan did not convey to the latter title in fee to the land under water adjacent to the upland granted to him. Certain riparian rights he no doubt did acquire and these were probably of value, but it is to be assumed that their value was taken into account in fixing the amount of the award for the upland, parcel 234.

It may also be true, as argued by the respondent, that the awards for parcels 235 and 236, burdened as they were with riparian rights appurtenant to parcel 234, were too large, but that question cannot be dealt with on this appeal.

It is clear that the right given to Ryan to dam the waters of Westchester creek *north* of the causeway adds nothing to respondent's claim of title to lands under water lying *south* of the causeway, and we do not understand that the respondent relies at all upon the grant of this right. From the description of the causeway given in the testimony, it would appear that it marked the head of practicable navigability, that portion of the creek lying south, where the lands in question were situated, being navigable, and that portion lying north of the causeway being unnavigable.

The result is that the order appealed from must be reversed, with \$10 costs and disbursements, the motion of respondent denied, with \$10 costs, and the awards for damage parcels Nos. 235 and 236 ordered to be paid to the city of New York, as successor to the town of Westchester.

INGRAHAM, P. J., and LAUGHLIN and CLARKE, JJ., concur.

McLAUGHLIN, J. (dissenting). The land described in the deed of conveyance from the trustees of the town of Westchester to Ryan, in my opinion, ran not only to the bank, but to the center of Westchester creek. *Smith v. Bartlett*, 180 N. Y. 360, 73 N. E. 63. There is nothing in the deed to indicate an intent to reserve the land between high-water mark and the center of the creek, and if such had been the intent, it seems to me appropriate words would have been used for that purpose. *Fulton L. H. & P. Co. v. State of New York*, 200 N. Y. 400, 94 N. E. 199, 37 L. R. A. (N. S.) 307. This view is also strength-

ened by the fact that the parcel conveyed was for a mill site, which necessarily included the water in the creek required for its full enjoyment.

I, therefore, dissent from the conclusion reached by Mr. Justice SCOTT, and vote to affirm the order appealed from.

PETERSON v. OCEAN ELECTRIC RY. CO.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. STREET RAILROADS (§ 98*)—INJURIES TO TRAVELERS—CONTRIBUTORY NEGLIGENCE.

Plaintiff was injured by being struck by a street car as she was crossing a 35-foot boulevard, on which the railway was operated. The car was running on the south track, the south rail of which was 10 feet from the curb, the distance between the rails being 5 feet. Plaintiff left the southerly curb and started to cross diagonally, facing the approaching car, and when she left the curb the car was about 160 feet away, running east at a high rate of speed. Plaintiff continued to walk rather rapidly, crossing the tracks diagonally, with her face in the direction the car was coming, but before she had fully crossed the tracks she was struck and injured. *Held*, that she was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*]

2. JURY (§ 12*)—RIGHT TO JURY TRIAL—CONSTITUTIONAL LAW.

Under Const. art. 1, § 2, providing that trial by jury in all cases in which it has previously been used shall remain inviolate forever, but a jury may be waived by the parties in all civil cases in the manner prescribed by law, the right of jury trial is preserved in actions at common law, so that, if there is any question of fact to be tried in such actions, it must be tried by a jury, unless one is waived.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 27-34, 82, 99, 101, 103; Dec. Dig. § 12.*]

3. APPEAL AND ERROR (§ 1177*)—DISPOSITION OF CAUSE—REVERSAL—DISMISSAL—APPELLATE DIVISION—JURISDICTION.

Const. art. 6, § 2, provides that the Appellate Division shall have jurisdiction previously exercised by the General Term of the Supreme Court, "and such additional jurisdiction as may be conferred by the Legislature." Code Civ. Proc. § 1317, as amended by Laws 1912, c. 380, provides that a court shall render judgment of affirmance or reversal, and final judgments on the right of any or all parties according to law, except where it may be necessary or proper to grant a new trial, when it shall do so, and when a trial has been before a jury, the judgment of the appellate court must be rendered, either on special findings of the jury or on the general verdict, or on a motion to dismiss the complaint, or to direct a verdict, and that after hearing the appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. *Held*, that where, in an action at law for injuries, it appeared from plaintiff's own case as a matter of law that she had failed to show herself free from contributory negligence, and for that reason the case should have been dismissed at the trial, the Appellate Division had jurisdiction on reversal to dismiss the complaint, and was not required to remand the cause for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. § 1177.*]

Laughlin, J., dissenting in part.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, New York County.

Action by Mae I. Peterson against the Ocean Electric Railway Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed and complaint dismissed.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

William C. Beecher, of New York City, for appellant.

Louis Steckler, of New York City, for respondent.

SCOTT, J. The plaintiff was very seriously injured in consequence of a collision with a trolley car owned and operated by defendant. The accident happened at about 7 o'clock in the morning on September 1, 1909, upon a road described as the "Boulevard near the Village of Rockaway Beach." The plaintiff was living in a settlement known as Tent City, lying between the boulevard and the ocean. The boulevard was a long street or road and, at the place where the accident happened, was partially built up on each side with small shops and buildings. The plaintiff was seriously injured about the head, one consequence of which was that she was unable, at the trial, to recall any of the circumstances attending the accident, although her memory on all other subjects appeared to be excellent. She called witnesses, however, who described the accident and plaintiff's movements immediately before it. At the time of the accident the street was entirely free from vehicular traffic, except the car which collided with plaintiff, and there were very few people moving about. The morning was damp but clear, and the street for a long distance was straight, or nearly so. There was nothing, therefore, to impede plaintiff's view of the approaching car, and nothing to impede the motorman's view of the plaintiff.

The testimony of plaintiff's witnesses shows that the boulevard at the point of the accident was about 35 feet wide; the car was running easterly upon the southerly track, the southerly rail of which was 10 feet from the curb, the distance between the rails being 5 feet. Plaintiff left the southerly curb with the apparent purpose of crossing the boulevard. She started to cross diagonally, facing the car. When she left the curb the car was about 160 feet westerly, running east at a high rate of speed. Plaintiff continued to walk, rather rapidly, crossing, or attempting to cross, the tracks diagonally, still with her face in the direction towards which the car was coming. Before she had fully crossed the tracks the car hit her.

[1] There seems to be no escape from the conclusion that, whether defendant was negligent or not, plaintiff was unquestionably guilty of contributory negligence. She deliberately walked along the track in the face of a rapidly approaching car, which must have been visible to her if she had looked, and, without changing her pace or her course allowed herself to be run down. It may be that, if she retained her memory as to the accident, she would say that she did not see the car until it was actually upon her. But this, even if true, would not absolve her from the charge of negligence. She was bound to look,

and if she had looked, she could not have failed to see the approaching car. If she saw it and made no attempt to avoid it, but relied wholly on the carefulness of the motorman, she was guilty of contributory negligence. Looked at from any angle, and considering only the testimony offered in behalf of the plaintiff, we see no escape from the conclusion that the evidence affirmatively shows that the plaintiff was guilty of contributory negligence. The complaint should have been dismissed at the close of the plaintiff's case in response to defendant's motion to that effect, a motion which was renewed and again denied at the close of the whole case, when the evidence was certainly no more favorable to plaintiff than it had been at the close of her case. *Zucker v. Whitridge*, 205 N. Y. 50, 98 N. E. 209, 41 L. R. A. (N. S.) 683, Ann. Cas. 1913D, 1250.

Being satisfied that the complaint should have been dismissed upon the undisputed facts, and that, upon a new trial upon the same evidence, it would be the duty of the trial court to dismiss it, the question is presented as to what order we should make. Should we order a judgment of dismissal, or must we go through the formality of sending the case back for a new trial, in order that the trial judge should make the order which inevitably must be made upon such new trial? This presents an interesting and important question, which frequently arises, and which may as well be disposed of now as at another time.

[2] The Constitution of the State provides (article 1, § 2) that:

"The trial by jury in all cases in which it has heretofore been used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."

It must therefore be conceded at the outset that in what is known as a common-law action, like the present, the right of trial by jury is preserved; and, if there be any question of fact to be tried, it must be tried by a jury, unless the parties waive their right thereto, and that the court, neither at Trial Term nor in its appellate branch, can usurp the functions of the jury. That conceded fact does not, however, answer the question we have now to consider. That question is whether or not this court, upon undisputed facts, may not only reverse the Trial Term, but may also direct the judgment which those facts require to be entered. Prior to the enactment of the Code of Procedure in 1848, the review on appeal in actions at law was by writ of error, and the reviewing court was only authorized to affirm or reverse the judgment brought before it for review by the writ, and, in case of reversal, to grant a new trial. Until 1848 the rule in equity cases was different, but after the creation of the Supreme Court by the Constitution of 1846, the rule formerly applicable to actions at law was applied to actions both at law and in equity. *Benedict v. Arnoux*, 154 N. Y. 715, 49 N. E. 326, and cases cited.

[3] Section 2 of article 6 of the Constitution was amended so as to read as follows:

"From and after the last day of December, 1895, the Appellate Division shall have the jurisdiction now exercised by the Supreme Court at its General Terms, and by the General Terms of the Court of Common Pleas for the city and county of New York, the Supreme Court of the city of New

York, the Superior Court of Buffalo and the City Court of Brooklyn, and such additional jurisdiction as may be conferred by the Legislature."

In 1912 the Legislature made an attempt to exercise this power to enlarge the jurisdiction of the Appellate Division by amending section 1317 of the Code of Civil Procedure so that it should read as follows:

"Upon an appeal from a judgment or an order, the Appellate Division of the Supreme Court, or Appellate Term, to which the appeal is taken, may reverse or affirm, wholly or partly, or may modify, the order or judgment appealed from, and each interlocutory judgment or intermediate order, which it is authorized to review, as specified in the notice of appeal, and as to any or all of the parties. *It shall thereupon render judgment of affirmance, judgment of reversal and final judgments upon the right of any or all of the parties, or judgment of modification thereon, according to law except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing. When a trial has been before a jury, the judgment of the Appellate Court must be rendered either upon special findings of the jury or the general verdict, or upon a motion to dismiss the complaint or to direct a verdict.* A judgment, affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent, a sum of money, or other relief, which was awarded to him by the judgment so affirmed. *After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties.*" Laws 1912, c. 380.

The second, third, and last sentences (indicated by italics) were added by the amendment. The effect of this attempt to enlarge the power of the Appellate Division in equity cases was considered by this court in *Bonnette v. Molloy*, 153 App. Div. 73, 138 N. Y. Supp. 67. It was not necessary in that case to consider what change, if any, the amendment had effected upon the power of the Appellate Division in actions at law, and the Court of Appeals in reviewing the case expressly reserved that point until it should be directly presented. *Bonnette v. Molloy*, 209 N. Y. 167, 102 N. E. 559. In that case, which was a suit in equity, this court, upon conflicting evidence, had reversed, a finding of fact by the trial justice, and had directed judgment against the party in whose favor judgment had gone at the Special Term, but had not specifically formulated a finding of act. For this omission, the Court of Appeals deemed it necessary to so modify the judgment directed by this court as to order a new trial, but in the course of its opinion took occasion to comment upon section 1317 of the Code of Civil Procedure in the following words:

"Under the authority conferred by the Constitution in section 2 of article 6, to grant additional jurisdiction to the Appellate Division, we think that the Legislature possesses the power to enlarge the jurisdiction of that tribunal to the extent which has been indicated in this opinion; that is to say, to deal with the evidence in an equity suit as the trial court should have done, and direct judgment accordingly."

This is a decisive and authoritative adjudication as to the power of this court, in equity suits, as the law now stands; the method in which the power should be exercised being merely a matter of detail.

So far as concerns actions at law which have been tried before a jury, it must be conceded at the outset that, if it appears upon appeal, though the judgment appealed from was erroneous, that there remains

an issue of act to be determined before the proper judgment can be rendered, a new trial should be ordered to the end that the disputed question of fact may be passed upon and determined by a jury. So much is required by the constitutional provision preserving inviolate the right of trial by jury. But cases frequently arise wherein, upon the undisputed evidence, the trial court should have disposed of the case without submitting it to the jury at all, either by dismissing the complaint or by directing a verdict for one party or the other. In such a case, is the Appellate Division empowered to enter the judgment which the trial justice should have ordered, without the useless formality, delay, and added expense involved in sending the case back to Trial Term, with instructions to enter the proper judgment? The language of section 1317 of the Code of Civil Procedure certainly seems to confer such authority. The Appellate Division is authorized, in addition to rendering judgment of affirmance or reversal, to render—

"final judgment upon the right of any or all of the parties or judgment of modification thereon according to law, except where it may be necessary or proper to grant a new trial."

That this provision is intended to apply to actions at law, as well as suits in equity, is made clear by the following sentence:

"When a trial has been had before a jury the judgment of the appellate court must be rendered either upon special findings by the jury, or the general verdict, or upon motion to dismiss the complaint or to direct a verdict."

That is to say, if in an action tried before a jury a motion has been made to dismiss the complaint or to direct a verdict, which should have been granted, but was not, the Appellate Division is authorized to render the judgment which should have been rendered at the trial. It would be difficult to frame a law more clearly giving power to the Appellate Division, in a case where there is no issue as to any material fact, to grant the judgment which should have been rendered at the Trial Term.

Even before the amendment of the Code, in 1912, the Court of Appeals has repeatedly approved the action of the court of intermediate appeal in awarding final judgment upon reversal of a judgment brought before it on appeal, although, of course, such a practice cannot be approved even now in an action at law, if there be left any disputed facts. But when the facts are conceded or undisputed, whether the cause is one triable before a jury or the court without a jury, the Appellate Court has, ever since the adoption of the Code, been authorized to render such a final judgment as the facts require. *Edmondston v. McLoud*, 16 N. Y. 543; *King v. Barnes*, 109 N. Y. 267, 16 N. E. 332; *Brackett v. Griswold*, 128 N. Y. 644, 28 N. E. 365; *Fischer v. Blank*, 138 N. Y. 669, 34 N. E. 397.

But, it is argued, a new trial should always be granted in a case like the present, because the plaintiff may then be able to offer other evidence, not produced upon the trial already had, which may establish her freedom from contributory negligence. That argument does not impress us favorably. Experience has shown that such a course does not always serve to promote the ends of justice. This court has, of

late years, felt constrained in certain classes of cases wherein it has reversed a judgment because the verdict was against the evidence, or not supported by the evidence, to abstain from pointing out the particular defect or deficiency in the evidence, because it had so often found that upon a new trial witnesses had changed their testimony to fit the criticism of this court, or new witnesses had been produced to supply the deficiencies found in the evidence on the first trial. It may, we think, be taken to be axiomatic that each litigant is entitled to one fair trial of the controversy to which he is a party, but to no more than one. He should not be permitted to speculate upon the amount of evidence required to sustain his case, but should produce upon the trial all the evidence he has that will enable the court to render a just judgment. If he has produced less than all, he has no claim to a second chance to produce evidence which he might have produced in the first instance, but did not. If he discovers material evidence after the trial, of which he had no knowledge at the trial, he has ample remedy in a motion for a new trial upon newly discovered evidence, which will be entertained in a proper case, even after a judgment has been finally affirmed on appeal.

Of course there are cases, not a few, in which the appellate court can see that a new trial ought to be ordered, even though the case is one which should have been disposed of at the trial by a dismissal or a directed verdict, but that is a matter which the Code expressly confides to the judicial discretion of the Appellate Division.

We are therefore of the opinion that the Code (section 1317) expressly authorizes this court, in an action at law which has once been tried before a jury, and in which it appears from the conceded or uncontroverted facts that the complaint should have been dismissed or a verdict directed, and a motion to that effect was made and denied, to direct the entry of the judgment which should have been entered at Trial Term, without imposing upon the parties the futile formality of going back to the Trial Term for the entry of the proper judgment. This authority extends to the case of a directed verdict, as well as to a dismissal, even though it has happened, as it sometimes does, that, owing to a misconception at Trial Term of the law properly applicable to the case, conflicting evidence has been received and even submitted to the jury upon a question of fact which, in the outcome, proves to have been immaterial. The primary object of creating courts and prescribing rules of procedure is to do justice between litigants. Subject to that primary object is the rule that the dispensation of justice should be made as expeditious and as economical of time and money as is possible, and to that end that legal chicanery should be discouraged and useless formalism avoided.

In arriving at this conclusion we have not overlooked the case of *Slocum v. New York Life Insurance Co.*, recently decided by the Supreme Court of the United States, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879. That was an action upon a life insurance policy, and was brought in the Circuit Court for the Western District of Pennsylvania. A motion was made by the defendant for a directed verdict, which was denied and the cause submitted to the jury, which rendered a

verdict in favor of the plaintiff. Upon appeal to the Circuit Court of Appeals, it was held that, as matter of law, the defendant should have recovered, and that it was error to have denied its motion for a direction. The court thereupon not only reversed the judgment, but also directed a judgment for defendant. It did this under a statute of the state of Pennsylvania which, in different language, confers upon an appellate court similar power to that sought to be conferred upon this court by section 1317 of our Code. Penn. Laws 1905, c. 198, p. 286. The Supreme Court of the United States agreed that the motion for a directed verdict in favor of the defendant should have been granted as matter of law, and sustained the Circuit Court of Appeals in reversing the judgment. It held, however, upon constitutional grounds, that notwithstanding only a question of law was involved, and that a new trial must of necessity result in the direction of a verdict, still the Circuit Court of Appeals had exceeded its power in directing the proper judgment to be entered, and should have ordered a new trial, to the end that there should be a formal verdict upon the record, although it would not be one found by the jury upon conflicting evidence, but one directed by the court as matter of law. This conclusion was arrived at upon a consideration of the seventh amendment to the Constitution of the United States, reading as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The decision turned upon the construction to be given to the second part of the amendment, as to the re-examination of the facts once tried by a jury, which, as was thought by a majority of the court, confined the practice in such cases to that which prevailed at common law when the seventh amendment was adopted, at which time, as it was said in the opinion, no such thing as an involuntary nonsuit or dismissal of a complaint was known, and upon reversal of a common law judgment upon appeal, it was necessary that a new trial should be had before a jury, if for no other purpose than to have upon the record a formal verdict, even though rendered upon direction, as the basis for a judgment. The highly artificial rules of procedure at common law which prevailed in England when the seventh amendment was adopted have long since been abandoned in that country, and in nearly all of the United States, in favor of a simpler and less technical procedure. In our own state, while we have preserved the inviolability of the right of trial by jury, in this regard conforming to the first part of the seventh amendment to the federal Constitution, we have not irrevocably bound ourselves to the ancient rules of procedure at common law by adopting any constitutional provision similar to that contained in the second half of the seventh amendment, upon which the decision in *Slocum v. N. Y. Life Ins. Co.* turned. That case, therefore, is not an authority upon the question we are now engaged in considering.

To return to the case at bar, we find upon the plaintiff's own case that as matter of law she has failed to show that she herself was free from contributory negligence, and for that reason that her complaint

should have been dismissed at the trial. There is no suggestion that she did not produce on the trial all the available evidence to support her complaint, or that upon a new trial she would be able to produce new evidence to support the deficiency in her proofs. An appropriate situation is therefore presented for exercising the power conferred by section 1317 of the Code of Civil Procedure as we construe it.

The judgment and order appealed from will therefore be reversed, and the complaint dismissed, with costs in all courts to the defendant.

INGRAHAM, P. J., and CLARKE and HOTCHKISS, JJ., concur.

LAUGHLIN, J. I dissent from the dismissal of the complaint, but vote for a new trial for error in allowing the contradiction of the witness Smith as to the speed of the car, and on the ground that the verdict is against the weight of the evidence.

PETERSON v. OCEAN ELECTRIC RY. CO.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

Appeal from Trial Term, New York County.

Action by Ernest Peterson against the Ocean Electric Railway Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed and dismissed.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

William C. Beecher, of New York City, for appellant.

Louis Steckler, of New York City, for respondent.

PER CURIAM. For the reasons stated in *Mae I. Peterson v. Ocean Electric Railway Company* (decided herewith), 146 N. Y. Supp. 604, the judgment and order appealed from are reversed, and the complaint dismissed, with costs in all courts to the defendant. All concur, except LAUGHLIN, J., dissenting in part.

LAUGHLIN, J., dissents from dismissal of complaint, and votes for a new trial.

CLEARY v. DYKEMAN.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. BILLS AND NOTES (§ 362*)—BONA FIDE PURCHASERS—DEFENSES.

A bona fide purchaser of an accommodation note for value and without notice acquires it free from all defenses, and can, even after maturity, transfer good title to another person, even though the assignee had notice of the defenses.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 937-943; Dec. Dig. § 362.*]

2. BILLS AND NOTES (§ 523*)—ACTIONS—PRESUMPTION.

Proof that a party furnished the money for the purchase of a promissory note prima facie shows him to be the real owner, entitled to enforce payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822-1825; Dec. Dig. § 523.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. WITNESSES (§ 400*)—EXAMINATION—CONTRADICTION.

Where a defendant was forced to call the one who claimed to be the real party in interest to establish his defense, he is not concluded by that party's testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 400.*]

4. BILLS AND NOTES (§ 496*)—ACTIONS—DEFENSES.

In an action on a promissory note, where defendant claimed that plaintiff was not the real party in interest, but was acting for the accommodation payee, he has the burden of establishing that fact.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1665½, 1669-1674; Dec. Dig. § 496.*]

5. BILLS AND NOTES (§ 523*)—ACTIONS—DEFENSES.

In an action on a promissory note, where defendant claimed that plaintiff was not entitled to recover, as he was acting for the accommodation payee, evidence held insufficient to establish that fact.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822-1825; Dec. Dig. § 523.*]

Appeal from Trial Term, New York County.

Action by Joseph W. Cleary against Conrad V. Dykeman. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 143 N. Y. Supp. 1110.

The opinion of Lehman, J., is as follows:

[1] The defendant, Dykeman, is sued upon a note made and executed by him. This note is a renewal note of an earlier note. The defendant claims that at the time when he made the original note he had been induced by one Kaufman Simon to purchase a very considerable proportion of the stock of a mining company controlled by Simon, and that he executed the note for Simon's accommodation to the order of the mining company. It is undisputed that the note was discounted by Simon in the Edgewater National Bank, and that the Edgewater National Bank had a title free from any possible defense that the note was made only for the accommodation of any party. The Edgewater Bank, having a title to the note free from all defenses, could transfer its title to any other party, even after maturity, and even though the assignee had knowledge of such defenses. The party suing upon the note as the assignee of the bank could enforce the note by virtue of the title received from the bank. The defense that the note was made for the accommodation of Simon, therefore, fails unless the note is the property of Simon, who, of course, could not enforce it as against a party who made the note only for his accommodation.

[2-5] The suit is, however, brought, not by Simon, but by one Cleary, who bought the note after maturity from the bank, with a check furnished by one Clegg, and at Clegg's request. Prima facie Clegg is the real owner of the note, and entitled to enforce payment from the maker. The defendant, therefore, to establish his defense, is bound to produce some evidence to show that Clegg is only an agent or dummy for Simon. The only evidence produced upon this point is the testimony of Clegg himself and the record of Clegg's bank account. Clegg testified in effect that Simon was a friend to whom he was under considerable personal obligations; that Simon said that he did not wish to take up the note from the bank himself, as it would embarrass him to be obliged to sue one of the directors of his mining company, and Simon therefore requested the witness to take up the note. The witness complied with this request through Cleary, and furnished Cleary with his own check. He further testified that Simon did not furnish him with the money, but that he drew the money from his own account, and that Simon had not promised to indemnify him in any way. Clegg's bank account shows that immediately before he drew this check he deposited a slightly larger sum in cash. Clegg claims this deposit was made up of cash received from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rents and various other sources, but his bank account shows that at no previous time had he ever deposited such a large amount in cash. Clegg was of course an interested witness, and, though produced by the defendant, he was an adverse witness. I do not think that the defendant is therefore actually bound by his testimony, and the question of the credibility of his testimony is a question for the jury. The jury would be entirely justified in refusing to credit his testimony; but, since his testimony is the only testimony produced by the defendant, the defendant is in the unfortunate dilemma that if the testimony is true, it affirmatively establishes that Clegg is the real plaintiff, and if false, then there is no testimony remaining to rebut the plaintiff's *prima facie* case. The defendant is bound to produce evidence which will justify the inference that Simon is the real plaintiff; and evidence that justified merely a suspicion is insufficient. Nevertheless, since it is clear that such a suspicion is justified, I have carefully examined Clegg's testimony to seek out whether, by disregarding those portions favorable to himself and regarding as credible only those portions which are favorable to defendant, any facts remain which justify the inference that Clegg is Simon's dummy. For this purpose I have accepted as true that Clegg was a close friend of Simon; that he took up the note in suit at Simon's request; that the bank received payment by a check drawn on Clegg's account; that for the purpose of meeting this check Clegg deposited a slightly larger amount of cash in his account; and that the deposit of such a large amount in cash was unprecedented. In considering the inferences that may be drawn from this testimony, it must be remembered that the question in the case is not whether Simon induced Clegg to take up the note to avoid the interposition of the defense that the defendant was an accommodation maker, but is whether the plaintiff is in fact representing him and not Clegg. None of the facts testified to is in any way inconsistent with the view that Clegg did take up the note individually, and is the person directly interested in a recovery, even though he was induced to come into the case out of friendship to Simon and to help Simon out of an embarrassing situation, unless there is also some evidence that Simon furnished him with the money to take up the note, or is in some way directly behind the suit. The defendant contends that this proof is furnished by the improbability of Clegg's story that the amount of cash deposited to meet this check came to him from his ordinary business. Conceding that this story is improbable. I still think that a finding that Simon furnished this money would rest only in conjecture, and is not an inference which can be drawn from the evidence. I, therefore, find no question to submit to the jury, and the motion to set aside the direction of a verdict must be denied. Thirty days' stay of execution and 60 days to make a case.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

J. F. Carew, of Brooklyn, for appellant.

Monte London, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion of Lehman, J., at Trial Term.

Order filed.

(161 App. Div. 33)

MCCORMACK v. SECURITY MUTUAL LIFE INS. CO.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

1. INSURANCE (§ 354*)—LIFE INSURANCE—NOTICE.

Under Insurance Law (Consol. Laws, c. 28) § 92, requiring insurance companies to send notices that premiums are due, and providing that no insurance company shall declare any policy forfeited unless a written or printed notice, stating the amount of the premium due, the place and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

person to whom it is payable, shall have been sent at least 15, and not more than 45, days prior to the day when the premium is payable, a notice that a premium is payable will not support a forfeiture, where it contained many alternative directions as to payment, and was incumbered by suggestions, intimations, and advice; the notice required by the statute being a danger signal which would not lull the insured into false security.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 908-911, 913; Dec. Dig. § 354.*]

2. INSURANCE (§ 378*)—LIFE INSURANCE—POWER OF OFFICERS.

Where the field superintendent and local cashier of the defendant insurance company consented to the reinstatement of a life policy after lapse in payment of premiums, with knowledge that the insured was hopelessly ill, such knowledge is chargeable to the company, and it cannot defeat recovery on the ground that a statement signed by the insured recited that he was in good health.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 988-997; Dec. Dig. § 378.*]

3. INSURANCE (§ 365*)—LIFE INSURANCE—INCONTESTABILITY.

A life policy contained a clause providing that it should be incontestable after the expiration of one year. It was forfeited for nonpayment of premiums, but was reinstated a few months later as of the date of the forfeiture, the company accepting the original check for the premium, which the insured's wife had negligently failed to mail. *Held*, that the policy as reinstated related back to the time of the forfeiture, and it became incontestable within one year after forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 932, 933; Dec. Dig. § 365.*]

Smith, P. J., dissenting.

Appeal from Trial Term, Albany County.

Action by Agnes L. McCormack against the Security Mutual Life Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before SMITH, P. J., and KELLOGG, HOWARD, and WOODWARD, JJ.

Rollin B. Sanford, of Albany, for appellant.

Harvey D. Hinman, of Binghamton (Jay L. Gregory, of Binghamton, of counsel), for respondent.

HOWARD, J. In 1901 the Security Mutual Life Insurance Company wrote a policy for \$2,000 on the life of John A. McCormack. He was then a sound and healthy man; afterwards he was stricken with a fatal malady, with which he suffered for several years and then died. On December 12, 1910, a quarter yearly premium became due and payable, with 30 days' grace. On November 12, 1910, a notice was sent out by the company and received by the assured, whereby the company undertook to apprise the assured of his obligation to make a premium payment on December 12th. Mrs. McCormack, the wife of the assured, the plaintiff herein, wrote a check on December 5th for the amount due, put it in an envelope, and directed the envelope to the company, but omitted to mail it. On February 13, 1911, the company notified the assured by letter of his default, and suggested that he arrange for a reinstatement of his policy. Mrs. McCormack

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

visited the office of the local agent, Miss M. F. Hearley, the person named in the notice, for the purpose of inquiring into the matter. She was told by Miss Hearley that a reinstatement of the policy was necessary, and that Mr. McCormack must certify that he was then in good health. Mrs. McCormack told the agent, so she says, that no such certificate could be made, for her husband was then and had been for years in bad health. But the assured did ultimately sign such a certificate, and was, in form, reinstated by the company. He died January 2, 1912.

[1] The defense to this action, brought on the policy, is that the policy was forfeited by the nonpayment of the premium due December 12, 1910, and that the reinstatement was procured by fraud and false statements. And so we must first inquire whether there was a forfeiture.

Section 92 of the Insurance Law requires insurance companies to send out to policy holders a notice that premiums are due. This section provides that no insurance company shall declare any policy forfeited—

"unless a written or printed notice stating the amount of such premium, * * * due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured * * * at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided."

The notice which the company sent to the assured in this case reads:

"Security Mutual Life Insurance Company, Binghamton, N. Y.

"Dear Sir: On or before Dec. 12th, 1910, a premium payment of sixteen & ²²/₁₀₀ dollars, for the regular ¹/₄ yearly payment required to renew policy No. 84629 on the life of John A. McCormack in this company, will, if such policy be in force on that day, but not otherwise, become due and payable to the comptroller of the company at its office, Security Mutual Life Building, Binghamton, N. Y., and unless said premium shall be paid on or before said date, the policy and all payments made thereon will become forfeited and void, except that this notice shall not affect any right to paid-up or extended insurance, or to 30 days' grace, if provided for in the policy contract.

"The acceptance of any premium by the company after the date when due is subject to the condition that the insured is in good health, and an expressed warranty upon the part of the holder of the policy to that effect, and shall not be construed as a waiver of the conditions of the policy as to future payments, nor as establishing a course of dealing between the company and the holder of the policy.

"The sending of this notice shall not be held to waive any forfeiture or lapse of the policy, if any previous payment has not been made.

"No agent, collector, or other person, except the president, vice president, comptroller, or secretary, has authority to receive payment of a premium after it becomes due, or to extend the time for the payment of a premium, or to grant permits, or to make, alter, restore, or discharge policy contracts, or to waive any condition thereof.

"Dated Binghamton, N. Y., Nov. 12th, 1910.

"Return this receipt with your remittance.

"Chas. A. La Due, Secretary.

"All premiums are due at the office of the company in the city of Binghamton, N. Y., but for the convenience of policy holders payments may be made

on or before the date when due to an authorized collector in exchange for the company's receipt therefor, signed by the secretary, and countersigned by the collector.

"Payment may be made to M. F. Hearley, 80 State Street, Albany, N. Y., authorized collector.

"Pay now and avoid overlooking it.

M. F. H."

It is unnecessary to analyze this notice. It is sufficient to say that in our judgment it does not comply with the statute either literally or substantially; this is apparent on its face. Its form, its verbiage, its surplusage; its suggestions, intimations, and advice, intermingled with the language of the statute, are all repugnant to directness and simplicity. The notice is intended to be, as the plaintiff's attorney has well expressed it, a "danger signal." But the danger signal is here confused with a dozen other signals. There is no excuse for this; no necessity for it. If the insurance company wishes to convey this additional information to its policy holders, it must do so at other times than when sending out premium notices, and on other papers. But it is urged that the plaintiff received the notice and attempted to act upon it, and therefore if it was in some degree defective, it served its purpose, and the plaintiff was not harmed. But neither was the company harmed by the default in payment; it received the same amount of money and the same identical check which it would have received if the premium had been paid when due. And we cannot be certain that the plaintiff was not harmed; the peculiar and ambiguous language of the notice may have lulled her somewhat into repose. She may not have been spurred on by fear of forfeiture, as perhaps she would have been by the simple, direct language of the statute. The law abhors the forfeiture of insurance policies on technical grounds, and in order to effect a forfeiture, the statute must be strictly complied with. This court has already taken a position on this subject. *Flint v. Provident Life & Trust Co.*, 157 App. Div. 885, 141 N. Y. Supp. 1119. There is no reason to change that position now. The notice must be held to have been defective and insufficient to work a forfeiture.

[2] Having reached the conclusion that the policy was never forfeited, it is not strictly necessary to make further examination of this case. It may not be unprofitable, however, to do so. Although the adjudicated cases in this state are by no means harmonious on the subject, the weight of authority is to the effect that agents of insurance companies cannot, by any statements which they may make, waive or alter the written conditions of policies. But that rule is not controlling here, for the situation before us presents a different question. We are now to determine whether knowledge on the part of agents becomes knowledge on the part of the company. That is the question before us now. The jury has found in this case that two agents of the company—a local agent and a "field superintendent"—had full knowledge of the condition of health of the insured at the time the policy was reinstated. The finding of the jury cannot be doubted, for it comports with the probabilities of the case and with common knowledge as to the methods of insurance agents. The field superintendent, by his title of office, as well as by his testimony, appears to have been a representative of much importance in the company. His jurisdiction ex-

tended all over the United States. His duties were general and supervisory in character. If he knew of reasons why a person ought not to be reinstated, it was his duty, so he tells us, to report such information to the company. Under these conditions it should be held that knowledge on the part of this agent was knowledge on the part of the company. It follows that, the company, having full knowledge of the condition of health of the assured at the time it reinstated his policy, it is estopped from setting up as a defense the false statements in his application for reinstatement. The company knew that Mr. McCormack was desperately sick. Notwithstanding this, with its eyes wide open, it reinstated his policy. It cannot now complain.

[3] And there is still another feature of this case worthy of consideration. The process of reinstatement here consisted of the acceptance by the company of the original check drawn by the plaintiff for the payment of the premium and the delivery by the company of the original receipt to the plaintiff. No new written contract was executed. The "reinstatement" was a reissuance of the old policy. That is, the policy having ceased to exist, as the company claimed, on December 12, 1910, it did not make out a new policy when it resumed relations with the plaintiff, but issued the old policy over again, and dated it, in effect, December 12, 1910. This must be so, otherwise the amount received by the company in premiums between December 12, 1910, and about February 18, 1911, was money accepted and retained by the company when there was no policy in existence. This plan avoided all gaps and interims. The old policy, issued anew, was to bear date December 12, 1910. That this was the distinct understanding of the parties is clearly apparent. This being so, the incontestability clause must be held to apply to the "reinstated" policy with the same force and effect as it did to the original policy. This is equitable and just, and has been sanctioned by the Court of Appeals. *Teeter v. United Life Insurance Association*, 159 N. Y. 411, 54 N. E. 72. Therefore it follows that after one year from December 12, 1910, the policy was incontestable.

The judgment of the Trial Term should be reversed, and judgment for the relief demanded in the complaint rendered for the plaintiff, with costs.

We disapprove of the finding of fact made by the Trial Court, to the effect that the defendant duly rescinded the contract of insurance and reinstatement. All concur, except SMITH, P. J., dissenting and LYON, J., not sitting.

KELLOGG, J. (concurring). The jury has found that the general field superintendent, at the interview in February, 1911, and the cashier at and prior to that time, understood the condition of the health of the insured. The trial justice has not disturbed those findings, but, upon the theory that they had such knowledge, says the fact is immaterial under the authorities. The jury has believed the plaintiff rather than those officials. The plaintiff says the petition for reinstatement was made after the cashier knew of the ill health of the assured, and after plaintiff had informed her that she could not truthfully make the

petition, and that when she explained that the check had been put in the envelope, and she was surprised to find that it was not mailed, the cashier said she was very sorry about it, and "she knew the company would do what was right." After the petition had been forwarded the cashier called the plaintiff to her office and introduced her to the general field superintendent, and said that he had brought the reinstatement paper to her from Binghamton, the home of the company. He delivered it to her and said—

"knowing the condition of affairs, and knowing how very sick my husband was, that the company had done me a very great favor in reinstating him."

She had the right to believe, and evidently did believe, that he came to her as the representative of the home office to close the transaction with her. He had a general supervisory power over agents and to look out for the interests of the company wherever he is. He says—

"that if he knew an applicant was not entitled to reinstatement, it would be his duty to report the facts to the company at once."

If he was intrusted by the home office with a reinstatement to deliver, and delivered it to a party known by him to be in ill health, he bound the company, where the party has relied upon his acts. The plaintiff evidently had no exact knowledge of the powers of the superintendent or the cashier. She may have exaggerated the authority of the cashier, as over her desk, in large letters, was the placard "Security Mutual Life Insurance Company." That fact, and the fact that the superintendent brought the reinstatement papers from the home office, undoubtedly caused her to believe that she was dealing with the company. The correspondence between the cashier and the company with reference to the petition, the reinstatement, and the check is not in evidence. It was her duty to inform the company of the known condition of the insured. We must assume that she performed that duty, in the absence of proof to the contrary. There is no proof that she and the superintendent failed to perform their duties to the company. The medical examiner says he did not know, but the correspondence was not with him, and the superintendent did not report to him. The petition was simply handed over to him by the company for his consideration. If the company felt that under the circumstances it was not just or wise for it to contest its liability upon technical grounds, evidently it would not have informed the medical examiner, as his approval was desired. If the plaintiff is telling the truth about the attempt to mail the check and the reinstatement, the company would at least have been acting very technically and shortsightedly if it had refused reinstatement. The insured was helpless and failing in strength from day to day; the insurance was constantly in the mind of himself and wife; the default was purely accidental. If the company did not have knowledge of the condition of the health of the insured, the circumstances were such that it is estopped by the acts of its representatives under the circumstances shown.

At the time of the default the policy had a surrender value of \$900; there was a note against it of \$282. The husband was in a hopeless condition, and clearly could survive but a short time. If the company

had refused reinstatement, it would have been easy for her, in his condition of health, to borrow the amount of the loan upon the strength of the paid-up policy, which would have resulted, at the worst, in her receiving \$618. The plaintiff had no intention to defraud the company. She was acting with its representatives, who knew the facts as well as she did; she believed they were honestly representing the company, and in fact were the company.

The cases relied upon by the respondent indicate that the cashier had not the power to bind the company by knowledge which she had and did not communicate to the company. We need not quarrel with them, for the fair inference is that the company had the knowledge. If the general field superintendent can bring from the home office and deliver a reinstatement to a dying man, under circumstances which render such delivery just and reasonable, and the company can avoid the effect of it after the assured, relying upon it, has allowed the time to obtain the surrender value on the policy to lapse, then technicality prevails over justice. I think the verdict of the jury, and the inferences fairly coming from it, indicate that the company had knowledge of the condition of the insured at the time it received the check for the premium in dispute, and that it is therefore liable on the policy.

The company received the check which had been drawn in December, and signed the receipt prepared for the December payment, giving it the date of December 10, 1910, and marking it "Reinstated." It was practically ignoring the fact that there had been a default, and was treating the matter as if the check had been received in due course of mail. It is not going too far, under all the circumstances, to say that the reinstatement was dated back as of December 10, 1910, and under the terms of the policy was incontestable.

In addition to the criticisms on the notice made by Justice HOWARD, it should be stated that the notice is conditional upon its face. It states that the premium will be due upon a certain day, if the policy is in force on that day. Why throw a doubt upon the validity of the policy? Why leave it to the assured to determine whether the premium is due on that day or not? The law required the company to give notice of the fact, and did not intend that whether the premium was due or not should be worked out in the mind of the insured. The law contemplates by the notice that it should, in substance, be a demand for the payment of a certain sum of money on a day stated. A demand by a plaintiff, as a basis for a replevin, that the property be delivered to him if he is the owner, and if he is entitled to the possession, is not the unequivocal positive demand which the law contemplates. It is not an absolute requirement that the property be delivered as matter of right. The party making a demand must lay aside all doubt, and by positive act assert his right. The statute contemplates that the notice shall only be given to those who have a legal policy, and that it shall be a positive statement that a certain sum of money is due on a date specified, and that a failure to make payment will avoid the policy.

The notice requires payment to the comptroller at Binghamton, and is signed by the secretary. A postscript, with the initials "M. F.

H.," authorized the payment to any authorized collecting agent having a receipt. We do not know how many such agents there are. It also states that payment may be made to M. F. Hearley, authorized collector, at Albany. This was confusing. A technical effect is sought to be given to the notice; it, therefore, should comply with the law. The court cannot be called upon to help it out. I, therefore, favor a reversal and judgment for the plaintiff.

SMITH, P. J. (dissenting). Whatever may be the hardship of this particular case, this judgment cannot be reversed without revolutionizing the law of contracts. If the statute had required a notice for the payment of premiums to be in any particular form, it would so have prescribed. That the notice required by the statute is embodied in the notice sent is unquestioned. That other matters included in the notice can be held to vitiate the notice given, in my judgment, does violence both to law and reason. The holding that the knowledge of the field superintendent, so-called, was the knowledge of the company, for the purpose of holding the company estopped, goes further than any case has ever gone in this state, or any other state, in the construction of life insurance contracts, and is a judicial abrogation of the contract made between the parties that a waiver can only be made by certain officers of the company, of whom the field superintendent was not one. Furthermore, the holding that the false representation made in the statement for a renewal of the insurance did not vitiate such insurance not only goes beyond all authority, but is condemned by the reasoning in those cases which have held that the knowledge of the medical examiner in certain cases as to the condition of the insured may be held to estop the company in case of a false statement made by such medical examiner and innocently approved by the party seeking insurance. The opinion in the case of *Hook v. Michigan Life Insurance Co.*, in 44 Misc. Rep. 478, 90 N. Y. Supp. 56, shows clearly that the rule of estoppel has never been applied to forbid companies to claim exemption by reason of false statements in the application for insurance, where the statement was made by the party himself, knowing the same to be false. This decision was approved unanimously by this court in 139 App. Div. 922, 123 N. Y. Supp. 1121.

Nor do I think the plaintiff is saved by the nonforfeiture clause in the contract. The reinstatement was in fact made in February of 1911. He died in January of the year following, so that one full year had not in fact passed since the reinstatement. There is not one particle of evidence to show that the company intended to make the reinstatement effectual as of any prior date. The check which was received was dated before the forfeiture. The check, of course, did not bear interest, and it might have been dated back. In any event its date is immaterial. The fact that the reinstatement involved the payment of premiums as upon the original contract cannot date back the renewal contract for the purpose only of making applicable the nonforfeiture clause, without facts authorizing a finding that it was so intended by both parties to the contract.

I, therefore, vote for an affirmance of this judgment.

HOEFLE et al. v. AMERICAN LAUNDRY MACHINERY MFG. CO.

(Supreme Court, Appellate Division, Second Department. March 20, 1914.)

1. SET-OFF AND COUNTERCLAIM (§ 31*)—MATTERS WHICH MAY BE OFFSET.

In an action by a trustee in bankruptcy, a judgment for costs, recovered against the bankrupt after the trustee's appointment in an action by the bankrupt on the same claim, could not be offset.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 52; Dec. Dig. § 81.*]

2. ACTION (§ 67*)—PROCEEDINGS—STAY.

Where defendant was awarded costs in a previous action, on the same claim brought by the original plaintiff, now represented by his trustee in bankruptcy, and in which two of the present plaintiffs were interested parties, defendant's motion to stay the action until the judgment for costs is paid should be granted, for the judgment could not be offset, and the persons beneficially interested are, under Code Civ. Proc. § 3247, absolutely liable for costs as if they were plaintiffs.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 739-751; Dec. Dig. § 67.*]

Appeal from Special Term, Kings County.

Action by Emil Hoefle, as trustee, etc., and others against the American Laundry Machinery Manufacturing Company. From an order denying defendant's motion for stay in proceedings until judgment for costs should be paid, defendant appeals. Order reversed, and motion granted.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Julius B. Baer, of New York City, for appellant.

J. A. Seidman, of New York City, for respondents.

PER CURIAM. [1, 2] The present three plaintiffs are the assignee in bankruptcy joined with two prior assignees of the cause of action under an assignment before the bankruptcy. These prior assignees, Messrs. Engesser and Abramson, according to the affidavits filed in the New York county action, were beneficially interested in that suit. The judgment in that action for costs, having been recovered after the trustee's appointment, could not be here offset. *Knight v. Rothschild*, 132 App. Div. 274, 278, 117 N. Y. Supp. 26. There is therefore a good ground to stay the present suit until the previous judgment for costs shall be paid. *Genet v. Davenport*, 58 N. Y. 607; *Barton v. Speis*, 73 N. Y. 133; *Behrens v. Sturges*, 138 App. Div. 537, 123 N. Y. Supp. 224. Whether or not the assignee in bankruptcy could be charged personally with these costs is not now involved. The real question is whether, by bringing a second suit in this county, the plaintiffs can escape liability for the costs imposed in the original suit, in which the trustee and the two other plaintiffs actively and beneficially participated. As was held in *Nelligan v. Groth*, 126 App. Div. 444, 110 N. Y. Supp. 619, the liability of the person beneficially interested for costs "is absolute, and to the same extent as if he was the plaintiff." Code Civ. Proc. § 3247. Defendant has therefore a right to have the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

costs of the original suit paid him before he can be put to the trouble and expense of defending another action for the same cause.

The order appealed from is reversed, with \$10 costs and disbursements, and defendant's motion for a stay granted, with \$10 costs.

COLEMAN & KRAUSE, Inc., v. SECURITY BANK OF NEW YORK et al.
(Supreme Court, Appellate Division, Second Department. March 20, 1914.)

1. APPEAL AND ERROR (§ 151*)—PARTIES ENTITLED TO ALLEGE ERROR.

In an action by subcontractors to foreclose a mechanic's lien, where the contractor's assignee, a bank, was made a party, and at the trial there was evidence that the bank had assigned a portion of the claim, a judgment that the city was to pay the balance of the claim to the bank, and retain the amount assigned by it until its assignee's claim was established, did not aggrieve other lienholders, who had been made defendants, and who appealed, as the bank alone was injured.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947-952; Dec. Dig. § 151.*]

2. JUDGMENT (§ 307*)—CORRECTION—MOTION.

The failure of such judgment to expressly provide which of the lienors was entitled to the small balance which remained could be corrected by motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 599; Dec. Dig. § 307.*]

Appeal from Trial Term, Kings County.

Action by Coleman & Krause, Incorporated, against the City of New York, the Security Bank of New York, Edward T. Felgenhauer's Sons, the Yale & Towne Manufacturing Company, and others. From the judgment Edward T. Felgenhauer's Sons and the Yale & Towne Manufacturing Company appeal. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

J. Edward Schwerin, of New York City, for appellant E. Felgenhauer's Sons.

Louis H. Porter, of New York City (F. Carroll Taylor, of New York City, on the brief), for appellant Yale & Towne Mfg. Co.

Richard Bennett, Jr., of New York City, for respondent.

BURR, J. [1, 2] On June 22, 1910, the Fox-Hennessy Company entered into a contract with the city of New York for the construction of a station building to be known as the Power and Gate Houses for the Gowanus Flushing Tunnel, the amount of such contract being for \$35,857. The work has been completed, and there now remains unpaid thereon the sum of \$4,085. On March 16, 1911, the Fox-Hennessy Company made an assignment to the Twelfth Ward Bank of New York of the sum of \$3,628.48, out of moneys to become due under said contract. Subsequently the Twelfth Ward Bank was merged with other banks, assuming the name of the Security Bank of New York. Thereafter the following notices of lien were filed: On April

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

22, 1911, by Yale & Towne Company for \$188.25; on April 25, 1911, by Thomas S. Moran Company for \$342.50; on May 3, 1911, by Coleman & Krause, Incorporated, for \$507; on May 4, 1911, by William Chandler for \$282; and on May 8, 1911, by E. Felgenhauer's Sons for \$3,396. Thereafter Coleman & Krause, Incorporated, began this action against the city of New York to enforce its lien, and the Security Bank of New York, sued as Twelfth Ward Bank, and the various lienors above named were made parties defendant. When the action came on for trial the parties stipulated in open court that "the question which arises is whether or not the assignment by the contractors [the Fox-Hennessy Company] to the Security Bank is good as against the claim of the subcontractors." The court at Special Term upon uncontradicted evidence found the due execution and filing of said assignment on March 16, 1911, and to this finding no exception was taken. In the course of the trial, counsel for the Security Bank stated that on February 14, 1912, the bank assigned to one Henry E. Fox a portion of its claim, amounting to \$2,917.48. The court thereupon made its judgment that there be paid to the Security Bank of New York the sum of \$711, with interest from March 16, 1911, and that the defendant, the city of New York, retain \$2,917.48 until the claim of Henry E. Fox to that amount be established, and that "the balance of the moneys still remaining with the city of New York be paid to the mechanics' lienors in the order of their priority." The judgment does not establish the amount due upon either of said claims, nor determine the relative priority thereof. Defendants Yale & Towne Manufacturing Company and E. Felgenhauer's Sons appeal from said judgment, and contend that all of the funds in excess of \$711 awarded to the Security Bank should have been distributed among the lienors, upon the ground that there is no proof of the assignment to Henry E. Fox of a portion of the bank's claim. If we concede this to be so, appellants are not aggrieved by the determination that the residue of the fund over and above that amount should be the subject of a further action by the alleged, if unproven, assignee. Upon the proof in the case the entire sum of \$3,628.48, named in the perfectly valid assignment to the bank, should have been paid to it. The bank is not appealing upon this ground. If it were, it is difficult to see upon what ground the appeal could be resisted. So much of the judgment as directs that the balance of the fund be held by the city is a provision in favor of and not against the appellants. They are not aggrieved thereby. The failure of the judgment to expressly provide which of the lienors is entitled to the small balance remaining may be corrected by motion. In view of the general provision contained therein, the absence of the necessary findings, and because the proper parties are not before the court upon this appeal, we cannot pronounce final judgment herein.

The judgment must be affirmed, with costs to respondent. All concur.

(161 App. Div. 414)

WEEKS v. DOMINY et al.

(Supreme Court, Appellate Division, Second Department. March 20, 1914.)

1. EVIDENCE (§ 336*)—CONVEYANCES—SEALS.

Where the testimonium of a conveyance by a municipal corporation recited the affixing of the corporate seal and that the deed was subscribed by the president of the board of trustees, the deed is admissible in evidence, if duly sealed, even though it was subscribed by one describing himself as clerk; the seal being evidence of corporate action.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1279-1282; Dec. Dig. § 836.*]

2. DEEDS (§ 8*)—INTEREST CONVEYED—TITLE OF GRANTOR.

A conveyance by a stranger to the title who did not even have possession passes nothing.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 13-18, 408-412; Dec. Dig. § 8.*]

3. APPEAL AND ERROR (§ 837*)—PLEADING—CONVEYANCES.

In a suit involving the right to land, a conveyance to defendant's ancestors, which was not specifically pleaded, and was not properly proven, may be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.*]

4. ADVERSE POSSESSION (§ 24*)—WHAT CONSTITUTES.

The charter to a municipality granted it certain land together with all havens, harbors, creeks, marshes, waters, lakes, rivers, fishing, and all other profits. The inhabitants of the municipality used a sandy beach to dry their nets when fishing, and frequently built small shacks on the beach, occupying them for short periods of time. *Held*, that such possession as this did not ripen into an adverse title against the town, particularly where claimant's ancestors who erected a cabin recognized the paramount title of the town by participating as town trustee in leases of parts of the land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 114, 115; Dec. Dig. § 24.*]

5. QUIETING TITLE (§ 10*)—RIGHT TO MAINTAIN.

A party's possession of land under color of title warrants him in maintaining a suit to quiet his title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36-42; Dec. Dig. § 10.*]

Appeal from Special Term, Suffolk County.

Action by Herbert A. Weeks against Henry Dominy, Felix Dominy and others. From a judgment for plaintiff and an order denying their motion to present certain testimony, the defendants named appeal. Affirmed.

See, also, 142 App. Div. 909, 126 N. Y. Supp. 1150.

Argued before JENKS, P. J., and THOMAS, RICH, STAPLETON, and PUTNAM, JJ.

Nicholas J. O'Connell, of New York City, for appellants.

Lynn C. Norris, of Brooklyn, for respondent.

PUTNAM, J. On May 18, 1909, Mr. Willard N. Baylis bought about 941 acres of wild land on Napeague Beach, lying on both sides

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the Long Island Railroad; the tract extending from Gardiner's Bay south to the Atlantic Ocean. It was mostly sand dunes, with beach grass, marshlands, and some scattering cedar bushes, with low bogs, having wild cranberries. The conveyance excepts the right of the public in highways, also the rights conveyed to the Montauk Extension Railroad Company, and the rights granted to the United States (for the life saving station), and then significantly excepts:

"(4) Rights of the inhabitants of the town of Easthampton to land fish, boats and nets, to spread nets on the adjacent sands, and care for the fish and material, on the south shore of the said described premises, if any such they have."

Mr. Baylis, with his wife, conveyed 100 acres out of this tract to he present plaintiff, a real estate operator, by deed dated May 20th, recorded May 21, 1909.

Mr. Weeks organized the H. A. Weeks Company, and filed in the county clerk's office a map called "Easthampton Beach," all subdivided into building lots except the portion at the easterly end, occupied as a life saving station.

After he had contracted for sale of several lots, on August 17, 1909, the attorney for Messrs. Dominy made a written claim of ownership of the land in question. Henry Dominy then began an action against Mr. Weeks, Willard N. Baylis, and the Long Island Railroad, in which he sued for himself and also for the benefit of all other heirs of Hydreda Dominy, deceased. Since many of such heirs were without the state and did not join as plaintiffs, on May 24, 1910, Mr. Weeks brought the present action, in order, through service by publication, to obtain jurisdiction over all these dispersed heirs. Jurisdiction over the interests of these absentees being acquired through this cross-suit, Mr. Dominy's action was stayed to await the result of the Weeks' suit. 142 App. Div. 909, 126 N. Y. Supp. 1150.

A trial at Special Term of the case at bar resulted in a decree for plaintiff, from which the defendants Dominy have appealed.

Plaintiff's title to the 100 acres here in question is deduced through a written chain starting from the colonial charter granted in 1686 by Col. Dongan as colonial governor to the freeholders and inhabitants of the town of Easthampton, followed by a conveyance on March 15, 1882, by the trustees of the freeholders of Easthampton to Arthur W. Benson, recorded October 25, 1882.

[1] An objection was made to the acknowledgment in this deed of the town trustees. The testimonium recited affixing the corporate seal and that these presents are subscribed by their president. It was subscribed by "Sineus C. M. Talmage, Clerk of the Trustees." The acknowledgment again referred to Mr. Talmage as president of the trustees. As the corporate seal was affixed in proper form, the court properly overruled this objection, as the evidence of corporate action is the seal. Trustees of Can. Academy v. McKechnie, 90 N. Y. 618; People's Bank v. St. Anthony's R. C. Church, 109 N. Y. 512, 525, 17 N. E. 408.

Except as impaired by the effect of the alleged adverse occupancy of the Dominy family, plaintiff's chain of title seems complete. By

line of recorded conveyances he showed a *prima facie* title from the sovereign.

[2] The Dominy title is claimed from three sources: An alleged deed from Gardiner Miller to Nathaniel Dominy (Clockmaker Dominy), dated March 10, 1795, recorded August 15, 1881; an alleged deed from trustees of Easthampton to Nathaniel Dominy in 1798 (but not specifically pleaded); and title by prescription from continued occupancy for over 20 years.

The deed purporting to come from Gardiner Miller, unrecorded for 86 years, is from a person whose connection with the lands is unknown. Such a deed from a stranger to the title, and without any traditions of possession, conveyed nothing.

In view of the record title in the plaintiff, it is immaterial whether the deed purporting to be made by Gardiner Miller to Nathaniel Dominy is genuine or was forged, since Miller was not shown to have had title, possession, or authority to convey. *Gardner v. Heart*, 1 N. Y. 528; *Miller v. Long Island Railroad Co.*, 71 N. Y. 380. The findings respecting the authenticity of such deed are therefore immaterial to the legal conclusions. The refusal of the court to reopen the case to take further evidence as to this instrument also becomes unimportant in this view of that deed.

[3] The conveyance purporting to come from the town in 1798, which refers to an authority granted at a town meeting held April 7, 1795, was never acknowledged. The original was not produced. The town meeting of April 7, 1795, only shows authority to give a lease to Nathaniel Dominy of ten square feet adjoining his clock-maker's shop in the settled part of the town, far removed from this beach. As this conveyance was not pleaded and was not properly proved, it may be disregarded upon this appeal.

[4] Possession by the Dominys is therefore the crux of the whole case. This land before the last 20 years was obviously of slight value. It was occupied in connection with fishing. The Dominys were not the only ones there who, in the fishing season, put up shacks, spread their nets, perhaps picked wild cranberries, and sometimes cut down dead trees for fuel. The general legal rules as to such occupation of wild and waste lands lying inland are reviewed in *Wiechers v. McCormick*, 122 App. Div. 860, 107 N. Y. Supp. 835. But rights of fishing participated in by the freeholders of the town are even less exclusive. The Dongan charter especially conferred rights over the fisheries. Such rights apparently would be commonable to all the townspeople (*Trustees of East Hampton v. Kirk*, 68 N. Y. 459), at least until the local authorities by proper corporate action should restrict or convey them. The charter granted these rights by the following *habendum*:

"Together with all Havens Harbors Creeks Quarries Woodlands Meadows Pastures Marshes Waters Lakes Rivers fishing Hawking Hunting & fowling & all other Profitful Commodities Emoluments & Hereditaments," etc.

In salt water fishing along such an uninhabited shore, the gear had to have some place of storage, so that putting up tents and then shacks naturally followed. Such small buildings, located there by the

Dominy's and by others, were not homes. They did not amount to the kind of habitations, the occupancy of which carries with it also legal possession of the adjoining waste and uninclosed pieces of land that may be held under the same title and used in connection therewith. It is rather like a deer shanty or hunting camp used by the guides in the North Woods. *People ex rel. Marsh v. Campbell*, 67 Hun, 590, 22 N. Y. Supp. 458. These shore huts at Napeague only carried out a right incidental to fishing; to house the gear, to cure and store the fish taken, and to sleep there during the season. An extension of the public fishing right so as to allow small buildings to be put up by the shores and beaches, the Roman law recognized. It was part of that policy which subjected the seashore to public uses of much wider extent than did the law of England. Thus the Institutes of Justinian declared:

"The use of the seashore, as well as of the sea, is also public by the law of nations; and therefore any person may erect a cabin" (*casam ibi ponere*) "upon it, to which he may resort to dry his nets, and haul them from the water." Lib. 11, tit. 1, § 5.

Such extensive shore rights did not ordinarily appertain to fishing in England or in this country—at least excepting Louisiana. *Morgan v. Nagodish*, 40 La. Ann. 246, 3 South. 636. But the freeholders of a town like Easthampton, enjoying such rights of fishing, may have well exercised upon the common beaches or seashore those special rights, as inhabitants of that town, to fish, to haul and dry their nets, and to erect huts to contain their catch and the gear therefor, as they also did to take seaweed from the beaches. *Trustees of East Hampton v. Kirk*, supra. The facts that these huts were somewhat inland of the shore proper, that during the fishing season the fishermen passed nights there in sleeping bunks, that they gathered seaweed, or sank empty barrels to get water in the sandy hollows, and had fish pools—all these incidents did not make their occupation other than temporary, and merely as an accessory to fishing. In the words of Austin, these shore rights are part of those *res publicæ* "which the state permits its subjects generally to use or deal with in certain limited and evanescent modes." *Jurisp.* vol. 2, § 1088. Furthermore, this occupation of the fishing huts was not exclusive, because lacking the intent on the part of the casual occupant to appropriate the site to himself—"animus rem sibi habendi"—and were not inconsistent with like rights of other town freeholders.

Hence the idea of exclusive possession by the Dominy family is colored by attempts to give their occupation a greater dignity than it possessed. The defendants' acts are to be looked upon as they actually were, in the circumstances attending the situation and in the light that the disputed acts were viewed by other fishermen, and by other temporary occupants of this beach. And such evidence is far short of proving open, notorious and continued acts of ownership.

[5] Here the decisive circumstances are the dominion by the trustees of the freeholders of Easthampton over this common land, with the power of granting leases, of disposal of grass growing in spots—all which rights had been long exercised and are matters of record of

the town meetings. Such acts not only constructively affected all the inhabitants, but are binding directly upon these Dominy heirs, whose ancestor was himself a town officer, participating in such corporate acts, even entering official minutes of them in the town records in his own handwriting—a participation and acquiescence which are inconsistent with the present claim of adverse title and possession. *Trustees of Brookhaven v. Strong*, 60 N. Y. 56. Plaintiff's possession under the conveyance to him of May 20, 1909, was sufficient to entitle him to maintain this action.

It follows that the findings of fact numbered 39, 40, 41, and 42, as to the forgery of the deed alleged to have been given by Gardiner Miller, being immaterial to the conclusions of law, should be stricken out; otherwise that the decision of the learned Special Term and the judgment and order entered thereon should be affirmed, with costs to the respondent Weeks. All concur.

(83 Misc. Rep. 632)

PEOPLE v. MARKHEIM.

(Supreme Court, Special Term, New York County. January, 1914.)

1. CRIMINAL LAW (§ 1073*)—APPEAL—CERTIFICATE OF REASONABLE DOUBT—PLEADING AND PROOF.

In a prosecution under an indictment charging merely the presentation of a false claim, not the presentation of proofs in support thereof, for the payment of a loss on a contract of fire insurance, in violation of Penal Law (Consol. Laws, c. 40) § 1202, the admission of evidence that defendant had made proofs of loss entitled him to a certificate of reasonable doubt, where it affirmatively appeared from the record and was conceded by the trial justice that at the time of a fire there sprang into existence a valid claim.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2730; Dec. Dig. § 1073.*]

2. CRIMINAL LAW (§ 1073*)—CERTIFICATE OF REASONABLE DOUBT—SUBMISSION OF ISSUES.

In a prosecution for the presentation of a false claim for insurance money in violation of Penal Law (Consol. Laws, c. 40) § 1202, the action of the court in withdrawing from the jury and deciding for himself two essential elements of the crime as charged, the existence of the claim and the presentation thereof, entitled defendant to a certificate of reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2730; Dec. Dig. § 1073.*]

Louis Markheim was convicted of presenting a false and fraudulent claim for payment of a loss on a contract of fire insurance, and applies for a certificate of reasonable doubt. Application granted.

See, also, 145 N. Y. Supp. 1138.

Charles S. Whitman, of New York City, for the People.
Levy & Unger, of New York City, for defendant.

COHALAN, J. [1] Application for a certificate of reasonable doubt. The defendant was convicted of the crime of presenting a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

false and fraudulent claim for the payment of a loss on a contract of fire insurance, in violation of section 1202 of the Penal Law. Thirty specifications of error are urged in the moving papers. It may be said, despite this lengthy recital of rulings adverse to the defendant's interests, that in the report of the trial of nine days' duration there is presented an excellent record for review. Yet in the last analysis there are two propositions of law the consideration of which may produce probable grounds for the reversal of this conviction. They may be stated: (1) The court took from the jury—under the indictment—two essential questions of fact; and (2) there was a defect in the indictment itself and the respective motions to dismiss thereunder should have been granted. In section 1202 of the Penal Law, first subdivision thereof, two crimes are defined: First, the presenting of a false claim; and, second, the presenting of proof in support of such a claim. The indictment alleges that the defendant did present a claim, but not proofs in support of the claim. The people claimed on the trial that:

"At the time of the fire, and just as soon as damage resulted therefrom, there sprang into existence a valid and subsisting claim by reason of a contract of insurance."

The defendant urges that the claim was not false or fraudulent, but at most the proofs in support of the claim were false and fraudulent. Without elaborating on this assertion of error it may be conceded that this proposition has not been considered in connection with section 1202 of the Penal Law. The defendant contends that under the federal statute an analogous situation has been disposed of in conformity with what he asserts is the correct interpretation of the law. If there had been no fire and a false claim that a fire had occurred were urged upon the insurance company, or if there had been no damage at all and a false claim was put in that there had been some damage, the defendant could be convicted under the present indictment because his claim would be without foundation, and hence false and fraudulent. But as the people claimed and as the court charged that at the time of the fire, and just as soon as damage resulted therefrom, by reason of the contract of fire insurance there was a false claim, yet the only evidence before the court was that the defendant presented false proofs in support of a legitimate claim.

Two federal cases are in point. *U. S. v. Miskell* (C. C.) 15 Fed. 369; *U. S. v. Rhodes* (C. C.) 30 Fed. 431. In the latter case the court held:

"The claim must be false, as well as the affidavit or deposition, and that a false affidavit to sustain a just and true claim is not within the denunciation of the section."

So there may be a question as to whether error was committed in letting in evidence of proofs of loss under the indictment, which charged the presentation of a false claim, where it affirmatively appears from the record, and is conceded by the trial justice, that at the time of the fire there sprang into existence a valid and subsisting claim.

[2] Reverting to the first ground, upon which an assignment of error is predicated, it is well to state the four elements of the crime as charged: (a) The existence of the claim; (b) the presentation of such

a claim; (c) the validity of such a claim; and (d) the knowledge of such validity. These four elements of the crime were properly recognized and pointed out in the charge to the jury. Yet the trial justice took from the consideration of the jury the first two essential ingredients and decided for himself that the defendant had committed these two elements of the crime. The charge reads:

"Instead of submitting to you all of these major questions contained in the case, I, as the judge of the law, assume the responsibility of determining two of those questions: First, as to whether a claim was in existence; and, second, as to whether a claim was presented. These questions will be practically taken away from you, and you will be charged on them as questions of law. * * * Therefore in listening to the instructions of the court you may, to a certain extent, relieve your minds from any feeling of responsibility that you may have entertained with regard to those two major questions, which I say to you are presented to you as questions of law."

It is a question for the Appellate Court to consider whether such a withdrawal from the jury of these elements constitutes error. *People v. Walker*, 198 N. Y. 334, 91 N. E. 806; *People v. Tuczkewitz*, 149 N. Y. 240, 43 N. E. 548.

In *People v. Walker*, supra, the court said:

"It was necessary for the people to establish by legal evidence the three elemental facts already pointed out, constituting the crime charged. The evidence introduced to prove these facts involved the credibility of witnesses. The plea of not guilty and the presumption of innocence make the credibility of every witness for the people in a criminal action a question of fact for the jury. Within the limits of sound discretion the court may discuss and comment upon that question, but cannot decide it, for that is the exclusive duty of the jury, established by the practice of many generations. The court cannot withdraw from them any controlling fact which depends upon the credibility of witnesses, even of the highest character and standing. No matter how conclusive the evidence was in the case before us, and assuming that it was wholly uncontradicted, and that the inferences all pointed one way, each of the three fundamental facts was for the jury to pass upon, for if the court could take away one from them, it could take away all, and thus direct a verdict, which is never allowed in a criminal case. While in a civil action, when there is no conflict in the evidence and no diverse inferences therefrom are possible within reason, the court may direct a verdict even in a case of the utmost importance, still in a criminal action this is not permitted by the law even in a case of the most trifling importance. * * * Both by statute and common law they are 'the exclusive judges of all questions of fact,' and every essential element of a crime presents a question of fact, whether there is any conflict in the evidence or not."

The language in the above case, elemental, clear, and explicit as it is, seems to be pertinent to the situation presented in this case. These two propositions of law import serious doubt of the correctness of the judgment and a probability of its reversal on appeal.

Motion granted.

(161 App. Div. 11)

COYKENDALL v. BLACKMER.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

INSURANCE (§ 182*)—MORTGAGEE CLAUSE—CONSTRUCTION—"PROVIDED."

The clause, "provided that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee shall, on demand, pay the same," being a part of the mortgagee clause of the New York Standard policy, and issued to a mortgagee upon the application and at the request of the mortgagor, in accordance with a covenant of the mortgage, *held* a condition and not a covenant, since the word "provided" means "if," or "on condition," and is used to express a condition.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 392, 393; Dec. Dig. § 182.*

For other definitions, see Words and Phrases, vol. 6, pp. 5749-5751; vol. 8, p. 7770.]

Smith, P. J., dissenting in part.

Appeal from Trial Term, Chemung County.

Action by Jacob Coykendall against Franc B. Blackmer, executrix of George M. Blackmer, deceased. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Brendel, Standart & Bagot, of Buffalo (Francis E. Bagot, of Buffalo, of counsel), for appellant.

Herendeen & Mandeville, of Elmira (Bertram L. Newman, of Elmira, of counsel), for respondent.

LYON, J. The decision of this appeal depends upon the construction to be given to the New York Standard mortgagee clause. In 1906 George M. Blackmer became the mortgagee of real property situated in the city of Elmira, N. Y., the mortgage containing the following provision:

"Second; that the parties of the first part will keep the buildings on said premises insured against loss by fire for the benefit of the mortgagee."

This action is against the executrix of the mortgagee to recover the amount of the premiums upon 20 fire insurance policies, which at the request of the owner, who was also the mortgagor, of the premises insured, and in compliance with the above-quoted provision of the mortgage, had been issued and delivered to the mortgagee by the plaintiff, who was a fire insurance agent. Nine of the policies were issued in 1907 for the term of three years, and were renewed for a like term in 1910. The other two policies were for one year each. Each policy insured the mortgagor as owner, and had attached thereto a mortgagee slip as follows:

"Mortgagee Clause.

"New York Standard.

"Loss or damage, if any, under this policy, shall be payable to George M. Blackmer, as mortgagee (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

invalidated by any act or neglect of the mortgagor or owner of the within described property nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

"Provided, also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

"This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right, on like notice to cancel this agreement.

"Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of their claim.

"Attached to and forming part of policy No. (Naming insurance company).
..... Agent."

None of the policies were procured by the mortgagee, or issued at his request, but all were mailed to and received and retained by him, whether with the knowledge of the contents of the policy and attached slip does not appear, and is perhaps not material. The premiums aggregating upwards of \$300 were due and payable upon the issuance and delivery of the policies, and were charged by the various insurance companies issuing them to the plaintiff, and were charged by the plaintiff upon his books of account to the owner, and were accounted for and paid by the plaintiff to the various insurance companies in his monthly settlements following the dates of issue. No part of the premiums was ever paid by the owner, nor any effort made by plaintiff to enforce collection thereof from her. No demand for payment of any portion of the premiums was made by the plaintiff upon the mortgagee until in January, 1911. The mortgagee died in April, 1912, and soon thereafter letters testamentary upon his estate were issued to the defendant, who, upon presentation by plaintiff of a claim for the payment of said premiums, rejected the same. In March, 1912, the plaintiff obtained from the various insurance companies issuing said policies assignments of all moneys due and to become due from, and all causes of action against, the defendant, and particularly of any cause of action which had arisen by reason of the issuance of such policies.

In October, 1912, this action was brought. The trial court found the facts, which were in effect conceded, as hereinbefore stated, but held as conclusions of law that the mortgagee became obligated to pay the plaintiff the amounts of said insurance premiums, with interest

thereon from the dates upon which the premiums became due, and the defendant was indebted to the plaintiff in such sum. From the judgment entered upon such decision, this appeal has been taken. The defendant filed no exceptions to the findings of fact of the trial court, but based his appeal solely upon the ground that the conclusions of law were not warranted by the findings of fact. The only question, therefore, before us is whether the plaintiff, as matter of law, is entitled to a recovery; that is, whether the clause, "provided that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand pay the same," should be construed as a covenant upon the part of the mortgagee to pay the premium in the event of the neglect of the mortgagor to pay the same, or should be construed merely as a condition which, if not complied with by the mortgagee, would foreclose him of the right to a recovery given him in the preceding portion of the mortgagee clause, notwithstanding the happening of any of the prohibited matters specified therein, which, under the conditions of the policy itself, would render the policy void. It must be conceded that unless the clause in question constituted a covenant, no recovery can be had in this action.

We are of the opinion that the word "provided" was used in the sense of "if" or "on condition," and hence that the clause referred to should be construed as a condition and not as a covenant. The word "provided" is defined by several authorities as follows: By Webster: "On condition, by stipulation, with the understanding, if." By Encyclopedia of Law and Procedure: "On condition, by stipulation, the appropriate term for creating a condition precedent, sometimes used in the sense of unless." In *Robertson v. Caw*, 3 Barb. 410, 418: "The appropriate term for creating a condition precedent." In *Locke v. Farmers' Loan & Trust Co.*, 140 N. Y. 135, 148, 35 N. E. 578, 582: "The word 'provided' usually indicates a condition." And, to the same effect, *Brennan v. Brennan*, 185 Mass. 560, 71 N. E. 80, 102 Am. St. Rep. 363. In *Rich v. Atwater*, 16 Conn. 409, 418: "The proviso, it is said, requires such a construction. There has been much nice discussion upon the word 'provided.' 2 Co. 72; Cro. Eliz. 242, 385, 486, 560; Cro. Car. 128. It is certain, as is said by Judge Swift, that there is no word more proper to express a condition than this word 'provided'; and it shall always be so taken, unless it appears from the context to be the intent of the parties that it shall constitute a covenant. [*Wright v. Tuttle*] 4 Day, 326." Many authorities in other states might be cited to the same effect.

Unquestionably the mortgagee clause constituted a new agreement between the insurance company and the mortgagee, and was attached to the policy for the purpose of enabling the mortgagor to perform the covenant of insurance contained in the mortgage, and in consideration of the taking of the policy by the mortgagor. It must be interpreted in such manner as to carry out the intention of the parties, and for that purpose the whole clause must be considered. While the mortgagee clause was for the benefit of the mortgagee in the respect before referred to, it was for the benefit of the insurance company in that it required the mortgagee to notify the company of any change of own-

ership or occupancy or increase of hazard which should come to his knowledge, and to pay the premium for the increased hazard; otherwise the policy should be null and void. It also gave the insurance company, upon the payment of any sum to the mortgagee as loss or damage under the policy, the right, upon claiming that as to the owner no liability existed, to be subrogated, to the extent of such payment, to all the rights of the mortgagee, or at its option to pay the mortgagee the amount of the mortgage and receive an assignment thereof, and of all securities held as collateral to the mortgage debt.

The apparent meaning of the mortgagee clause is that the insurance, as to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor, if the mortgagee shall on demand pay any unpaid premium, and hence that if the mortgagee shall on demand neglect or refuse to pay the unpaid premium, he shall no longer be entitled to avail himself of the stipulation that no act or neglect upon the part of the mortgagor shall invalidate the policy, but the insurance of the interest of the mortgagee shall thereafter be governed by the policy itself, and this was doubtless the relation of the mortgagee and the insurance companies following the demand of the company for the payment of the premium in January, 1911, and the neglect of the mortgagee to pay the premiums.

We are referred by the briefs of the respective counsel to but two cases in which the main question at issue here seems to have been decided, *St. Paul Fire Insurance Co. v. Upton*, 2 N. D. 229, 50 N. W. 702, and *Safe Deposit Co. v. Thomas*, 59 Kan. 470, 53 Pac. 472. In the former case the question arose upon a demurrer to the complaint, and the mortgagee took the novel position that the mortgagee clause could not be effective unless the mortgagee had paid the premium, which he could not have had the opportunity of doing in case the mortgagor paid it on time. In the latter case, the agent of the mortgagee negotiated with the agent of the insurance companies for the insurance, furnished the mortgagee slips, and the mortgage contained a covenant upon the part of the mortgagor to pay the insurance premiums, and a provision that if such payments were not made, the mortgagee might pay the premiums, and that the amount so paid, with interest at the rate of 12 per cent. per annum, should be a lien on the premises. The court apparently considered this clause, providing for the reimbursement of the mortgagee for any premiums paid by him, as important as bearing upon the intention of the parties that the mortgagee clause should be construed as a covenant. The mortgage in the case at bar contained no such provision. While it provided that the mortgagor would keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee, the construction required by the statute to be given to such condition was that, in the event of the default of the mortgagor to keep the buildings insured, and the policies delivered to the mortgagee, the mortgagee might make the insurance, pay the premiums, and add the amount so paid with interest to the mortgage debt. *Real Property Law*, § 254, subd. 3 (*Consol. Laws*, c. 50 [Laws 1909, chap. 52]). The policies in question were never canceled, and in case they had been, the mortgagee, by the terms of the mort-

gagee clause, had 10 days after notice of cancellation in which to procure other insurance, and there was no time during the six-year period of their existence when the buildings were not kept insured by the mortgagor and the policies in the possession of the mortgagee, and hence the mortgagee was not at any time authorized to pay the premiums and tack the sum so paid to the mortgage debt. Evidently the plaintiff relied upon the mortgagor for payment, as it was nearly four years after the issuance of the first policies, and one year after the expiration of 11 of the policies, before the plaintiff made demand upon the mortgagee for payment of premiums, and, so far as appears, such demand was the first notice which the mortgagee had that the premiums had not been paid by the mortgagor. The plaintiff had the power to protect himself against loss by reason of nonpayment of premium by the mortgagor by canceling the policy, which one of the conditions thereof gave him the right to do on five days' notice.

Opposed to the two cases above cited is that of *Ormsby et al. v. Phenix Insurance Co. of Brooklyn*, 5 S. D. 72, 58 N. W. 301, holding that such clause constituted a condition and not a covenant.

The provision that no act or neglect of the mortgagor shall invalidate the insurance as to the interest of the mortgagee is not in any way dependent for consideration or validity upon the provision that the mortgagee shall, upon default of the mortgagor, pay the unpaid premiums, as it was held, prior to the insertion in the mortgagee clause of the latter provision, that the former was valid and enforceable. *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141. Subsequent to the time of this decision the latter provision was inserted. Had the intention been that the provision should be construed as a covenant rather than as a condition, a slight modification thereof or the addition of the words, "which the mortgagee hereby covenants to do," would naturally have been inserted and thereby all ambiguity removed.

"The general rule to be observed in the construction of an insurance policy is that, if possible, effect should be given to every word and expression contained therein, and if the policy be susceptible of two readings, or is so ambiguously expressed that reasonable and intelligent men on reading it might honestly differ as to its meaning, that reading must be adopted which is most favorable to the insured. *Kratzenstein v. Western Assurance Co.*, 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799; *Lite v. Firemen's Ins. Co.*, 119 App. Div. 410, 104 N. Y. Supp. 434.

"While it is the duty of the court to so construe the policy as, if possible, to give effect to every word used, if the sense in which the words were used is uncertain and the meaning is ambiguous, that meaning should be given which is most favorable to the insured" (citing several cases). *Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307, 43 N. E. 856.

To the same effect, *Janneck v. Metropolitan Life Ins. Co.*, 162 N. Y. 574, 57 N. E. 182; *London Assurance Co. v. Thompson*, 170 N. Y. 94, 62 N. E. 1066.

We conclude that the provision in question should be construed as a condition rather than as a covenant, which leads to a reversal of the judgment and a dismissal of the complaint upon the merits. In view of such conclusion we have considered it unnecessary to discuss the subject as to the effect of the assignments by the insurance companies to the plaintiff. All concur.

SMITH, P. J. (concurring). I am unable to agree with Mr. Justice LYON in his construction of this contract. As I construe the contract the provision of the policy in question constitutes a covenant on the part of the mortgagee, if the insurance policy be accepted by him, to pay under the terms thereof. In the first place, before the word "provided" is a semicolon, which would be out of place if what followed were a mere condition of what preceded. While this fact of itself has not much significance, in a close question connected with other facts it is worthy of note. In the second place, the word "provided," which separates the two clauses, is printed in capital letters. This would not ordinarily be so if the clause thus introduced were merely a condition attached to what preceded it. Again, by section 254 of the Real Property Law, subdivision 3, if the mortgagor fails to keep the property insured, the mortgagee may do so, and charge the amount of the premiums paid as a part of the debt secured by the mortgage. The mortgagee and the insurance company are thus protected, and the mortgagee is given his right to reimbursement from the mortgagor. These considerations indicate the intention of the Legislature to make this provision of the contract a covenant on the part of the mortgagee upon the acceptance of the policy by him. This construction is further in accord with the holding of the court in the case of *St. Paul Fire & Marine Insurance Co. v. Upton*, 2 N. D. 229, 56 N. W. 702; and also in the case of *Safe Deposit Co. v. Thomas*, 59 Kan. 470, 53 Pac. 472. I do not read in the case of *Ormsby v. Phoenix Insurance Co.*, 5 S. D. 72, 58 N. W. 301, any different rule of construction. The clause of the policy there construed was an entirely different clause, and could in no event, without forced construction, have been held as imposing a covenant upon the part of the mortgagee.

It does not follow, however, that the defendant is liable in this action. The mortgagee is to pay these premiums on demand. This demand cannot be made capriciously at the convenience of the insurance company, but must be made in the usual course of business. That means within a reasonable time upon the failure of the mortgagor to pay the insurance. This interpretation is in accord with the interpretation of analogous contracts. An indorser upon a note payable on demand is only made liable if the demand be made within a reasonable time. Moreover, under the provision of the Real Property Law cited, upon failure of the mortgagor to procure insurance, the mortgagee may declare the whole amount of the mortgage due and proceed to foreclose. It will hardly be claimed that the insurance company may wait until after the mortgage had been foreclosed, and then make demand and collect this premium. By parity of reasoning the insurance company should not be allowed to wait beyond a reasonable time before making the demand of the mortgagee, which is made a condition of the mortgagee's liability to pay. If made promptly, the mortgagee might either declare the mortgage due and foreclose, or force the mortgagor to pay the premiums. In the case at bar 9 of the insurance policies for which the premiums are sought to be collected, were taken out in 1907, and 11 others were taken out between February 13, 1908, and July 13, 1910; the policies taken out in 1907 having expired in 1910.

The first request to the mortgagee to pay was made in January, 1911, which was the first notification to the mortgagee that these premiums had not been paid by the mortgagor. Because, therefore, the demand was not made within a reasonable time in the due course of business, the mortgagee has, in my judgment, been relieved of the obligation to pay these premiums.

(161 App. Div. 221)

PEOPLE v. SWEENEY et al.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. CRIMINAL LAW (§ 510*)—EVIDENCE OF ACCOMPLICES.

The evidence of accomplices alone is sufficient to establish the fact that a crime has been committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. § 510.*]

2. CRIMINAL LAW (§ 510*)—EVIDENCE OF ACCOMPLICE—CORROBORATION.

The rule as to the corroboration of an accomplice's evidence does not apply to every part of his evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. § 510.*]

3. CRIMINAL LAW (§ 511*)—EVIDENCE OF ACCOMPLICES.

It is not necessary that the evidence corroborating an accomplice's testimony shall of itself prove defendants' participation in the crime, nor need it be inconsistent with their innocence if it tends to connect them with the crime without the aid of the accomplice's testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. § 511.*]

4. CONSPIRACY (§ 47*)—CRIMINAL RESPONSIBILITY—SUFFICIENCY OF EVIDENCE.

Evidence, aside from the testimony of accomplices, in a prosecution for conspiring to obstruct the administration of justice, *held* to sustain a conviction against defendant S.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Dec. Dig. § 47.*]

5. CONSPIRACY (§ 47*)—CRIMINAL RESPONSIBILITY—SUFFICIENCY OF EVIDENCE.

Evidence, in a prosecution for conspiring to obstruct the administration of justice, *held* to sustain a conviction as to defendant M.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Dec. Dig. § 47.*]

6. CRIMINAL LAW (§ 59*)—"ACCOMPLICE."

To be an "accomplice," one must be so connected with the crime that, at common law, he could himself be convicted as a principal or accessory before the fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71, 73, 74, 76-81; Dec. Dig. § 59.*]

For other definitions, see Words and Phrases, vol. 1, pp. 75-79; vol. 8, p. 7561.]

7. CRIMINAL LAW (§ 59*)—ACCOMPLICE—WHAT CONSTITUTES.

To make one a principal or accessory before the fact, so that he can be an accomplice, he must have had an intention that his act should aid in the commission of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71, 73, 74, 76-81; Dec. Dig. § 59.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. CRIMINAL LAW (§ 507*)—WHO ARE ACCOMPLICES.

One who acted merely as a messenger for defendants, who were conspiring to obstruct justice by preventing F., a witness, from testifying to certain matters, was not himself an accomplice so as to require his evidence to be corroborated, though he knew that it was hoped that F. would not testify, and that F.'s family would be taken care of in case his silence got him into trouble, in the absence of any knowledge of the conspiracy itself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082–1096; Dec. Dig. § 507.*]

9. CRIMINAL LAW (§ 627½*)—TRIAL—DISCRETION OF COURT—INSPECTION OF MINUTES OF GRAND JURY.

A motion for leave to inspect the minutes of the grand jury is addressed to the sound discretion of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1431, 1434, 1435; Dec. Dig. § 627½.*]

10. INDICTMENT AND INFORMATION (§ 137*)—MOTION TO QUASH—GROUNDS.

A motion to quash the indictment on the ground that it was found solely upon the evidence of accomplices was properly denied, where that fact did not appear from the face of the indictment, though all of the witnesses indorsed thereon were afterwards shown to be accomplices.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480–487; Dec. Dig. § 137.*]

Appeal from Trial Term, New York County.

Dennis Sweeney and others were convicted of conspiracy, and appeal. Affirmed as to defendants Sweeney, Murtha, and Thompson, and reversed as to defendant Hussey, and his discharge ordered.

See, also, 156 App. Div. 895, 141 N. Y. Supp. 303.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

A. S. Gilbert, of New York City, for appellant Murtha.

Alfred J. Talley, of New York City, for appellant Sweeney.

John B. Stanchfield, of New York City, for appellant Thompson.

Herbert C. Smyth, of New York City, for appellant Hussey.

Robert C. Taylor, of New York City, for the People.

SCOTT, J. The four appellants, who were, at the times mentioned in the indictment, inspectors in the police department of the city of New York, were jointly indicted and tried for the crime of having conspired to prevent and obstruct the due administration of justice. Penal Law (Consol. Laws, c. 40), § 580, subd. 6. The particular purpose of the conspiracy, as charged in the indictment, was the suppression of testimony which, if produced, would have tended to prove that the appellants, and other members of the police force, had been guilty of accepting bribes to influence their official action.

The city of New York is divided, for the purposes of police administration, into inspection districts, each of which is in charge and under the command of an inspector of police, and is further subdivided into precincts, each of which is commanded by and in charge of a captain of police, who is subordinate in authority to the inspector in charge of the inspection district, of which the precinct forms a part. The prosecution with regard to which it is charged that the appellants sought to suppress evidence arose out of testimony given by one George A. Sipp,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the keeper of a disorderly house, before a committee of the board of aldermen which was engaged in investigating police conditions in the city of New York. Sipp's testimony before the committee was to the effect that for a series of years he had been in the habit of making regular payments of "protection" money to a patrolman named Eugene Fox, attached to the Forty-Third police precinct, which was included within the Sixth inspection district. It was further proven upon the present trial that Fox paid over the money thus collected, less a percentage for collection, to Thomas W. Walsh, the captain of the precinct. Walsh testified on the present trial that he had been captain of the Forty-Third precinct from June, 1907, until late in the year 1912; that during that period the four defendants were successively the inspectors in command of the Sixth inspection district; that during all this period Eugene Fox, the patrolman above mentioned, had regularly collected tribute from the keepers of various disorderly and illegal resorts in the precinct, and that of the amounts so collected Fox kept sometimes 20 and sometimes 15 per cent., and turned the balance over to Walsh, who divided it, half and half, with whoever happened to be inspector in that district at the time. Fox corroborated him except as to the division with the inspectors. The aldermanic investigation took place late in the year 1912, and it was on December 18th of that year that Sipp testified as to his payments to Fox. His evidence naturally created a great stir in the police department. It directly implicated only Fox, because Sipp had no personal knowledge of what disposition Fox made of the money which was paid him. It became therefore very important to those into whose hands the money had actually come that Fox should be prevented or dissuaded from telling what he had done with the money, and, in order to render it more easily possible to keep his mouth closed, it was desirable that Sipp should be prevented from testifying in any proceeding which might be instituted against Fox. Two such proceedings were promptly instituted, one before the police commissioner upon a charge of official misconduct, and one before a city magistrate upon a criminal charge of accepting a bribe. At the time these events were happening, Capt. Walsh was a very ill man, being confined for the most part to his house. The appellant Sweeney was the inspector then in charge of the inspection district. The latter became very active in taking steps to carry out the object sought to be attained by the alleged conspiracy, securing counsel to represent and advise Fox, and frequently consulting with Walsh with respect to raising the money, which it was considered would be necessary to induce Fox to remain silent, and to keep Sipp without the jurisdiction. In due course Sipp was subpoenaed to attend at the hearing, before the police commissioner, of the charge against Fox. He consulted a lawyer named Newell (who has since been disbarred), who advised him to leave the jurisdiction and go to New Jersey. This Sipp and his son, Howard, also subpoenaed, did. Newell put himself into communication with Rouss, the lawyer who had been retained by Fox, and obtained several hundred dollars, to be given to Sipp to compensate him for staying away. There is evidence which, if believed by the jury, as it apparently was, is quite sufficient to con-

nect Walsh, and at least some of the appellants, with the raising of this money, part of which was retained by Newell and part paid to Sipp. Later Sipp was apprehended in New Jersey upon a criminal charge, and brought back to New York. Soon after Fox and Walsh broke down, the former pleading guilty to the charge of bribery, and Walsh went before the grand jury and testified to his connection with the scheme of wholesale bribery, and as to the receipt of part of the money by the four defendants. The foregoing is but a brief outline of the history of the case given upon the trial. It is supported by the testimony of various persons, many of whom were themselves engaged in the conspiracy, but whose testimony was, notwithstanding, accepted and believed by the jury. None of the defendants testified in his own behalf, each relying upon the supposed weakness in the case of the prosecution.

It is not seriously contended by any defendant that no conspiracy existed such as is charged in the indictment, but each defendant insists that the evidence is insufficient to connect him with the crime, and that, in any case, the evidence against him is solely that of accomplices, and is therefore insufficient to warrant a conviction under section 399 of the Code of Criminal Procedure, which provides that:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

It rarely happens that a criminal conspiracy can be proven without the aid of some of the participants and accomplices, and the present case was no exception to the general rule. Of the witnesses relied upon by the prosecution the trial court charged, as matter of law, that Capt. Walsh, Eugene Fox, George and Howard Sipp, and the two lawyers, Newell and Rouss, were accomplices, and this instruction was clearly right. As to certain other witnesses, to whom reference will be made hereafter, the court properly left it to the jury to determine, as a question of fact, whether they were or were not accomplices.

Before proceeding to consider the evidence de hors that of accomplices, which is relied upon to connect each appellant with the crime charged, it will be well to recall certain well-established rules of law bearing upon the question of corroboration.

[1-3] In the first place, the evidence of accomplices alone, if believed by the jury, is sufficient to establish the fact that a crime has been committed. The rule as to corroboration of an accomplice does not attach to each and every part of the material evidence given by the accomplice. *People v. Elliott*, 155 App. Div. 486-496, 140 N. Y. Supp. 553. It is not necessary to elaborate this proposition further, because it is not denied in the present case that there had been a conspiracy for the unlawful purpose charged in the indictment. Just as it is not necessary that the corroborative evidence shall alone be sufficient to prove the fact of the crime, so also is it not necessary that it shall, standing by itself, prove absolutely the defendants' participation in the crime, nor need it be inconsistent with the defendants' innocence. *People v. Elliott*, 106 N. Y. 288, 12 N. E. 602. All that the statute requires, and all that is necessary, is that there shall be

evidence, other than that of accomplices, which *tends* to connect the defendant with the crime. If the evidence be of that character, the jury, and not the court, is to judge of the weight to be given to it. *People v. O'Farrell*, 175 N. Y. 323-326, 67 N. E. 588.

It will be most convenient to consider the case of each defendant separately.

[4] As to the defendant Sweeney. The evidence implicating him, if believed, was ample. In fact, so far as the testimony of the conceded accomplices went, he was by far the most active person concerned in promoting the conspiracy. Capt. Walsh, who was also deeply interested, and a considerable contributor to the fund that was raised, was ill and unable to be about, so that the active part of the work fell upon Sweeney, who frequently consulted and conspired with Walsh at the house of the latter. It was perhaps not unnatural that an inspector should visit one of his captains while the latter was ill, and such acts on his part were not inconsistent with innocence, but they also fitted in with the theory of guilt. Walsh's testimony respecting Sweeney's participation was corroborated in important particulars by Mrs. Walsh. It is claimed, in behalf of Sweeney, that Mrs. Walsh was also an accomplice, and consequently that her testimony adds nothing to the testimony of the other accomplices. The question whether or not she was an accomplice was left to the jury, and, as we think, rightly so. She undoubtedly knew that her husband and Sweeney were getting together a sum of money which was to be sent to Fox, but it is by no means clear that she knew that the money was to be used to suppress evidence. She may well have believed that it was to be used by Fox for his own defense. A nurse, whom nobody accuses of being an accomplice, also corroborated Walsh as to at least one of Sweeney's visits. There are circumstances shown here and there in the case which go far to connect Sweeney with the crime; the most significant being his activity in procuring affidavits upon which to fasten a disgraceful crime upon Sipp. The fact that such a charge was in preparation was communicated by Rouss to Newell, and by the latter to Sipp while he was a fugitive in New Jersey. It is not difficult to trace the preparation of this charge, which apparently lacked much foundation, to the desire to keep Sipp out of the state and out of the witness chair. The natural effect upon a man of Sipp's character of learning that such a charge was pending against him would be to lead him to avoid, if possible, any appearance as a witness. It is true that that charge was afterwards used as means to force Sipp's return to New York, but this was not done by Sweeney, or any of the other alleged conspirators. We think that there was sufficient evidence outside the testimony of accomplices to justify the jury in finding that Sweeney was a participant in the crime.

[5] As to the defendant Murtha. The evidence against this defendant consists of a statement made by him to the district attorney. It is related by a policeman named Thomas, assigned to serve as a detective for the district attorney. His evidence is uncontradicted. His statement was that he met Murtha, whom he knew well, and that the lat-

ter expressed a desire to see the district attorney, remarking that he "wanted immunity." Arrangements were made, and Thomas and Murtha went to the residence of the district attorney, and in the presence of Thomas, Murtha made a statement which, as it is claimed by the prosecution, proves Murtha's connection with the crime. The court left it to the jury to determine whether the conversation took place as testified to by Thomas, and, if so, what Murtha meant by his statement. The jury by their verdict have shown that they believed the statement to have been made, and considered that it sufficiently implicated Murtha in the crime. We see no reason to question their finding in this regard. Counsel for this defendant makes much of the fact that the court refused to leave it to the jury to say whether or not Murtha had made his statement under duress, or under some inducement on the part of the district attorney. The difficulty on this point is not only that there was no evidence to show or indicate that any threat or promise had been made, but counsel for Murtha affirmatively proved by the district attorney, whom he called as his own witness, that in fact there had been neither threat nor promise. On that question, therefore, there was no issue to submit to the jury.

[6] As to the defendant Thompson. He is abundantly connected with the crime by the testimony of Fox; but, as he was a conceded accomplice, corroboration was necessary to justify a conviction. Such corroboration is sought to be found in the evidence of one Nelson, who was a nephew of Fox's wife, and who was sent by Fox to find Thompson and bring back a message. He testified that he did so, and the message given him, if his evidence was credited by the jury, was quite sufficient to connect Thompson with the crime. Nelson's evidence is bitterly assailed by counsel for Thompson, but the credence to be given to it was wholly a matter for the jury, and we are not disposed to overrule their finding. A more serious question is whether or not Nelson was not also an accomplice. This question was left to the jury, and their verdict indicates that they did not consider that he was an accomplice. It is insisted, however, that the court should have ruled, as matter of law, that he was. The rule is that, to constitute an accomplice, one must be so connected with a crime that at common law he might himself have been convicted, either as the principal or as an accessory before the fact. *People v. Zucker*, 20 App. Div. 363-365, 46 N. Y. Supp. 766, affirmed on opinion below, 154 N. Y. 770, 49 N. E. 1102; *People v. Bright*, 203 N. Y. 78, 96 N. E. 362, Ann. Cas. 1913A, 771; *People v. Elliott*, 155 App. Div. 486, 140 N. Y. Supp. 553.

[7] "To warrant such a conviction, the one accused must have taken part in the perpetration of, or preparation for, the crime, with intent to assist in the crime. Every act which may have a tendency to assist in the perpetration of the crime is not, of absolute necessity, criminal. Before it will have that effect it must have been done with the *intention* on the part of the actor that it shall aid in the commission of the crime. Unless it appears without dispute that there was such intention, the person doing the act cannot be said to be a principal; and, if there is a question whether the act was done with such intent, that question must be submitted to the jury, and answered by them in the affirmative, before the actor can be held to be a principal, and consequently before he can be held to be an accomplice." *People v. Zucker*, *supra*.

[8] Tested by this rule we think that the jury was justified in finding that Nelson was not an accomplice. He was used merely as a messenger. What he learned from Thompson was undoubtedly enough to inform him that it was hoped that Fox would not testify, and that arrangements had been made, or would be made, to provide for his family if his silence led to his conviction, but mere knowledge of this sort did not make him a conspirator. In fact it does not appear that he knew that any conspiracy was on foot, or that any concerted effort was being made to keep Sipp out of the state. Given the existence of the conspiracy and Thompson's knowledge of it, the message he sent to Fox was sufficient to connect him with the crime, but the message, without knowledge of the conspiracy, did not establish the guilty intent on the part of Nelson which was requisite to put him in the accomplice class.

As to the defendant Hussey. There was no evidence to connect this defendant with the conspiracy, except that of conceded accomplices, mainly that of Newell, as to whom the court correctly charged that, as matter of law, he was an accomplice. Hussey's conviction was therefore unwarranted by the evidence.

[9, 10] All of the defendants also bring up for review two orders made before trial. One denied a motion for leave to inspect the minutes of the grand jury. This motion appealed to the sound discretion of the court, and was, we think, rightly denied. The second order denied a motion to quash the indictment on the ground that it had been found upon the evidence only of accomplices. The indictment had indorsed upon it, as the witnesses who had appeared before the grand jury, the names of Walsh, Fox, George A. Sipp, and Newell. The motion to quash was made on affidavits by the defendants stating generally that all of these four witnesses were accomplices. Again we think that the motion was properly denied. It did not appear on the face of the indictment that all of these witnesses were accomplices, and the court was not bound to accept the bare allegation of the defendants, unsupported by the statement of any facts from which the court itself could form a judgment whether or not all the witnesses were accomplices. It is true that the evidence upon the trial showed that they were, but the court, when it decided the motion to quash, had no means of knowing what the evidence on the trial would be, and its action in denying the motion to quash must be judged by the information it then had, and not by what may have afterwards been disclosed.

It results that the judgment appealed from must be affirmed as to the defendants Dennis Sweeney, John J. Murtha, and James F. Thompson, and that it be reversed as to the defendant James E. Hussey, and that he be discharged. All concur.

SCHWABE et al. v. HERZOG.

(Supreme Court, Appellate Division, First Department. March 13, 1914.)

1. JUDGMENT (§ 822*)—MATTERS CONCLUDED.

That defendant, sued on a foreign judgment, recovered in an action in which he had disputed the debt, but allowed the judgment to go against him under an agreement that it should not be enforced until he should be able to pay it, and that he is not so able, is no defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488-1490, 1496-1500; Dec. Dig. § 822.*]

2. JUDGMENT § 822*)—FOREIGN JUDGMENTS.

That the foreign judgment sued on is too large is no defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488-1490, 1496-1500; Dec. Dig. § 822.*]

3. JUDGMENT (§ 506*)—COLLATERAL ATTACK.

One sued on a judgment cannot impeach it collaterally by alleging that it is too large.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 949; Dec. Dig. § 506.*]

4. PLEADING (§ 8*)—CONCLUSIONS.

An answer, alleging that plaintiffs carried on transactions in which defendant was mutually interested with plaintiffs, some part of which should have been put to his credit, states a mere conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.*]

5. JUDGMENT (§ 517*)—COLLATERAL ATTACK—COUNTERCLAIM.

One sued on a judgment cannot impeach it collaterally by setting up a counterclaim involving a re-examination of transactions settled by the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 959, 960; Dec. Dig. § 517.*]

6. CHAMPERTY AND MAINTENANCE (§ 5*)—CONTRACTS WITH ATTORNEYS.

It is not a defense to an action on a judgment that the action is prosecuted under a champertous agreement between plaintiffs and their attorneys.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 24-51; Dec. Dig. § 5.*]

Appeal from Special Term, New York County.

Action by Alfred J. Schwabe and another against Aladar W. Herzog. From an order permitting defendant to interpose an answer, plaintiffs appeal. Reversed.

See, also, 159 App. Div. 899, 144 N. Y. Supp. 1144.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Theodore K. McCarthy, of New York City, for appellants.

Barnett L. Hollander, of New York City, for respondent.

SCOTT, J. The action is upon a judgment obtained against defendant, upon personal service of process in the Court of King's Bench Division of the Supreme Court of Judicature of England on May 6, 1907.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

The defendant heretofore served an answer, which was demurred to and held to be insufficient in law, but leave was given to apply at Special Term to be allowed to serve an amended answer upon presenting to the court an answer which sets up some defense to the complaint. The defendant has presented an answer which the Special Term has given him leave to serve, and the question now is whether it does present any defense. The proposed answer consists of four separate defenses and two counterclaims.

[1] The first defense alleges that he disputed the amount of his indebtedness to plaintiff but finally allowed judgment to go against him for the amount of the recovery under an agreement with plaintiff that he should be under no obligation to pay the same, and that plaintiff would not take any steps to enforce it until defendant should be financially able to pay it, and that he is not so able. It is clear that this attempted defense is insufficient in law. *Dunston v. Higgins*, 138 N. Y. 70, 33 N. E. 729, 20 L. R. A. 668, 34 Am. St. Rep. 431; *Greene v. Hallenback*, 32 Hun, 469; *McElroy v. Board of Education*, 158 App. Div. 219, 142 N. Y. Supp. 1090.

[2, 3] The second defense repeats the first with the addition of allegations purporting to show that the amount for which judgment was recovered was larger than it should have been. This defense is also insufficient, not only under the authorities above cited, but also because it is an attempt to impeach collaterally the judgment sued upon. This cannot be done. *Dunston v. Higgins*, supra.

[4] The third defense commences with the following allegation:

"XXX. Upon information and belief that from the 19th day of July, 1905, and from the 6th day of May, 1907, to the day of the date hereof various and substantial transactions were had and carried on by plaintiffs, consisting of the buying and selling of securities as brokers, lending money thereupon, and the collection thereof and transactions in the buying and selling of securities generally in which defendant was mutually interested with plaintiffs, some part of which was for the account of defendant, and a portion of the proceeds of which should have been to his credit, and in connection with which substantial sums of money became due to the defendant from the plaintiffs."

Then follow allegations that the books and accounts are kept by plaintiff, and that defendant has no knowledge of their contents, and that upon a proper accounting a considerable sum will be found due to defendant.

Obviously this is not a defense. The same allegations are, however, repeated as a counterclaim, and it is necessary to examine them in that light. The difficulty with it is that it alleges only conclusions and not facts. It may be that plaintiffs have carried on certain transactions "in which defendant was mutually interested with plaintiff, some part of which was for account of defendant, and a portion of the proceeds of which have been put to his credit," but there is no allegation of any contract between plaintiffs and defendant, nor any facts whatever from which the court can see that defendant was entitled to an interest in any of plaintiffs' transactions, or to any part of the proceeds thereof. As a counterclaim, therefore, the allegations state no cause of action.

[5] The second counterclaim seeks to re-examine the transactions between plaintiffs and defendant which were liquidated and finally settled by the judgment sued upon, and is confined to transactions taking place prior to the recovery of the judgment. This again is an attempt to impeach the judgment collaterally.

[6] The fourth defense alleges that the present action is prosecuted under a champertous agreement between plaintiffs and their attorneys. This is not a defense. *Story v. Satterlee*, 13 Daly, 169; *Hall v. Gird*, 7 Hill, 586.

In my opinion, therefore, the proposed answer contains no sufficient defense or valid counterclaim. The order appealed from should therefore be reversed, with \$10 costs and disbursements, and the motion denied with \$10 costs. All concur.

PEOPLE ex rel. MCCLURE PUBLICATIONS, Inc., v. PURDY et al.

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

1. TAXATION (§ 123*)—CAPITAL STOCK—"SURPLUS."

The "surplus" of a corporation is the accumulation of moneys or property in excess of the par value of the stock issued by it.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 222; Dec. Dig. § 123.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 6816, 7811.]

2. TAXATION (§ 496*)—CAPITAL STOCK—DEDUCTIONS—CERTIORARI—REVIEW.

Though a writ of certiorari to review a tax assessment authorizes a new trial of the question of assessability, where a corporation files a verified statement with the tax officers, which shows to a mathematical certainty that it had no surplus, a petition for a writ of certiorari, merely alleging that the company had, in fact, a stated surplus less than 10 per cent. of its capital stock, which should have been deducted, and not asking for any change in the statement, or for the correction of errors therein, presents no issue.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 890-910; Dec. Dig. § 496.*]

Ingraham, P. J., dissenting.

Appeal from Special Term, New York County.

Certiorari by the People, on the relation of the McClure Publications, Incorporated, against Lawson Purdy and others, as commissioners. From an order dismissing the writ and confirming the assessment of a tax upon relator's capital stock, relator appeals. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

H. S. Duell, of New York City, for appellant.

Curtis A. Peters, of New York City (William H. King, of New York City, on the brief), for respondents.

SCOTT, J. [1] The relator's petition for a writ of certiorari shows that on October 1, 1912, its name and a valuation of its capital stock and surplus profits were entered in the assessment roll, and that on or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

before November 30, 1912, application was made to the commissioners of taxes and assessment for a review and correction of said assessment, which was denied, and the valuation of the capital stock was fixed and confirmed at the sum of \$50,000. At the time the relator presented its application for a review and reduction of its assessment, it filed with the commissioners a verified document, purporting to contain a true statement of its assets and indebtedness. That statement showed that the capital stock actually issued was \$2,900,000. The assets were stated to be of the total gross value of \$2,919,378.99, of which by far the greater amount represented "value at which patent rights, copy rights, trade-marks, good will, and franchises taken in payment for capital stock." The liabilities were stated at \$213,773.04, leaving an apparent excess of assets over liabilities of \$2,705,605.95. This was less than the amount of the outstanding capital stock, and consequently it appeared upon the face of the statement that the relator had no surplus, for the surplus of a corporation has been defined to be "the accumulations of the company of moneys or property in excess of the par value of the stock issued by it." *People ex rel. Manhattan Railway Co. v. Barker*, 165 N. Y. 305-339, 59 N. E. 137, 138. The relator's statement also contained a statement of the deductions which it claimed should be made from its list of assets for the purpose of assessment for taxation. These aggregated \$2,850,197.40, exclusive of a surplus which relator claimed should be deducted, and the refusal to deduct which has led to this proceeding. Disregarding the surplus, the statement showed that the value of the assets exceeded the allowable deductions by \$69,181.50, which appeared to be the actual taxable value of relator's capital, and justified its assessment at \$50,000. The relator in its statement claimed that it had a surplus of \$103,038.79, which sum, being less than 10 per cent. of its capital stock, should, as it is claimed, have been deducted from its taxable assets, leaving nothing to be assessed. From relator's own statement of assets and liabilities, which the tax commissioners were justified in accepting as true, it appeared to a mathematical demonstration that there was not and could not be any surplus because, as already said, the net assets over and above the liabilities amounted to less than the outstanding capital stock.

[2] The relator now insists that it is entitled in this proceeding to prove that in fact it had a surplus, notwithstanding the figures it gave as to its assets and liabilities conclusively show the contrary. That is, it now seeks to show, by its books or otherwise, that its own statement of its assets and liabilities was false or erroneous. The petitioner relies upon *People ex rel. Manhattan Railway Co. v. Barker*, 152 N. Y. 417, 46 N. E. 875, and numerous other kindred cases in which it has been held that a tax certiorari like the one now under consideration permits a new trial of the question of the relator's assessability, and a redetermination of all questions relating thereto upon new evidence taken by the court. There is no doubt about this proposition. The question is whether the relator has put itself in a position to take advantage of it. As was said in the case cited:

"The petition is regarded as the complaint, the return as the answer, and, in deciding the issues joined thereby, the court may call witnesses to its aid,

and their testimony becomes a part of the proceedings upon which the determination of the court is to be made."

What is to be tried by the court are "the issues raised by the pleadings," to wit, the petition and the return. Turning to those in the present case, we find no allegation of error in any fact contained in the statement filed with the commissioners and followed by them in fixing the assessment, except a slight correction as to the amount of capital outstanding, which does not affect any question at issue here. What the relator does, and all that it does is to assert that it had a surplus of \$103,038.79, notwithstanding the fact that its own figures as to the amount of its assets, and of its capital stock, which are not claimed to be erroneous, and are not sought to be changed, except in the immaterial particular noted, demonstrate mathematically that it had no surplus.

A surplus is not a concrete, primary fact, but is a conclusion of fact, to be ascertained by the comparison of a corporation's assets with the amount of its capital stock. To show that the tax commissioners had erred in not deducting from relator's taxable assets a certain sum for surplus, the relator should have alleged what its capital stock is and what its assets are. Then perhaps it would have tendered an issue to be tried. But it has done no such thing. It simply asserts that:

"On October 1, 1912, your petitioner had actually earned from the savings or accumulations of its business the surplus of \$103,038.79."

It does not even allege that it was then in possession of that surplus, or that it was represented in its assets. On the other hand, the statement of assets, not sought to be corrected, shows conclusively that such assets could not then have included any surplus at all. In my opinion, there was no issue to be tried, and the writ was properly dismissed.

The order appealed from should be affirmed, with costs and disbursements.

McLAUGHLIN, LAUGHLIN, and CLARKE, JJ., concur.

INGRAHAM, P. J. (dissenting). A proceeding under the Tax Law to review an assessment for taxation is to be determined, not upon the evidence submitted to the tax commissioners upon which they have based their determination, but upon testimony to be produced before the court charged with the duty of reviewing the action of the tax commissioners, and the court, upon such evidence, determines the question as to the propriety of the assessment by the commissioners.

The Court of Appeals in the case of *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 417, 46 N. E. 875, states the nature of this proceeding and the functions of the court. In speaking of this proceeding, it is there said:

"What is called a review may thus become a proceeding in the nature of a new trial. The return is not conclusive, as in the common law and code writs. * * * The provisions of the Code do not apply to it. * * * The petition is regarded as the complaint, the return as the answer, and, in deciding the issues joined thereby, the court may call witnesses to its aid,

and their testimony becomes a part of the proceedings upon which the determination of the court is to be made. That determination is a revaluation, and it may be a different valuation of the property assessed."

The relator presented to the Supreme Court a petition stating that the valuation of the capital stock and surplus profits of the petitioner for the purpose of taxation entered on the assessment rolls was the sum of \$50,000; that the said valuation and assessment of the petitioner as to its capital stock and surplus profits was and is illegal and erroneous in principle, and that the petitioner would be injured thereby, in that the petitioners refused to deduct from the assets of the petitioners an item of \$103,038.79, being the surplus of the petitioner as shown by a statement filed by it, said surplus not being in excess of 10 per cent. of the par value of the shares of capital stock issued by it; that if the deduction "just mentioned had been made together with the other proper deductions set forth in the application filed by the petitioner, and properly allowed by the board of assessors, there would have been no capital stock or surplus profits of the petitioner subject to taxation," and this allegation was denied in the return. It seems to me that an issue of fact was there presented for the determination of the court at Special Term, and that the relator was entitled to offer testimony tending to show the truth of this allegation of fact in the petition. When this case was before the Special Term the writ was dismissed, it being there ordered that the relator's request for leave to present evidence, in reference to the claim for deductions for surplus not exceeding 10 per cent. of its capital, be and there was denied, and the writ of certiorari was dismissed. I think this was error, and I, therefore, think that the order should be reversed, and the matter remitted to the Special Term to take the evidence offered by the relator.

(161 App. Div. 494)

MONTROSE v. BAGGOTT et al.

(Supreme Court, Appellate Division, Second Department. March 13, 1914.)

1. JUDGMENT (§ 707*)—RES JUDICATA—NEGLIGENCE OF ATTORNEYS.

In an action against attorneys for negligence in that sureties on an appeal bond were held discharged for failure to justify, after exceptions were filed to the sureties, the judgment in the action which determined the non-liability of the sureties was not *res judicata* in the action for negligence, as persons neither parties nor privies are not bound by a judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 707.*]

2. COURTS (§ 89*)—STARE DECISIS.

The rule of *stare decisis* is controlling when the court of last resort has laid down a principle of law applicable to a certain state of facts, or an intermediate court has made such a decision in harmony with established law or not at variance with the established authority.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.*]

3. ATTORNEY AND CLIENT (§ 106*)—LIABILITY FOR NEGLIGENCE.

Where attorneys are sued for negligence, in that they permitted sureties on an appeal bond to become discharged by failure to justify, after

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

taking exceptions to them, their liability is to be determined by the settled law at the time of the acts which are asserted to be negligent.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 217, 219; Dec. Dig. § 106.*]

4. COURTS (§ 190*)—MUNICIPAL COURTS—REVIEW—BONDS—LIABILITY OF SURETIES—EXCEPTIONS.

On an appeal from the Municipal Court if an undertaking be given to stay execution, the sureties are bound if no exception to the sufficiency of the sureties is taken, and if exceptions are taken and the sureties justify they are bound, but if exceptions are taken and there is no justification the sureties are discharged.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 190;* Appeal and Error, Cent. Dig. § 103.]

5. COURTS (§ 190*)—MUNICIPAL COURTS—REVIEW—BONDS—LIABILITY OF SURETIES—WITHDRAWAL OF EXCEPTIONS.

If, on appeal from a Municipal Court, exceptions to sureties on the appeal bond are withdrawn by written or oral stipulation before the time for justification fixed either by original notice or by stipulation for adjournment thereof expires, the undertaking stands as though no exception to the sureties had been taken.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 190;* Appeal and Error, Cent. Dig. § 103.]

6. ATTORNEY AND CLIENT (§ 77*)—AUTHORITY OF COUNSEL—STIPULATIONS.

Counsel in charge of a proceeding in an action has authority of the attorney appearing for the same party to make any stipulation or do any other act in relation to the procedure which, in his judgment, would benefit the cause of his client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 88-90, 132, 136, 148, 149; Dec. Dig. § 77.*]

7. ATTORNEY AND CLIENT (§ 129*)—NEGLIGENCE—QUESTIONS FOR JURY.

In an action against attorneys for negligence in permitting sureties on appeal bonds to be discharged by failure to justify, evidence held sufficient to take to the jury the question of the making of an oral stipulation between the parties to the suit withdrawing the exceptions to the sureties.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 284-291; Dec. Dig. § 129.*]

8. ATTORNEY AND CLIENT (§ 112*)—NEGLIGENCE—DISCHARGE OF SURETIES.

Since a stipulation by counsel for a defendant to withdraw exceptions to sureties on an appeal bond is sufficient to hold the sureties though the sureties do not justify, attorneys for plaintiff are not liable for negligence for the reason that, in an action on the bonds, the court held the sureties discharged because of their failure to justify.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 224-227; Dec. Dig. § 112.*]

9. APPEAL AND ERROR (§ 1227*)—ATTORNEY AND CLIENT (§ 112*)—NEGLIGENCE—STIPULATION FOR FUTURE JUDGMENT—DISCHARGE OF SURETIES.

Sureties on an appeal bond conditioned to pay whatever judgment should be entered against their principal are not discharged by a stipulation between the parties that judgment should not be entered until a time in the future, and the attorneys for plaintiff are not liable to him because in an action on such bond the court determined that the sureties were discharged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4736-4748; Dec. Dig. § 1227;* Attorney and Client, Cent. Dig. §§ 224-227; Dec. Dig. § 112.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Kings County.

Action by George H. Montrose against Vallandigham B. Baggott and George Ryall, copartners. From a judgment for plaintiff, defendants appeal. Reversed, and new trial granted.

Argued before JENKS, P. J., and BURR, THOMAS, STAPLETON, and PUTNAM, JJ.

Samuel Fleischman, of New York City, for appellants.

Meier Steinbrink, of Brooklyn (William H. Griffin, of New York City, on the brief), for respondent.

STAPLETON, J. Plaintiff was a client of the defendants, who were lawyers. By the judgment from which the appeal is taken he has recovered damages against them. The cause of action alleged was negligence of the lawyers in the discharge of professional employment, causing pecuniary injury to the client. If the cause of action was proved, it is certain liability follows. *Byrnes v. Palmer*, 18 App. Div. 1, 45 N. Y. Supp. 479, affirmed 160 N. Y. 699, 55 N. E. 1093. The facts from which the jury were permitted to find negligence are:

In May, 1906, the plaintiff, a manufacturer of cloaks and suits, being unable to collect a claim of between \$1,300 and \$1,400 against one Solomon Rothschild, gave it for collection to the defendants, a firm of lawyers, having large and long experience in commercial practice and litigation, and who had been his attorneys. Unable to collect by the dunning process, the defendant split the claim and brought two actions, one in the Municipal Court for goods sold and delivered, for \$432, evidently to obtain quick judgment, and one in the City Court of the City of New York for work, labor, and services, for \$898.20 and interest from March 24, 1896. Summonses were served at the same time in both actions. Rothschild appeared by an attorney, Meyer J. Stein, who, however, disappeared shortly after the litigation was started. He obtained an order to show cause why both suits should not be consolidated and tried in the City Court. On the application of plaintiff's attorneys, the order was vacated *ex parte*. The defendant Rothschild being in default in the City Court, plaintiff's attorneys entered judgment. The judgment was vacated and the order to show cause reinstated on *ex parte* motion. The motion to consolidate was argued and denied. In the Municipal Court action a verified answer was filed. The defendant Rothschild appeared by Wales F. Severance as counsel. He applied for a long adjournment—to August—on account of the absence of the plaintiff, who had gone to Europe on May 19th, five days after the actions were started, claiming that plaintiff was a material witness for Rothschild. The application was denied and the case set down for trial for a particular day. On that day Mr. Severance moved on affidavit for adjournment. Defendant Ryall prepared three affidavits in opposition. The motion was denied and plaintiff took an inquest; the judgment, including costs, amounting to \$457.31. The defendants subsequently moved to open the default, which was denied. From the judgment and order the defendants took appeals. An undertaking on the appeal was given, with Michael Levinson and Nettie Eisenberg as sureties. Plaintiff's attorneys served

notice of exception to the sureties. Mr. Max D. Steuer, an attorney, came into the case as counsel for Mr. Rothschild and took entire charge of it, immediately after the entry of judgment, having been retained by Mr. Rothschild. Justification of the sureties was adjourned from time to time by stipulation, on Mr. Steuer's application, to July 20, 1906. There were several interviews at Mr. Steuer's office as to a proposed settlement; Mr. Rothschild being present. Defendant Ryall then went to Mr. Steuer and expressed his dissatisfaction at the delay in justifying. Mr. Steuer assured him of the perfect solvency of at least one of the sureties, and Mr. Ryall thereupon told Mr. Steuer that he withdrew the exception to the sureties.

An involuntary petition in bankruptcy was filed against Rothschild on August 1, 1906, and he was adjudged bankrupt August 30, 1906. The appeals from the Municipal Court judgment and order were dismissed November 9, 1906, in the Appellate Term, after plaintiff's attorneys had a stay granted in the United States court vacated, and execution was thereupon issued.

The City Court action was commenced about May 12, 1906. The defendants procured an order to show cause to consolidate that and the Municipal Court action, with a stay of proceedings of both actions. That order was vacated and judgment entered on defendants' default. The motion to consolidate was heard and denied. The judgment by default was opened by order. A verified answer was interposed. Defendant Rothschild demanded a bill of particulars, which was furnished. This was followed by an amended answer. Plaintiff's attorneys served notice of trial and filed a note of issue for the earliest possible date, the first Monday in June, and also moved to place the case on the short cause calendar, which was opposed by Mr. Steuer for the defendant Rothschild. The motion was granted. It appeared on the day calendar on June 13th. The defendant Rothschild applied for adjournment on account of Mr. Steuer's engagement, and the application was opposed and denied. Plaintiff took an inquest. A motion was made by Mr. Steuer, on an affidavit of merits made by defendant Rothschild, and on other affidavits, to open the inquest. The motion was granted and an order entered restoring the case to the calendar. The defendant Rothschild, in compliance with the order, gave an undertaking, with Michael Levenson and Leo Rosengarten as sureties, that the defendant Rothschild would pay any judgment that the plaintiff might recover, not exceeding \$1,000. The sureties justified. The case appeared on the calendar on June 19th. A settlement having been practically agreed upon, it was marked settled; but, the arrangement not having been carried out by the defendant Rothschild, the plaintiff's attorneys had the case restored to the calendar for June 25th. It was the twelfth case on the calendar. It was marked ready in the morning, but, not being reached, was set down for 2 o'clock. Before that hour arrived, Mr. Steuer represented to Mr. Ryall that plaintiff had a good bond; that to attempt to force the case to trial as a short cause at that time, the last week in June, was folly; that he did not believe the plaintiff and defendant Rothschild ought to litigate; that he was satisfied that if plaintiff would waive the requirement of going to trial in

June he could get Mr. Rothschild to consent to let plaintiff take a judgment in October; that in that event plaintiff would be very much better off, because, if they went to trial and did not complete the trial within the time allotted for short causes, it would result in the case going over at least fifteen months, and it seemed to him that any cautious attorney would take the preference of being certain that he was getting a good judgment, with a bond that was perfectly good, rather than take the chance of being sent off to the general calendar, in which event it might be reached anywhere from 15 to 24 months later. He therefore accepted the proposed arrangement giving plaintiff judgment for the full amount with costs, to be entered October 1st, and exchanged stipulations carrying the arrangement into effect. Other circumstances contributed to his acquiescence: Mr. Steuer's statement that if forced to go to trial he would devote his efforts to prolonging the trial so as to have the case sent to the foot of the calendar; doubt as to whether the case could be reached, there being only two more days of the term; his belief that he had a perfectly good bond and was fully securing the plaintiff; his knowledge that there was a defense to the action; the circumstance that he had no client with whom he could confer, the plaintiff being in Europe and having been there throughout the litigation; and his reliance upon the plaintiff's instructions to do the best he could, given over the telephone the night before the plaintiff left for Europe.

Mr. Ryall had not heard from the plaintiff from the time the plaintiff left for Europe until after the arrangement in the City Court was completed. Then, learning that the plaintiff had returned on the previous Saturday evening, or some time thereafter, he went to plaintiff's office and explained to him everything that had taken place in both actions, and plaintiff expressed satisfaction with what Mr. Ryall had done. After that, during the progress of the Municipal Court action, he reported fully to the plaintiff. From the time he received the claim until he obtained judgment in the City Court, he gave almost half of his personal time to these actions, and during the two weeks preceding June 25th, his whole time.

After the dismissal of the appeals from the Municipal Court judgment and order, he brought suit in the City Court against the sureties on the Municipal Court undertaking. It was tried before Justice Conlan without a jury. Briefs were submitted. The judge held the matter under advisement for two or three weeks and then directed judgment for plaintiff against the sureties. An appeal was taken by the sureties and the judgment was reversed and the complaint dismissed on the merits (sic). *Montrose v. Levenson*, 130 App. Div. 904, 114 N. Y. Supp. 1136. Before suing on the undertaking, and throughout the litigation, Mr. Ryall reported fully to the plaintiff. Mr. Ryall moved at the Appellate Term and at the Appellate Division for leave to appeal to the Appellate Division. The motions were denied, as was also a motion for reargument at the Appellate Division. Judgment was entered on the stipulation in the City Court action in favor of plaintiff, *Montrose*, against *Rothschild*, for \$1,058.97, October 3, 1906, and execution was issued on that day and returned unsatisfied. Mr. Ryall's

firm subsequently brought an action in the Supreme Court in behalf of plaintiff against the sureties to the bond in the City Court suit. Answers were interposed. Before suing, and throughout the litigation, Mr. Ryall reported fully to the plaintiff. This action was tried at Special Term. Briefs were submitted. The justice held the case under consideration for about six weeks and then directed a verdict in favor of the sureties, and judgment thereon was rendered December 19, 1908. An appeal was taken to the Appellate Division, where the judgment was affirmed without an opinion (132 App. Div. 928, 118 N. Y. Supp. 1125). The judgment of affirmance was filed July 8, 1909. It was stipulated that the sureties Levenson and Rosengarten were solvent during the years 1906 and 1907 and for some time thereafter, and of sufficient financial ability to pay their bonds.

The aggregate amount of plaintiff's claim and costs paid by him in the actions against the sureties was \$2,452.39. The verdict was for \$2,625.44.

Upon the facts presented, the foundation of the charge of negligence is that the defendants did not apply to the conduct of the litigation discussed, principles of law which are elementary or conclusively settled by authority; because for errors of judgment they are not liable, and no other dereliction of professional duty was proved. *Byrnes v. Palmer*, *ut supra*.

[1] The case at bar was tried and submitted to the jury upon the theory that the determinations against the plaintiff here, in the two suits brought by him to establish the liability of the sureties in the two undertakings to which we have adverted, were so far binding upon the defendants here that from that circumstance, standing alone, the jury could infer negligence on their part. We do not agree with the plaintiff that the defendants are bound under the doctrine of *res adjudicata*, and we do not understand that the court below gave effect to such a contention. Persons neither parties nor privies to an action—and these defendants bore neither relation to the other actions—are not estopped by a judgment. *Moore v. City of Albany*, 98 N. Y. 396, 410; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474, 490.

[2, 3] The plaintiff's further contention is that under the rule of *stare decisis* the law as decided in the two former actions became the law of the case. This contention was adopted by the trial court in submitting the case to the jury. If the law was correctly applied in the former cases, no harm was done. The defendants here assert it was not. The rule of *stare decisis* is controlling when the court of last resort has laid down a principle of law applicable to a certain state of facts, or an intermediate court has made such a decision in harmony with established law or not at variance with conclusive authority. *Matter of Laudy*, 161 N. Y. 429, 435, 55 N. E. 914; *Moore v. City of Albany*, *ut supra*. At this point it is pertinent to say that the defendants here are to be judged by the settled law at the time of the acts or omissions which are asserted to be negligent. The dereliction charged is that they were negligent in not knowing the settled law, or, knowing it, were careless in not applying it. There is no other basis for the judgment against them. No proof of any other negligent or

wrongful act was adduced. What was the law? What did they do or omit?

[4, 5] We think the law is settled that upon appeal to the appellate tribunal from a judgment of the Municipal Court of the City of New York, if an undertaking be given to stay execution upon the judgment, the sureties are bound if no exception to the sufficiency of the sureties is taken. If exception be taken and the sureties justify, they are also bound. If exception be taken and there be no justification of the sureties, they are thereby discharged from liability. *Manning v. Gould*, 90 N. Y. 476; *Zwecker v. Levine*, 135 App. Div. 432, 433, 120 N. Y. Supp. 425; sections 314, 315, Municipal Court Act of New York City (chapter 580, Laws of 1902), compared with sections 1335, 1352, Code of Civil Procedure. If the exceptions taken be withdrawn by written or oral stipulation before the time for justification, fixed either by original notice or by stipulation for adjournment thereof, expired, the undertaking stands as though no exceptions to the sureties, requiring them to justify, had been taken. *Goodwin v. Bunzl*, 50 N. Y. Super. Ct. 441, affirmed 102 N. Y. 224, 6 N. E. 399; *Zwecker v. Levine*, ut supra.

[6] It is clear therefore that if the defendants had entered into a stipulation, oral or written, with the appellant Rothschild or his attorney, upon whom it was required by law that the notice of exception to the sufficiency of the sureties be served withdrawing the notice (section 315, Municipal Court Act of New York City), the sureties would not have been discharged. Now could an oral agreement, entered into between them and the counsel representing the defendant Rothschild, have any different effect? We are of the opinion that counsel in charge of a proceeding in an action has the authority of the attorney appearing for the same party to make any stipulation or do any other act in relation to procedure which in his judgment would benefit the cause of his client. We have been referred to no authority, nor have we found any, which would incline us to relinquish that opinion.

[7, 8] The defendant Ryall and the witness Steuer gave testimony which would have authorized the jury to find that an oral stipulation had been made between Mr. Ryall and Mr. Steuer as counsel for defendant Rothschild, withdrawing the exception to the sufficiency of the sureties while the proceeding for justification was pending. The court was requested to charge as follows:

"That if the notice of exception to the sureties on the Municipal Court undertaking was withdrawn on oral stipulation, the sureties were not discharged, though they did not justify, and the defendants are not liable for the loss of the claim sued upon in said court."

The court declined the request and exception was taken. The court charged the jury that the oral stipulation referred to was not efficient to hold the sureties, and exception was taken. These exceptions present reversible errors.

[9] The plaintiff recovered in this action the amount of the City Court judgment and the costs adjudged against him in an action brought by him to recover the amount of that judgment against the sureties on an undertaking given as a condition of vacating a default

judgment taken by the plaintiff in the action in the City Court. The undertaking read as follows:

"An inquest having been taken herein on behalf of the plaintiff upon the defendant's default, and an application having been made on behalf of the defendant to open his default and vacate the inquest, and such application having been granted on condition that the defendant herein execute an undertaking in the sum of one thousand (\$1,000) dollars for the payment of any judgment herein:

"Now, therefore, we, Michael Levenson, residing at 189 East Seventy-Second street, New York City, and Leo Rosengarten, residing at 71 East Ninety-Sixth street, New York City, do hereby jointly and severally undertake and agree that the defendant herein will pay the amount of any judgment which the plaintiff may recover in this action not exceeding the sum of one thousand (\$1,000) dollars.

"Dated, New York, June 14th, 1906.

"Michael Levenson [L. S.]
"Leo Rosengarten [L. S.]"

The theory of the recovery of the last-named amount was that the defendants were negligent in disregarding legal principles conclusively established by authority, in entering into the following stipulations in contemplation of all the facts recited at the opening of this opinion:

"It is hereby stipulated as follows: That the plaintiff may have judgment against the defendant for the full amount claimed in the complaint herein, together with interest. That the plaintiff may tax a full bill of costs, including two trial fees. That the defendant hereby withdraws the appeal heretofore taken from the order of Mr. Justice Green, entered in the office of the clerk of this court on the 25th day of May, 1906, and consents that the plaintiff may tax costs as if the order had been affirmed by the Appellate Term of the Supreme Court after argument.

"Dated, this 25th day of June, 1906.

"Baggott & Ryall, Plaintiff's Attorneys.

"Steuer & Hoffman, Defendant's Attorneys."

"In consideration of the consent of the entry of judgment herein, and the taxation of certain costs, it is hereby stipulated and agreed on the part of the plaintiff that judgment shall not be entered in this action before the 1st day of October, 1906.

"Dated, this 25th day of June, 1906.

"Baggott & Ryall, Plaintiff's Attorneys."

The plaintiff here was defeated in his action to enforce the obligation of the sureties in the above undertaking. *Montrose v. Levenson & Rosengarten*, 130 App. Div. 904, 114 N. Y. Supp. 1136, affirmed without opinion 132 App. Div. 928, 118 N. Y. Supp. 1125 (First Department). The plaintiff advances the same argument in support of the binding effect of this adjudication on this branch of the case as he did in regard to the other branch. There is no need to repeat our views. We cannot hold that there was any elementary principle of law, or one established by conclusive authority, upon which the sureties upon the undertaking quoted should have been exonerated from liability. That undertaking was not to pay the plaintiff's claim; it was to "pay the amount of any judgment which the plaintiff may recover in this action not exceeding the sum of one thousand (\$1,000) dollars." The rule which liberates a surety from his obligation and the reason for it are well settled. It has been recently restated in *National Park Bank v. Koehler*, 204 N. Y. 174, 179, 97 N. E. 468, 470:

"It is a rule, long recognized, that an accommodation indorser, or surety, is entitled to have the engagement of the principal debtor preserved, without variation in its terms, and that his assent to any change therein is essential to the continuance of his obligation. The reason of the rule is that his right must not be affected, upon the maturity of the indebtedness, to make payment and, by subrogation to the creditor's place, to, at once, proceed against the principal debtor to enforce repayment. Therefore it is that any agreement of the creditor, which operates to extend the time of payment of the original debt and suspends the right to immediate action, is held to discharge the nonassenting indorser, or surety; as the law will presume injury to him thereby. The creditor may arrange with his debtor in any way, which does not result in effecting either of these results."

The undertaking we are considering was not to pay the claim in suit, but the judgment that might be recovered. The sureties' obligation did not arise until the judgment was recovered. The indebtedness for which they were sureties had not matured. A judgment might never have been recovered. Until its recovery the sureties would be in no position to pursue the principal debtor. They could not control the creditor's litigation. He could conduct it in accord with his best judgment to accomplish his own purposes. The rule of exoneration did not apply because the reason for it did not exist.

The learned trial court was requested to charge:

"That, if the defendants, in good faith and in the exercise of reasonable judgment, were in doubt as to whether they could, by forcing or attempting to force the City Court case to trial, obtain judgment in June, they were not negligent in consenting to accept a stipulation for judgment and agreeing in consideration thereof, to postpone the entry of judgment to October 1st."

It declined so to charge and exception was taken. The court had charged that the giving of the stipulation had discharged the sureties, to which charge an exception was taken. These exceptions present reversible error.

There is no evidence that the defendants were negligent in their employment in the City Court action.

The defendants were entitled to have submitted to the jury the question whether an oral stipulation withdrawing the exceptions to the sufficiency of the sureties in the Municipal Court action was made between Ryall and Steuer, and, if the jury found it was, the defendants were entitled to a charge that no negligence could be found against them on that branch of the case.

The judgment and order should be reversed, and a new trial granted; costs to abide the event. All concur.

(161 App. Div. 458)

DAVIS v. McMAHON et al.

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

1. WILLS (§ 697*)—CONSTRUCTION—ACTION.

One of the next of kin of a testator not interested under the will may maintain an action in equity for construction of the will involving the annulment of a trust and to declare a resulting trust in favor of the next of kin.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1671-1675; Dec. Dig. § 697.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 146 N.Y.S.—42

2. PERPETUITIES (§ 7*)—TRUSTS—VALIDITY.

Where a testator devised corporate stock and other property to trustees to pay the income to one C. for life and to divide the surplus, if any, above a certain amount, between the testator's sister and nephew, and in the event of C.'s death before the expiration of 25 years to pay the income to the sister and nephew until the expiration of the 25 years when the trust property should be distributed, the trust is invalid as a perpetuity in so far as it seeks to suspend power of alienation for a fixed period of 25 years not being limited in accordance Personal Property Law (Consol. Laws, c. 41) § 11, for not more than two lives in being.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 48, 54, 55; Dec. Dig. § 7.*]

3. WILLS (§§ 81, 448*)—CONSTRUCTION—CANONS.

That construction of a will which will sustain its validity in whole or in part and avoid either partial or total intestacy is favored, and therefore, where a will contains invalid and valid trusts which are independent, the invalid trusts may be annulled and the valid trusts sustained.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 201, 202, 964; Dec. Dig. §§ 81, 448.*]

4. WILLS (§ 822*)—CONSTRUCTION—ANNUITIES.

Where a testator directs the payment of an annuity in a fixed amount, it is a charge on the residuary estate without the intervention of a trust, and the lien may be discharged by payment of the present value of the annuity, irrespective of the validity of the trust; but where the annuity is not given absolutely, but is expressly limited to the income, there is no charge upon the residuary estate unless a valid trust is created to carry the gift into effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2120; Dec. Dig. § 822.*]

5. PERPETUITIES (§ 6*)—VALIDITY—PERPETUITY.

A testator devised his real and personal property to trustees to collect the income and pay the same up to the amount of \$2,100 to C. and to divide the surplus, if any, between his sister and nephew. The will also provided that the sister and nephew should receive the income in the event of C.'s death before the expiration of 25 years, and that at the expiration of that period or at the subsequent death of C. distribution should be made. *Held*, that while the trust, in so far as it attempted to suspend the power of alienation for a definite period of 25 years, was invalid, there was a valid trust in favor of C. and she was entitled to the income for life.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-47, 49-53, 56; Dec. Dig. § 6.*]

6. WILLS (§ 852*)—VALIDITY.

A testator devised his property in trust to pay the income to one C. for life with provisions that in case of her death before the expiration of 25 years the income should be paid to his nephew and sister if living, and that distribution should be made at the expiration of 25 years or at the death of C. should she survive that period. The will provided for distribution between the nephew and sister in case of their survival and for many other contingencies in case of their death without heirs of their bodies, etc. *Held*, that the 25-year period which suspended alienation being invalid under Real Property Law (Consol. Laws, c. 50) § 42, there was no valid disposition of the remainder; it being impossible to determine who would take at the expiration of that period.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2167, 2168; Dec. Dig. § 852.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, New York County.

Action by Annie Davis against Cecil H. McMahon, as executor and trustee under the last will and testament of Henry E. Smith, deceased, and others. From judgment for defendants and dismissal of the complaint, plaintiff appeals. Reversed.

Appeal by plaintiff from a judgment adjudging the devise in the will of Henry E. Smith, deceased, of the remainder of his estate in trust to pay the net income thereof together with the dividends, if any, on capital stock of the Conservative Realty & Investment Company, to the extent of \$2,100 per annum, to Marion Chase Currey for life to be valid, and dismissing the complaint upon the merits with costs.

The testator died on the 28th of February, 1912, leaving two sisters—the plaintiff and the defendant Florence J. Muchmore—claimed, asserted, and found to be his sole heirs and next of kin. The defendant Davis was the testator's nephew. The defendant Ward W. Muchmore is the husband of said Florence, and the two infants are their children. The defendant Currey was about 40 years of age on February 3, 1913, and was not related to the testator. In the first and second paragraphs of the will, the testator gave directions with respect to his funeral and the payment of his debts; and by the sixth he merely appointed Cecil H. McMahon and a trust company executors. The other provisions of the will are as follows:

"Third. I give and bequeath the eight shares of stock owned by me in the Conservative Realty & Investment Company (a corporation of the state of New Jersey with its principal office in the city of Newark in said state, as appears by the books of said company) to my trustees hereinafter named, in trust, to hold said shares until the expiration of twenty-five years from the date hereof, during which time they shall not sell, assign transfer said shares; and upon the further trust that they will cause as the holders of such stock the name of said Conservative Realty & Investment Company to be changed as soon as may be convenient after my death to the 'Estate of Henry E. Smith' if such change can then lawfully be made; and upon the further trust to vote from time to time upon said shares of stock, so that the corporation may not expend moneys or incur liabilities in the improvement of the properties known as Nos. 224, 226 and 228 Washington street in said city of Newark for the erection of a new building or buildings thereon, or the improvement of any building or buildings now or which may be hereafter erected on said properties, in any amount greater than will make the value of such building or buildings after such improvements are made more than one-third of the value of the lands upon which such buildings are erected at the time such improvements may from time to time be authorized by said company, the valuation of the lands to be arrived at, disregarding the fact that the buildings are there; and upon the further trust that they will vote upon said stock in such manner as to prevent the sale of any of the real estate of said company until the expiration of twenty-five years from the date hereof; and upon the further trust to vote from time to time for the election of Cecil H. McMahon of Newark aforesaid, for president and treasurer of said company to fill any vacancy caused by my death or otherwise, and thereafter so long as he may live and the trust created by this will continue, and to vote to fix the salary of the president and treasurer at one thousand dollars per year so long as Cecil H. McMahon fills those offices (I make this direction because Cecil H. McMahon has for years past been familiar with my business affairs). Subject to the limitations aforesaid, my said trustee may vote upon such shares of stock at any meeting of the stockholders of said company as they may deem best for the interests of my estate; the income from such shares of stock to be disposed of by my said trustees as hereinafter mentioned.

"Fourth. I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, to my trustees hereinafter mentioned, in trust, however, to sell and dispose of the same as they may deem for the best interest of my estate and to invest the same and keep it invested and to pay the net income therefrom together with the income from the shares

of stock of Conservative Realty & Investment Company, up to the sum of twenty-one hundred dollars, in each year, in monthly instalments as near as may be, to Marion Chase Currey, so long as she lives, the net income remaining from my entire estate after making the payments of twenty-one hundred dollars a year aforesaid to Marion Chase Currey, shall be divided equally between my sister Florence Muchmore, and my nephew, Norman Davis, until the division of the principal of my estate hereinafter directed, in case they shall live so long. After the death of the said Marion Chase Currey, all the net income from my estate shall be divided between my sister, said Florence Muchmore, and my nephew, Norman Davis, until the above-mentioned division of my estate if they shall so long live. Upon the death of my sister, Florence Muchmore, the income hereby directed to be paid to her shall be paid to her husband, Ward W. Muchmore, if he survives the said Florence Muchmore, and if he dies before the said Florence Muchmore or before the said division of my estate, then the income hereby directed to be paid to the said Florence Muchmore shall be paid to the children of Florence Muchmore. Upon the death of my nephew, Norman Davis, the share or shares of income hereby directed to be paid to him shall be paid to Florence Muchmore, if she survives the said Norman Davis, or if she be dead, then to be paid to her husband, Ward W. Muchmore, if he survives her; and if he dies before her and upon his death before a division of my estate, then the income hereby directed to be paid to Norman Davis, shall be paid to the children of Florence Muchmore.

"Fifth. It is my intention that my trustees shall retain my estate as indicated above for twenty-five years from the date hereof and at the expiration of twenty-five years from the date hereof if the said Marion Chase Currey be then dead, or if she then be living, then upon her death after the expiration of said period of twenty-five years, my trustees shall divide my estate, real, personal and mixed, including the shares of stock in the Conservative Realty & Investment Company by whatever name said company may then be known between my sister, Florence Muchmore, and my nephew, Norman Davis, share and share alike if they then be living; if Florence Muchmore then be dead, one-half of my estate shall be paid and transferred to her children in equal shares and the other one-half of my estate shall be paid and transferred to my nephew, Norman Davis; and if both my sister, Florence Muchmore, and my nephew, Norman Davis, be dead at the time when my said trustees are directed to divide my estate, then I direct that my estate shall be paid and transferred one-half to the children of Florence Muchmore, and one-half to the children of Norman Davis, if there shall be any such then living, and if the said Norman Davis shall have died without leaving any children surviving him at the time of the division of my estate by my trustees as aforesaid, I direct them to pay and transfer the whole of my estate in their hands to such legal heirs of my sister, Florence Muchmore, as may then be living. For the purpose of making a proper division and transfer of my estate, as provided for in this paragraph, I hereby authorize and empower my trustees or the survivor of them to sell and convey such part of my estate, including the shares of stock aforesaid, as in their discretion they may deem proper."

The trust company duly waived and renounced its right to qualify as an executor and trustee, but the individual executor and trustee duly qualified. The estate consists of personal property only. The inventory and appraisement of the property left by the decedent shows that its total value was \$22,528.70, and that the eight shares of stock of the Conservative Realty & Investment Company were appraised at \$800, which was their par value. The property of the corporation consisted of five city lots in Newark, N. J., with improvements thereon which were mortgaged. The aggregate amount of the incumbrances was \$113,500, and the executor estimated that the equity therein was of the value of about \$125,000; but the income therefrom was insufficient to pay the current running expenses, and no dividend had been or was likely in the near future to be declared.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

John Ewen, of New York City, for appellant.
Howard W. Ameli, of New York City, for respondent McMahon.
Thomas F. Murtha, of New York City, for respondent Currey.
John V. Judge, of New York City, for infant respondents Muchmore.

LAUGHLIN, J. [1] It is within the jurisdiction of a court of equity to entertain a suit at the instance of one of the next of kin of a testator not interested under the will for the construction of the will involving the annulment of a trust or other disposition of personal property by will and to declare a resulting trust in favor of the next of kin as against the executor who holds the property. *Read v. Williams*, 125 N. Y. 560, 26 N. E. 730, 21 Am. St. Rep. 748; *Tonnele v. Wetmore*, 195 N. Y. 436, 88 N. E. 1068; *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917. The executor and trustee, who is a member of the bar in New Jersey, testified that voting trust agreements with respect to capital stock are lawful in that state, and that there is no limitation with respect to the period for which they may be created. But we are not concerned with the validity or effect of the directions, with respect to the management of the corporation through stock control, given by the testator, by paragraph 3 of the will, to his trustees. If the trustee should fail or refuse to observe the directions, then those questions might arise between him and those beneficially interested in the stock; but they are not presented for decision now.

[2] We have merely to decide whether any attempted disposition of property by the testator is invalid. It is stated in the will that he gives and bequeaths this stock to his executors in trust for the period of 25 years. He not only attempted to make them voting trustees of the stock for that period, but he expressly authorized them to collect and distribute the income, if any, from the stock during that period and to pay the same to the legatee Currey so far as necessary to make up the amount of \$2,100 given to her by paragraph 4, and to divide the surplus, if any, and all of it in the event of said Currey's death before the expiration of 25 years, between the testator's sister Florence and his nephew until the termination of the trust period of 25 years, with a proviso that on the death of Florence, her husband, if living, and if not, her children, should take her share, and if the nephew should die his share of such income was to go to the sister if living, and, if not, to her husband, and if he should not be living then to her children. In order to make his purpose with respect to the development of the corporation, for the future financial success of which he evidently had high hopes, he attempted to suspend the absolute ownership, which includes the power of alienation of the stock, for a period not limited by two lives in being, but for a definite fixed period of 25 years in any event in contravention of our statute against perpetuities. *Personal Property Law*, § 11; *Hagemeyer v. Saulpaugh*, 97 App. Div. 535, 90 N. Y. Supp. 228. The trust in one contingency was to be limited by the life of Mrs. Currey; but the testator expressly, clearly, and pointedly declared

it to be his intention that the trust should, even in the event of Mrs. Currey's prior death, continue until the expiration of 25 years. The will makes it as plain as meaning can be expressed that he intended to create a trust for the period of 25 years in any event, and since that is not a limitation to two lives in being it is void, at least in so far as it purports to be for 25 years. *Herzog v. Title Guarantee & T. Co.*, 177 N. Y. 86, 69 N. E. 283, 67 L. R. A. 146; *Matter of Willcox*, 194 N. Y. 288, 87 N. E. 497; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938.

[3-5] The learned counsel for the appellant contends that the testator attempted to create but a single trust and that it must all stand or fall together. Counsel for respondents argue, however, that, if the attempted suspension of absolute ownership for the period of 25 years be void, the trust may be sustained as one for the life of Mrs. Currey, on the theory that the trust provisions for her benefit are independent of and separable from the provisions for continuing the trust after her death until the expiration of the trust period of 25 years. The rule is well settled that that construction of a will, which will sustain its validity in whole or in part and avoid either partial or total intestacy, is favored (*Kalish v. Kalish*, *supra*); and therefore where a will contains one or more invalid trusts and one or more valid and independent lawful trusts, not forming an essential part of the general scheme of the will as a whole, the invalid provisions may be annulled and the valid ones sustained (*Simpson v. Trust Co. of America*, 129 App. Div. 200, 113 N. Y. Supp. 370, affirmed 197 N. Y. 586, 91 N. E. 1120; *Matter of Willcox*, *supra*; *Central Trust Co. v. Egleston*, 185 N. Y. 23, 77 N. E. 989; *Benedict v. Webb*, 98 N. Y. 460; *Knox v. Jones*, 47 N. Y. 389; *Hooker v. Hooker*, 166 N. Y. 156, 59 N. E. 769); and on the same theory invalid provisions which relate to and are connected with valid provisions, but not dependent thereon, will likewise be excised and the valid provisions to which they relate retained (*Hascall v. King*, 162 N. Y. 134, 56 N. E. 515, 76 Am. St. Rep. 302).

It is argued that the provisions for Mrs. Currey may be sustained as an annuity and charge upon the residuary estate, even though they cannot be sustained on the theory of a trust. If the testator directed the payment of an annuity in a fixed amount to Mrs. Currey, it would be deemed a charge on the residuary estate without the intervention of a trust, even though he directed it to be paid out of income (*Clark v. Clark*, 147 N. Y. 639, 42 N. E. 275; *Dunham v. Desaires*, 165 N. Y. 65, 58 N. E. 789; *People's Trust Co. v. Flynn*, 188 N. Y. 385, 391, 393, 80 N. E. 1098), and the lien on the residuary estate might be discharged by payment of the present value of the annuity (*Buchanan v. Little*, 154 N. Y. 147, 47 N. E. 970; *People's Trust Co. v. Flynn*, *supra*), or sufficient of the residuary estate, if there were sufficient, might be set apart and retained by the trustee to produce and pay the annuity (*Clark v. Clark*, *supra*); but here the annuity is not given absolutely, but it is expressly limited to income and made dependent upon the amount and sufficiency of the income. It is not, therefore, a charge upon the residuary estate in the

sense that it may be paid out of the corpus thereof. The validity of the trust would seem therefore to be necessary to give Mrs. Currey the benefit of the provision the testator intended to make for her. A trust, however, for the life of Mrs. Currey to enable her to receive the income of the residuary estate to the extent specified in the will, is one which was clearly authorized by law, and the trustee may hold the legal title for the purposes of that trust, even though with respect to the remainder the testator died intestate and it passed to and vested in his next of kin. *Kennedy v. Hoy*, 105 N. Y. 134, 11 N. E. 390; *Matter of Willcox*, supra; *Schlereth v. Schlereth*, 173 N. Y. 444, 449, 66 N. E. 130, 93 Am. St. Rep. 616. On this theory, the testator lawfully disposed of the entire income of the residuary estate during the life of Mrs. Currey. She takes it all, unless it shall exceed \$2,100 per annum, and the surplus, if any, over that amount goes to the nephew and sister, and, in the event of the death of either or both of them, to the substituted beneficiaries specified in the fourth paragraph of the will. *Schermerhorn v. Cotting*, 131 N. Y. 48, 29 N. E. 980.

It is as has been stated by counsel for appellant, that the trusts are entire and inseparable, and that therefore, under the well-settled rule (see *Central Trust Co. v. Egleston*, supra), all must stand or fall together. I am unable to agree with that argument. To sustain the trust for the benefit of Mrs. Currey does not conflict with any part of the scheme or plan of the testator with respect to the disposition of the remainder, for the provisions for her benefit are not dependent upon or interwoven with the other provisions; nor is there anything to indicate that the testator would not have so provided for her had he known that he could not dispose of the remainder as he did dispose of it; but, on the contrary, it would seem that to properly provide for her was his primary consideration. It cannot be reasonably inferred that he only intended that she should have the income of the residuary estate to the extent of \$2,100 per annum during her life in the event that he could lawfully continue the trust for the period of 25 years if she should die sooner. It is manifest that, whether the law forbade or permitted the trust for 25 years, he intended to provide an annuity for this woman for life from the income of his residuary estate. Therefore giving effect to those provisions of the will designed to afford Mrs. Currey an annuity for the period of her natural life gives effect to the plain intention of the testator, and the fact that owing to his failure to follow the requirements of law we are unable to give further effect to the provisions of his will does not preclude the court from giving it effect as contemplated by the testator until the death of Mrs. Currey. See *Kennedy v. Hoy*, supra.

I am of opinion, therefore, that there was a valid trust created during the life of Mrs. Currey, but that the trust attempted to be created for the period of 25 years was void.

[8] Counsel for the executor respondent contends that, if the testator contemplated a trust for the period of 25 years which would be invalid, that provision may be disregarded and the trust sustained as

one for the life of Mrs. Currey, and the will upheld as a valid disposition of the remainder at that time, and counsel for all the respondents contend that in any event in order to sustain the will as a disposition of the residuary estate it should be construed as creating a trust only during the life of Mrs. Currey. As already observed, the intention of the testator to have the trust continued in any event for 25 years, no matter how long prior to that time Mrs. Currey may die, is quite plain, and it is equally plain that the testator has not attempted to dispose of the remainder until the expiration of the trust whether it shall terminate with death of Mrs. Currey after the expiration of the 25-year period or by the expiration of that period should she die before. Moreover, the remainder is contingent, and those who would take now if Mrs. Currey should die presently if the testator had provided for distribution on her death might not be the same persons as those who would take at the expiration of the 25-year period. If Mrs. Currey should die presently, the defendant Davis, the nephew, would take one-half the residuary estate; whereas, he may die before the end of the 25-year period prescribed in the will without leaving issue, and in that event, if the remainder were to vest at the expiration of the 25-year period as contemplated by the testator his sister, if then living, and if dead her children, would take the one-half that the nephew was to take if then living. If Mrs. Currey should die before the expiration of the 25-year period, and the testator's nephew and sister should survive her, and the disposition of the remainder could be sustained, they would take, and yet they might die within the 25-year period and leave none of the property to their issue who would have taken if the will were sustained as made by the testator.

There can therefore be no doubt but that, if the will could be sustained as made, the remainder would not vest until the expiration of the 25-year period, even though Mrs. Currey should die before that time, and therefore it could not be definitely known until the time for distribution who would take the remainder. *Schlereth v. Schlereth*, supra; *People's Trust Co. v. Flynn*, supra. If it were certain that identically the same remaindermen would take whether the remainder vested in possession at the death of Mrs. Curry or at the expiration of the 25-year period, then under the statute and authorities the will might be sustained as a valid disposition of the remainder. Real Property Law, § 42; *Purdy v. Hayt et al.*, 92 N. Y. 446; *Kalish v. Kalish*, supra; *Matter of Willcox*, supra; *Rice v. Barrett*, 102 N. Y. 161, 6 N. E. 898; *Knox v. Jones*, supra. Since, however, by the clear and explicit provisions of the will, the remainder is contingent and it cannot be known who will take until the expiration of the trust which the testator directed should continue for 25 years in any event, the court cannot eliminate those provisions and decree that the remainder shall vest in possession upon the death of Mrs. Currey, for that would not be construing the will as made, but would in effect be construing a will for the testator. *Simpson v. Trust Co. of America*, supra. The observations already made suf-

ficiently answer the contention that the will may be construed as creating a trust for the life of Mrs. Currey only.

It follows therefore that the judgment should be reversed, with costs to appellant and to the executors, payable out of the estate, and judgment should be entered in favor of the plaintiff to the effect that the trust in the fourth paragraph of the will is valid for the life of Mrs. Currey, and that the provisions thereof disposing of the income of the residuary estate during that period are valid, but that the further trusts with respect to income until the expiration of the 25-year period and the disposition of the remainder of the residuary estate are void, and that upon the death of Mrs. Currey the next of kin of the testator will be entitled to take in possession the residuary estate as intestate property. All concur.

(84 Misc. Rep. 511)

In re CARLISLE, State Highway Commissioner.

(Supreme Court, Special Term, Onondaga County. March 7, 1914.)

HIGHWAYS (§ 124*)—MAINTENANCE—TAXATION.

Highway Law (Consol. Laws, c. 25) § 134, provides that on completion of a highway, and after filing the notice required, the highway shall be deemed to have been accepted by the board of supervisors of the county, and thereafter it would be maintained as provided in such charter. *Held*, that the maintenance of a highway which is to be "thereafter" exercised under such section has no bearing on the raising of funds with which to pay for such maintenance, and where a statement in October, 1912, specifying the number of miles of state and county highways in each town and the amount required to be paid for maintenance thereof for the year 1913, was transmitted to the clerk of the board of supervisors, as required by section 172, and on December 18, 1912, notice was given pursuant to section 134 that the county highways in question had been accepted, the board of supervisors was not authorized to refuse to include a tax for the maintenance and repair of the roads for 1913 in the tax levy, because the highways had not been accepted on December 15, 1912, when the tax levy for that year was made.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 381; Dec. Dig. § 124.*]

Application by John N. Carlisle, as State Commissioner of Highways, for writ of mandamus against the Board of Supervisors of Onondaga County. Writ granted.

Thomas Carmody, Atty. Gen. (James J. Barrett, and Edward G. Griffin, Deputy Attys. Gen., of counsel), for petitioner.

Herbert L. Smith, Co. Atty., of Syracuse, opposed.

CROUCH, J. It is sought to compel the board of supervisors of Onondaga county, pursuant to section 172 of the Highway Law, to cause the sum of \$900 to be raised by certain towns of Onondaga county for the maintenance and repair of county highways.

In the fall of 1912 four highways running through six towns of Onondaga county were completed, or nearing completion, two being state and two county highways. Under date of October 15, 1912, and on or about October 28, 1912, a statement, specifying the number of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

miles of state and county highways in each town and the amount which each town was required to pay on account of the maintenance for the year 1913, was transmitted to the clerk of the board of supervisors, as required by section 172 of the Highway Law. On the 18th of December, 1912, notice was given pursuant to section 134 of the Highway Law that the county highways in question would be accepted. On the 27th of December, 1912, the two state highways were accepted, and on January 8, 1913, the two county highways were accepted. The general tax levy was made by the board of supervisors, as required by law, on December 15, 1912, but included no tax for maintenance and repair for the year 1913, nor has any tax for that year been included in subsequent levies. The board claims that, inasmuch as the highways had not been accepted on December 15, 1912, when the tax levy for that year was made, it had no power or authority to cause the towns in question to pay the statutory maintenance tax for the year 1913. This contention, so far at least as the county highways are concerned, seems to rest largely upon the following provision of section 134 of the Highway Law:

"Upon the proper completion of such highway or section thereof and after filing the notice above given it shall be deemed to have been accepted by the board of supervisors of such county and *thereafter* it shall be maintained as provided in this chapter."

Assuming that the board has discretion in such a case, I do not think the maintenance which is to be "thereafter" exercised under section 134 has anything to do with the raising of the fund which is to pay for such maintenance. The intent of the statute seems to be to fix the point of time when it becomes the duty of the public officials physically to maintain and repair and to expend public moneys for that purpose. Up to that point the duty rests with the contractor. The statute does not prevent the levy of a tax to be paid to the credit of the fund out of which the expense of maintenance and repair for the forthcoming year is to be paid. In the present instance the towns had the benefit and use of the highways in question substantially the entire year, and should be willing to pay their proportion to the credit of the fund.

The creation and maintenance of an improved highway system is a great governmental undertaking. I think the commissioner of highways should be and is vested with as much discretion as he has sought to exercise in the instances here involved. In any event the duty of the board of supervisors was, under section 172, merely ministerial. Having received the statement, it should have proceeded as directed.

The writ prayed for may issue.

(161 App. Div. 49)

WIGHTMAN v. CAMPBELL

(Supreme Court, Appellate Division, Fourth Department. March 4, 1914.)

1. BOUNDARIES (§ 36*)—EVIDENCE—ADMISSIBILITY.

In a suit involving a disputed boundary, notes of a deceased surveyor who made a survey of the lands when they were owned by the parties' common grantor are inadmissible in evidence as hearsay, where defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant's deed not only made no reference to the survey, but no courses and distances corresponding with the surveyor's notes were contained in the description therein, and it did not appear under what circumstances the survey was made.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 160-162, 164, 166-176; Dec. Dig. § 36.*]

2. APPEAL AND ERROR (§ 231*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Where defendant's objection to a witness' testimony as to his use of the field notes of a former survey was on the ground that the notes used were a copy, a general objection after the introduction of proof which warranted the use of the copy does not raise on appeal the objection that the notes were in the nature of hearsay evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.*]

3. APPEAL AND ERROR (§ 237*)—OBJECTIONS AT TRIAL—RECEPTION OF EVIDENCE—MOTION TO STRIKE.

Where an objection was not made until after the answer was given, it is unavailing, and the only remedy is to move to strike out the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1302½; Dec. Dig. § 237.*]

4. APPEAL AND ERROR (§ 1052*)—REVIEW—HARMLESS ERROR.

Defendant cannot complain that the court improperly allowed a witness to testify as to his use of the notes made by the original surveyor of the land in dispute, where on cross-examination the notes were offered in evidence by defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

5. TRIAL (§ 105*)—INCOMPETENT EVIDENCE—FAILURE TO OBJECT.

In a suit involving a disputed boundary, where defendant did not make proper objection to the testimony of a surveyor's use of notes made by an earlier surveyor, and himself introduced the notes in evidence, the jury is entitled to consider the notes in connection with their use by the second surveyor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.*]

Appeal from Trial Term, Yates County.

Action by James C. Wightman against Thomas W. Campbell. From a judgment for plaintiff and an order denying his motion for new trial, defendant appeals. Affirmed.

Argued before KRUSE, P. J., and ROBSON, FOOTE, LAMBERT, and MERRELL, JJ.

James O. Sebring, of Corning, for appellant.

Michael A. Leary, of Penn Yan, for respondent.

ROBSON, J. The judgment appealed from awards to plaintiff, together with the costs of the action, the possession of a tract of land about three-quarters of an acre in extent, situate on the shore of Keuka Lake, which, as was found by the verdict of the jury, was without right withheld by defendant claiming title thereto.

Defendant is the owner of a parcel of land which adjoins lands in which plaintiff has a life estate. The north line of defendant's parcel is the south line of plaintiff's land. This line is the center of a small

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stream, known as Basswood creek, as it existed in 1851 when defendant's predecessor in title bought the premises of which defendant's parcel is a part, from the then owner of the lands on both sides of the creek. The mouth of this creek is the northeast corner of defendant's land. It appears that this creek now discharges into a bay or cove called the Basin, which, while a part of the lake, is partially separated from the main body of it by a narrow point of land jutting out into the lake. The general course of the creek as it approaches the lake is easterly. As it reaches a point southerly of the Basin, it, as it now flows, turns at almost a right angle to the northeast and thence discharges into the Basin. Plaintiff claims, and the jury have found, that this creek at the time defendant's predecessor in title acquired title from the common owner of his and plaintiff's lands, instead of having its present course from the bend in the stream and thence to the Basin, followed the same general direction to the east and discharged directly into the main body of the lake. The disputed territory is the land bounded by the lake and Basin, the line of the creek, as it now flows, and the alleged old line of the creek from the present bend therein easterly to the main body of the lake. It is apparent from an inspection of the conveyance to defendant's predecessor in title and the mesne conveyances down to and including that by which defendant acquired his title that the mouth of this creek is recognized as being the northeast corner of his premises. That is equally true as to the chain of title through which plaintiff claims in which the description of the premises conveyed in the deeds in that chain of title has its point of beginning at the northeast corner of the premises which are now owned by the defendant. The location of this northeast corner, i. e., the mouth of the creek as it was when defendant's predecessor in title acquired his title to the premises, was therefore the chief determining factor in the decision of the case. Many witnesses were sworn on each side, who testify as to their observation and recollection of the course of the creek with equal positiveness and apparent sincerity in support of plaintiff's claim on the one hand and defendant's contention on the other. Our examination of this conflicting testimony leads us to conclude that the finding in favor of plaintiff was not against the weight of evidence, and therefore should not be disturbed.

[1] Appellant's counsel urges that the court committed error in that one Ogden, a surveyor sworn as a witness for plaintiff, was permitted to give testimony as to his having surveyed and made a map of certain lines, angles, and distances, appearing in a copy of the original field notes of what it was claimed was an original survey of the lands conveyed by the common owner of all the lands in question to defendant's predecessor in title, made in 1851, being the same year the premises were so conveyed. These original notes had been lost or destroyed; but the copy thereof used by Ogden was sufficiently proved, as was also the fact that such original notes were in the handwriting of a surveyor named Arnold, since deceased, who at and for many years before and after the date appearing on these notes was a surveyor frequently employed in making surveys in that vicinity. We think that

this copy of the Arnold field notes and the evidence of the surveyor Ogden as to the use he made of it in making his survey therefrom and what that survey disclosed should not have been received in evidence, if proper objection had been made by defendant to this testimony. No reference to a survey of the farm is made in the deed conveying these premises to defendant's first predecessor in title, and no courses and distances corresponding with the surveyor's notes appear in the description of the premises contained in that deed. It does not appear at whose instance, on what occasion, for what purpose, or under what circumstances the notes of the survey were made. In other words, there is nothing to connect either the defendant's predecessor in title or his grantor directly as an actor in the alleged survey, nor as having procured it to be made for them or either of them; nor that it was thereafter accepted and used by them; nor that they, or either of them, directly, or indirectly, recognized that it was correct. Without some fact of the nature above indicated being made to appear, even the original field notes, if produced, would have been necessarily considered as at the most merely hearsay, and for that reason incompetent as evidence.

[2] But defendant's counsel does not seem to have raised the question, which he now seeks to urge on this appeal, by any sufficient objection, or exception when the evidence was offered. The first objections made to the testimony of this witness as to the use he made of the Arnold field notes were pointed solely to the fact that it appeared that the witness was testifying to the use of a copy instead of the original notes. Such objections were met and satisfactorily overcome by proof which would permit the use of that copy provided the original notes could have been used for a like purpose in giving the proposed testimony. Thereafter this question was asked by plaintiff's counsel: "In making this survey you followed those courses as indicated upon Arnold's notes?" The witness answered, "Yes, sir." And after the answer was given defendant's counsel objected as follows: "We object to all that proof as incompetent, inadmissible, and improper." The ruling of the court was, "Overruled and exception." It will be observed that the objection to the use of these notes was not pointed to the exact ground upon which it should properly have been based that they were in the nature of hearsay evidence only. It is possible, if this specific objection had been made, plaintiff could have furnished further proof which would have obviated an objection on that ground.

[3] Besides the objection, not having been made till after the answer was given, was unavailing, and defendant's remedy was to move to strike out the evidence. This motion was not made. *Link v. Sheldon*, 136 N. Y. 1, 32 N. E. 696; *Buckley v. Westchester Lighting Co.*, 93 App. Div. 436, 87 N. Y. Supp. 763. The witness then proceeded without further objection to give a full statement and description of the use he made of these notes and the survey and map made therefrom, and the map was received in evidence without objection. No motion was made to strike out any part of this testimony.

[4] The copy of the notes was not offered in evidence by plaintiff.

When defendant had the case the record discloses that the witness Ogden was recalled and examined as a witness for defendant as follows:

"Defendant's Counsel: The court says I am entitled to see that so-called Arnold survey. The Court: And the whole of the Arnold survey. A. I have no objection at all. Which one do you want? The Court: The Arnold survey. A. There it is. The Court: The Arnold survey was put in evidence and marked 'Exhibit 7.'"

It thus appears that these notes, which defendant now claims were inadmissible, were called for by his own counsel and without objection put in evidence as a part of defendant's case. In view of these facts, it would seem that objection cannot now be successfully urged that they were inadmissible.

[5] The court's attention was not thereafter called to the question as to what consideration the jury might properly give to these field notes as evidence until the close of the charge; when this request to charge was made by defendant's counsel:

"Also asks the court to charge that the Arnold notes, so called, are no proof as to the outlet of Basswood creek."

To this request the court responded:

"I decline to charge that. In the light of Mr. Ogden's testimony abstractly and alone, they do not prove anything, they are incompetent."

Though the court's reply appears in the record as above quoted, it is clear that the sentences are inaccurately divided and that it should read:

"I decline to charge that in the light of Mr. Ogden's testimony. Abstractly and alone they do not prove anything; they are incompetent."

To this defendant's counsel excepted. The court was then asked to charge "that the map prepared by Ogden is no proof as to the outlet in question." The court declined to charge as requested, and defendant's counsel again excepted. Neither of these exceptions seems to present error calling for a reversal of the judgment. The trial court in response to the first request to charge correctly instructed the jury in effect that the Arnold notes taken abstractly and alone did not prove anything, and, so taken, were as evidence incompetent; but that the jury might consider them in connection with Ogden's testimony and the use he, without a tenable objection by defendant, testified he made of them in verifying the location of the mouth of the creek as coinciding with his memory of it as it was in 1866 when he first observed it. Being in evidence, the jury had a right to consider them as in the case for that purpose at least. There was the same reason for denying the second request to charge.

Defendant's remaining exceptions have been examined and do not seem to require further comment.

The judgment and order should be affirmed, with costs. All concur.

(161 App. Div. 506)

In re BUTTERFIELD'S WILL.

(Supreme Court, Appellate Division, Second Department. March 13, 1914.)

DESCENT AND DISTRIBUTION (§ 34*)—PERSONAL PROPERTY—COLLATERAL HEIRS PREFERRED.

Consol. Laws, c. 13, § 98, providing where there is no widow, child, or representatives of a child, personal property shall be distributed to the next of kin, in equal degree, and their legal representatives, and for distribution to brothers and sisters, and their descendants, in whatever degree, and that no representation shall be admitted among collaterals after brothers' and sisters' descendants, prefers brothers and sisters, and their descendants to the remotest degree, over all other kindred not in closer blood relationship, conforming distribution to descent of realty, and hence cousins are not entitled as next of kin as against nephews and nieces and their descendants.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 97-101; Dec. Dig. § 34.*]

Appeal from Surrogate's Court, Putnam County.

Proceedings for the probate of the will of Julia Lorillard Butterfield, deceased. From an order permitting certain first cousins of testatrix to intervene as next of kin, William E. McReynolds and another, as special guardians of certain infants, appeal. Reversed, and motion for leave to intervene denied.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and STAPLETON, JJ.

Nathan P. Bushnell, of New York City (Frederick C. Hunter, of New York City, on the brief), for appellants.

William H. Hamilton, of New York City, for respondents Georgianna Marshall and others.

Charles F. Brown, of New York City, for the proponent and executors named in will.

STAPLETON, J. The appeal is from an order of the Surrogate's Court of Putnam county, permitting certain first cousins of a testatrix to intervene as next of kin in a proceeding for the probate of a will.

The executors nominated in the will, in the petition by which the proceeding was commenced, specified, as all of the heirs at law and next of kin, a grandnephew and four great-grandnieces of the testatrix. The petition for probate contains an allegation that the testatrix left her surviving no husband, no child or children, no adopted child or children, no issue of any deceased child or children, no issue of any deceased adopted child or children, no father or mother, no brothers or sisters of the half or the whole blood, no issue of any deceased brother or sister, no uncle or aunt, and no issue of any deceased uncle or aunt except as above stated.

The surrogate, in determining the motion for leave to intervene, decided that the petitioners for intervention were children of deceased uncles of the testatrix. The sole question to be determined is whether under the Decedent Estate Law (chapter 18, Laws 1909; chapter 13

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the Consolidated Laws, § 98) the persons who have been permitted to intervene are entitled, as next of kin of the testatrix, to a distributive share of her personal property not lawfully bequeathed. The answer must be found in the Decedent Estate Law as it was written on the 6th day of August, 1913, the date of the death of the testatrix.

In *Matter of Youngs*, 73 Misc. Rep. 335, 132 N. Y. Supp. 689, the learned surrogate traced, with an accuracy that our investigation has confirmed, the history of the statutes relating to the distribution of personal property of a decedent. We quote his clear and succinct statement of the result of his labor:

"It is, of course, entirely familiar learning that the English statute of distributions in 1774 became by express re-enactment, a part of the law of this state, as it was probably before such re-enactment. It was only revised by the revisers of the Revised Statutes of 1830, without substantial change. Revisers' note to 2 R. S. p. 96, § 75.

"Chapter 686 of the Laws of 1893 next transferred without material change the statute of distributions as contained in the Revised Statutes (2 R. S. 96, § 75) to section 2732 of the Code of Civil Procedure. If we disregard a temporary alteration of the year 1898 (chapter 319), soon removed, in effect, from the statute book (Laws of 1905, c. 539), the statute of distributions, as re-enacted in the Code of Civil Procedure by chapter 686 of the Laws of 1893, remained substantially as displayed in the Revised Statutes, at least until the year 1903, when chapter 367 of the Laws of 1903 varied the language of subdivision 5 of section 75, 2 R. S. 96. Chapter 539, Laws of 1905, in like manner somewhat varied the language of subdivision 11 of section 75, 2 R. S. 97. In other respects the statute of distributions, as first enacted, temp. Charles II, remains in substance on the present statute book of this state."

Under the statute of distributions, which read as former section 2732 of the Code of Civil Procedure, as amended by chapter 319 of the Laws of 1898, the Court of Appeals (*Matter of Davenport*, 172 N. Y. 454, 65 N. E. 275) held that, where there were no others entitled to preference, a nephew, niece, and two uncles and two aunts were next of kin in equal degree, the degree being the third; that the personalty of the estate should be divided into six equal parts and so distributed; that first, second, and third cousins, descendants and representatives of deceased uncles and aunts of the intestate, should be excluded; and that as the distributees were of the same degree of kinship it was unnecessary to invoke the doctrine of representation.

In the case at bar the petitioners for intervention are all issue of uncles; that is, they are cousins and in the fourth degree of collateral consanguinity to the testatrix, as also is the grandnephew mentioned in the petition for probate. The great-grandnieces mentioned in the petition for probate are in the fifth degree.

Since the decision in *Matter of Davenport*, *ut supra*, there have been two changes in the statute regulating the distribution of personal property of intestates:

(1) The statute then contained the provision:

"Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate."

This provision was placed in the statute of distributions by chapter 319 of the Laws of 1898. Prior to the enactment of this last-mentioned statute, the law was:

"No representation shall be admitted among collaterals after brothers' and sisters' children."

This latter provision was restored, substituting the word "descendants" for "children," and the former abrogated, by chapter 539 of the Laws of 1905. The provision, as it existed before the amendment by chapter 319 of the Laws of 1898, was held to exclude, from participation in personal estates of intestates, children of first cousins in favor of first cousins, and that the brothers and sisters referred to in the statute are the brothers and sisters of the decedent. *Adee et al. v. Campbell*, 79 N. Y. 52. This case is authority for the proposition that, as the statute read at the time of the death of the testatrix, no one except brothers' and sisters' descendants could take under the statute by representation.

(2) Chapter 367 of the Laws of 1903 amended section 59 of the Decedent Estate Law by adding the words contained within brackets; so that the statute read at the time of testatrix's death:

"5. If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives; [and if all the brothers and sisters of the intestate be living, the whole surplus shall be distributed to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants in whatever degree of those dead; so that to each living brother or sister shall be distributed such share as would have been distributed to him or her if all the brothers and sisters of the intestate who shall have died leaving issue had been living, and so that there shall be distributed to such descendants in whatever degree, collectively, the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.]"

The added words are substantially the words used in section 87 of the Decedent Estate Law providing for the descent of inheritance where all nearer of kin in degree of propinquity to the intestate have predeceased him. The form only is slightly changed by the adoption of words appropriate to the legal devolution of the different species of property. What was the design of these two amendments? We think the design was clearly to prefer brothers and sisters of an intestate, and all the direct lineal descendants of brothers and sisters to the remotest degree, as distributees over all other kindred not in closer blood relationship to the intestate, and thus conform the distribution of personality to the descent of realty. No other purpose is apparent. The other provisions of the statute may be read effectually in harmony with this purpose, so as to give effect to all its provisions.

We are unable to see how section 87 and subdivision 5 of section 98 of the Decedent Estate Law, expressed in substantially the same words, are to be construed under a certain state of facts, the one as excluding the uncles and aunts and their descendants from inheritance, and the other as including them among distributees.

The petitioners for intervention have no status as next of kin of the testatrix, and the order permitting them to intervene should be reversed.

Order reversed, with \$10 costs and disbursements, and motion for leave to intervene denied, with costs. All concur.

(161 App. Div. 329)

NEW YORK CENT. & H. R. R. CO. v. ALBANY STEAM TRAP CO. et al.

(Supreme Court, Appellate Division, Third Department. March 13, 1914.)

1. EMINENT DOMAIN (§ 86*)—RAILROAD RIGHT OF WAY—NECESSITY—DISCRETION OF COMPANY.

The courts will not attempt to control the reasonable exercise of a railroad company's discretion in deciding what land is necessary to enable it to render its services.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165-167; Dec. Dig. § 86.*]

2. EMINENT DOMAIN (§ 56*)—SUFFICIENCY OF EVIDENCE—NECESSITY.

In a railroad's proceeding to condemn a strip adjoining its right of way, evidence *held* sufficient to show a necessity for the taking.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 56.*]

3. EMINENT DOMAIN (§ 149*)—SUFFICIENCY OF EVIDENCE—ADEQUATE COMPENSATION.

On the evidence in a proceeding to condemn, a strip about 36 feet in width and 190 feet adjoining a railroad right of way was taken, including about one-third of the end of a building in which heavy machinery was located. *Held*, that an award of \$13,600 was adequate.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 327-331, 401; Dec. Dig. § 149.*]

4. EMINENT DOMAIN (§ 133*)—COMPENSATION—PERSONAL PROPERTY.

In such case, the heavy machinery located in part of the building taken, carried on defendant's inventory as personal property, and which was held in place by screws and could be moved without injury to the realty, was properly valued as personal property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 358-361½; Dec. Dig. § 133.*]

Appeal from Special Term, Albany County.

Condemnation proceeding by the New York Central & Hudson River Railroad Company against the Albany Steam Trap Company and others. From a final order and from an interlocutory judgment confirming the report of the referee, etc., defendant Albany Steam Trap Company appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Holmes & Bryan, of Troy, for appellant.

Visscher, Whalen & Austin, of Albany, for respondent.

LYON, J. The real property sought to be condemned is situated along the west side of the respondent's right of way between the Broadway viaduct and Van Woert streets in the city of Albany. One parcel belonged to the Albany Steam Trap Company, and the other to Jacob W. Bloom. The latter evidently accepted the award, as the Albany Steam Trap Company alone appeals. The trial of the issues had before a referee resulted in favor of the respondent; the referee deciding that the respondent had established a necessity for the acquisition for the respondent's corporate purposes of the property sought to be acquired, and that it should have judgment against both

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

landowners, entitling it to take and hold the property upon making compensation therefor. An interlocutory judgment was thereupon granted, overruling appellant's exceptions, confirming the report of the referee, awarding condemnation, and appointing three commissioners of appraisal. The commissioners awarded the appellant, the Albany Steam Trap Company, \$13,600. The objections and exceptions filed by the appellant to the report of the commissioners were overruled and the report in all things confirmed. This appeal was thereupon taken from the final order; the appellant specifying in its notice of appeal its intention to bring up for review the interlocutory judgment.

Of the many questions raised by the appellant, the only ones calling for consideration at this time are as to the necessity of the respondent acquiring so wide a strip of the appellant's property and the adequacy of the award. As to the first of these propositions it appears that the respondent operates a railroad system extending from the city of New York to the city of Buffalo, and that daily about 60 passenger and from 75 to 100 freight train movements are made over respondent's right of way opposite the property of appellant, and that the width of the right of way at that place is only about 49 feet, and that over this space are laid four main tracks, two for through passenger and two for through freight traffic, and that this narrow space does not permit of sufficient clearance being had between the tracks for the safe operation of trains. The distance from the center of the westerly track to the center of the track next east (track 2) is 11.2 feet; from the center of track 2 to the center of track 3 is 10.9 feet; and from the center of track 3 to the center of track 4 is 11 feet. Respondent's engineers testified that the clearances required by the regular standard, and which it is apparent that the appellant requires for the safe and proper operation of its railroad, are 13 feet between the centers of tracks 1 and 2; 17 feet between the centers of tracks 2 and 3 (which is the space separating the passenger and freight tracks), and 13 feet between the centers of tracks 3 and 4. One of respondent's engineers testified that he knew of no other point upon respondent's railroad where the clearance was so small, and that the place has had to be carefully watched in order to avoid danger to the men operating trains, and that owing to increased dimensions of cars, some of which are 10½ feet in width, it has frequently been necessary to make special examinations to determine whether it was safe to permit cars to pass through this space, and by reason of the width of certain cars to divert them to another route.

In addition to the requirement for safe and proper clearances, it appears that as the tracks leave the Broadway viaduct, which is about 250 feet southerly from appellant's property, they curve to the right for about 225 feet, then run upon a straight line about 300 feet, and then curve to the left, crossing Van Woert and North Pearl streets at grade and near the intersection of said streets. These curves make the operation of respondent's road more expensive, also make it impossible, because of the buildings erected along respondent's right of way, to see up and down the tracks a sufficient distance for the safe

operation of trains. The westerly rail of the westerly track is 3 feet 7 inches at appellant's northerly line and 3 feet 9 inches at appellant's southerly line, from appellant's fence, and about 9 feet 8 inches from the northeasterly corner of its building. Standing at the northerly end of the Broadway viaduct in the center of track 2, a clear view of the tracks north of North Pearl street is obstructed by the appellant's main building. It is impossible to eliminate these curves upon the present right of way, and in order to do so and to obtain the standard clearances it will be necessary to move all the tracks westward, the westerly track being moved westerly at the Van Woert street crossing about 40 feet, and opposite appellant's property from 17 to 20 feet, which will give the respondent an approximately straight track for about 1,500 feet north of the Broadway viaduct. The present plans contemplate taking a strip of appellant's land about 35 feet wide measured at right angles to the division line between lands of the appellant and respondent.

Respondent's engineers testify that proper construction of the track bed, owing to the great weight of the trains which pass over it, requires the placing underneath the track of ballast from 18 to 24 inches in thickness, the shoulder of which shall be 9 feet from the center of the track; the construction of a ditch at least 3 feet wide outside that, to carry surface water and of sufficient depth to drain the subgrade; and sufficient land outside the ditch to provide the necessary slope to the ditch, taking into consideration the elevation of the adjoining lands. The construction which would appear to be required, owing to the cellar underneath the portion of appellant's building sought to be taken being of the unusual depth of 12 feet, would be the building of a retaining wall of sufficient height and thickness to retain the pressure of the earth upon the railroad side of the wall. This construction would also require the appropriation of a narrow strip of land outside the wall for use in constructing the wall. In either case all the land sought to be acquired would be necessary for the safe and proper construction and operation of defendant's railroad. It appears, also, that plans have been prepared by the city of Albany, and submitted to the Public Service Commission, contemplating the raising of the grade of respondent's railroad north of the Broadway viaduct, and the elimination of the Van Woert street crossing, and that the plans of respondent in connection with the acquisition of the real property of appellant have been made in conjunction with said plans for the elimination of said grade crossings.

[1, 2] The appellant contends that the condemnation is not in good faith and that the respondent does not intend to make the improvements alleged. This claim appears to be wholly unwarranted, as the necessity for the improvement is urgent, and the respondent has already acquired all the other lands needed for making it. The appellant also contends that the referee decided the question as to the quantity of land which the respondent might take under a misapprehension of the law; the appellant claiming that the referee's finding was based upon the law giving to the railroad company the right to determine that question for itself and that such determination was conclusive. I

do not so construe the finding of the referee, but rather that he held that the respondent had the right to determine what betterments were necessary for its service, and that the court could not supervise and control the reasonable and lawful exercise of that discretion in adopting plans for the consummation of its purpose. The conclusion of the referee is amply supported by the authorities:

"To a large extent the company is to determine, under the delegation of power to it by the state, the extent of its wants, and to fix upon the location of lands, subject to the qualification that the purposes for which the land is to be taken are strictly within its charter. Where a reasonable necessity is shown, a reasonable discretion must be exercised, and the courts will not interfere to control that discretion, unless it will result in great injury or is influenced by some improper motive." *In re New York Cent. & H. R. R. Co. v. M. G. L. Co.*, 63 N. Y. 326, 331.

"Where the necessity exists, and a reasonable discretion is exercised, the courts will not interfere." *Matter of New York Cent. & H. R. R. Co.*, 77 N. Y. 248.

"When the necessity exists and a reasonable discretion is used, the courts will not interfere, even if the exercise of the power to take lands under the statute is attended with extreme inconvenience and hardship to individuals." *Matter of New York, L. & W. R. R. Co.*, 33 Hun, 148, affirmed 98 N. Y. 664; *Syracuse, Lake Shore & Northern R. R. Co. v. Carrier*, 149 App. Div. 411, 416, 134 N. Y. Supp. 791.

The evidence bears out the decision of the referee, which was confirmed by the court upon granting the order appointing commissioners of appraisal, to the effect that the respondent had established a necessity for the acquisition of the property sought to be acquired from the appellant herein for the respondent's corporate purposes.

[3, 4] As to the adequacy of the award of \$13,600: The appellant's property is about 36½ feet wide and runs from respondent's right of way to North Pearl street, a distance of about 190 feet. Situated nearly at the easterly end of the lot is appellant's main building, built of brick, 36½ feet wide, 78½ feet long, with the east half three stories high and the west half four stories high, with a cellar under all. The portion sought to be condemned included about one-third of the easterly end of this building, and is 37 feet long on the southerly line and 40.3 feet on the northerly line. In this building is located heavy machinery used by the appellant in its business. Westerly of this building is the one-story foundry, and westerly of that and fronting on North Pearl street, the office building. The property was purchased by the appellant in 1906 for \$4,500. The appellant expended in repairing the office and main building and in erecting the foundry about \$8,400, making the cost of the property to appellant about \$12,900. The property was carried by appellant upon its inventory at \$13,644.54, or less than \$50 more than has been awarded appellant for the piece to be taken by respondent. Upon the hearing before the commissioners the appellant claimed that a large portion of its machinery was so affixed to the building as to be a part of the real estate, and that the commissioners should make their award accordingly. It appears that the greater portion of the heavy machinery has been owned by the appellant for about 20 years, and has been twice moved as appellant changed its business location. The machinery has been carried upon appellant's inventory as personal property. It has been

fastened and held in place by screws, and can be moved without injury to the real estate. It was properly held by the commissioners to be personal property.

The appellant also claims that the finding of the referee that the respondent had been unable to agree with the appellant for the purchase of the strip of land, although it had made efforts so to do, was not warranted by the evidence. The proof was that, prior to the proceedings being instituted, respondent's agent had several conversations with appellant's president, who was the owner of a majority of the stock, regarding the purchase of the strip of land, exhibiting a map of the property desired, and was told that the company would not consider any proposition to sell a part, but would sell the whole of the premises for \$35,000, and that he would make no price on a part. Later an offer to purchase was served upon the president of appellant, and later another offer was left at the office of appellant with the bookkeeper in charge, to which no response was made. I think the finding referred to was warranted, and that the award was ample. There are no exceptions calling for a reversal of the order appealed from.

The interlocutory judgment and final order should be affirmed. All concur.

(161 App. Div. 404)

LOGAN v. FIDELITY-PHENIX FIRE INS. CO. OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. March 20, 1914.)

1. CORPORATIONS (§ 432*)—OFFICERS—BORROWING SECURITIES—AUTHORITY.

Where the president of an insurance company, without authority conferred by the board of directors, borrowed certain corporate stock from plaintiff, giving therefor a receipt reciting that the stock was borrowed for the account of the insurance company to be returned on demand, signed as president, such receipt was not conclusive as to whether the transaction was for the benefit of the insurance company or of the president individually.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

2. CORPORATIONS (§ 413*)—ACTIONS OF PRESIDENT—BORROWING SECURITIES—AUTHORITY.

A by-law of an insurance company, declaring that the president shall have special supervision and care over the property and concerns of the company, did not authorize him to borrow securities to conceal his own defalcation, and make the company responsible for the return thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1647-1649; Dec. Dig. § 413.*]

3. CORPORATIONS (§ 425*)—AUTHORITY OF PRESIDENT—BORROWING SECURITIES—ESTOPPEL.

The president of an insurance company had no implied authority to borrow securities from a director, ostensibly to retire certain reinsurance risks, but in fact to cover his own defalcations, and, having done so, the corporation was not estopped to deny the existence of any such authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701, 1705; Dec. Dig. § 425.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. CONTRACTS (§§ 131, 138*)—ILLEGALITY—ENFORCEMENT—LOAN OF SECURITIES FOR ILLEGAL PURPOSE.

Where plaintiff, a director of an insurance company and a member of the committee of accounts whose duty it was to examine the corporation's assets and securities at least every six months, loaned certain corporate stock to the president, on his representation that it was to deceive the insurance commissioner, while it was in fact to conceal his own defalcations consisting of a sale of certain bonds belonging to the corporation, which would have been discovered had plaintiff made the proper examination of the company's assets and securities, plaintiff was chargeable with notice of such defalcation, and, being unable to prove his claim against the corporation without proving his illegal agreement with the president, was not entitled, after the president's death, to recover against the corporation for its alleged conversion of securities by reason of its refusal to return the same.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 594-607, 681-700; Dec. Dig. §§ 131, 138.*]

Appeal from Trial Term, Kings County.

Action by William J. Logan against the Fidelity-Phenix Fire Insurance Company of New York. From a judgment for plaintiff and from an order denying defendant's motion for a new trial, it appeals. Reversed and remanded.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

I. R. Oeland, of Brooklyn, for appellant.

John D. Fearhake, of New Canaan (James M. Gifford, of New York City, on the brief), for respondent.

BURR, J. Plaintiff alleges that on October 27, 1909, he was the owner of 1,400 shares of stock of the American Sugar Refining Company; that at that time he loaned it to the Phenix Insurance Company (to whose obligations defendant has succeeded), to be returned on demand; and that on December 18, 1909, he demanded the return of said stock, which was refused. In an action for conversion he has recovered a verdict for \$198,375, the value of said stock. From a judgment entered thereon, and from an order denying a motion for a new trial, this appeal is taken.

The crucial question is: To whom was this stock loaned? Was it loaned to the insurance company to be used for its lawful purposes, or was the transaction a personal one between plaintiff and one George P. Sheldon? There is no substantial conflict of evidence. The material facts are as follows:

On October 27, 1909, Sheldon was president of the Phenix Insurance Company, and had been for 20 years. Plaintiff was one of its board of directors, and had been for about 12 years, and was Sheldon's intimate friend. Plaintiff was on the date named, and for several years had been, a member of the accounts committee, of the executive committee, and of the finance committee of said board. In January, 1908, Sheldon caused to be entered upon the books of the insurance company a list of stocks and bonds which he claimed to have bought on its account, of the value in the aggregate of \$489,-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

576.67. These were thereafter included in its statement of assets. As matter of fact, no such purchase had been made. There came a time when Sheldon must produce the securities or his fraud would be detected. Accordingly, in January, 1909, stocks and bonds of the character and value indicated by the entries in its books were purchased, but in the meantime these had advanced in price to \$622,-611.95, so that to purchase the same required an additional expenditure, plus interest on the adjustment, of nearly \$140,000. This amount Sheldon must in some way make good. To accomplish this he directed the brokerage firm of Fiske & Robinson to sell for account of the company, New York City 3½ per cent. bonds of the par value of \$200,000. Such sale was made, and the company given credit therefor in the sum of \$180,000, upon a statement issued by said firm February 28, 1909. Although these bonds were taken from the box containing the company's securities, the sale thereof was never entered upon its books; but they were still included in the list of its assets.

In October, 1909, the representatives of the insurance department began an examination of the affairs of the company. It was inevitable that before the completion of this examination the loss of the New York City bonds would be detected, and it was again necessary for Sheldon to take some steps to conceal his fraudulent conduct. The account between Fiske & Robinson and the company as it appeared upon their books, and upon said statement of February 28, 1909, then sent to the company's office, showed among other transactions the sale of the New York City bonds on January 12, 1909. Crediting the company with the proceeds of this sale at \$180,000, and at the close of February in that year there was due it upon this and other transactions as to which there seems to be no question the sum of \$52,596.46. This balance was continued without change except by way of interest adjustments until April 2, 1909, when the company made a cash deposit with said firm of \$75,000, and the balance thus created continued without change until September 30th of that year. At this time the surplus arising from the sale of the city bonds, plus the cash deposit of \$75,000, plus interest on balances, amounted to \$121,541.30. No change was made in said account until October 28, 1909. Two or three days before that time, Sheldon seems to have realized that the first step necessary to take was to procure a change in the form of this account. To make it correspond with the books of his company, it should have only shown a balance equal to the sum of \$75,000 deposited April 2, 1909, with interest from that date, and it should not have shown any sale of New City bonds on January 12, 1909. Between October 25th and October 28th there were two or three interviews between Mr. Sheldon and Mr. Robinson of that firm on the subject, and at least one letter was written by Sheldon. In substance, Sheldon proposed to Fiske & Robinson to "remodel" the account so as to cancel the sale of New York City bonds, to return the bonds to the company, and to omit the credit balance resulting from such sale. Fiske & Robinson agreed to thus readjust the account. While the cancellation of the sale of said bonds reduced the credit balance of the company to just exactly the sum of

\$75,000 and accrued interest, the return of the bonds would have made a debit balance arising out of this item which, with interest, amounted to \$138,542.23. This sum Sheldon undertook to pay, and did pay as hereinafter set forth, and, upon receiving the "remodeled" statement, he sent his personal check for that sum, dated October 28, 1909, to Fiske & Robinson, and said firm delivered to the secretary of the company the 200 Dock bonds. In reality, Sheldon bought the bonds back and restored them to the treasury of the company. The company was then actually in possession of its bonds, as its own books during that entire period falsely stated was the fact, and its statement of account with Fiske & Robinson upon its face might not be criticised for variance from its books.

How did Sheldon obtain the money necessary to make this large payment of \$138,542.23? On October 26, 1909, he went to the plaintiff and, after telling him that the insurance examiners were then at work, he falsely stated to him in substance that there was entered upon the books of the company a large item for reinsurance of the risks of another company. If that were allowed to remain, he added:

"I am afraid that our surplus might get down so we will have to drop out the 20 per cent. dividend; but, if I could get that reinsurance we took on out of the way, it will be all right."

The plan was to place this reinsurance with some other company and take the item from the Phenix books. To accomplish this it would seem to be necessary to pay the premium of such reinsurance. If this were done, it would, of course, deplete the cash in the treasury of the Phenix Company by just that amount. Whether that would be sufficient to so reduce the surplus that a dividend of 20 per cent. upon the stock, which for some time previously thereto had been paid (see Insurance Law, Consolidated Laws, c. 28 [Laws of 1909, c. 33, as amended Laws of 1909, c. 301] §§ 22 and 78), would be no longer permissible under the law, does not clearly appear; but both parties seemed to be apprehensive of this. If the arrangement to retire this reinsurance was merely a temporary one, for a few days only, as Sheldon stated it would be, and accomplished by cash furnished elsewhere than from the insurance company's treasury, and if this reinsurance was taken back as soon as the examiners had departed, the loss, if any, would be relatively small. Plaintiff asked Sheldon how much cash he would require for this purpose. He promised to let him know the next day. The next day Sheldon told him that he would require \$145,000. Plaintiff told him that he did not have that much money, but he added, "I can give you some securities, and you can borrow on them." Therefore, on October 27th, he gave to Sheldon 14 certificates, of 100 shares each, of the stock of the American Sugar Refining Company, indorsed for transfer, and Sheldon gave him a receipt in the following form:

"New York, October 27, 1909.

"Received of Mr. Wm. J. Logan fourteen hundred (1,400) shares of Am. Sugar Refining Co. com. stock for acct. of Phenix Insurance Co., to be returned upon demand.
George P. Sheldon, President."

Sheldon took this stock, went to the office of Carter, Wilder & Co., another firm of brokers, hypothecated it with them, and obtained their check for \$145,000. This check he deposited to the credit of his personal account in the Liberty National Bank. He was thus enabled, upon the succeeding day, when the transactions above referred to with Fiske & Robinson were completed, to give them his certified personal check for \$138,542.23, the balance due to them on the "remodeling" of the account with the insurance company. There still remained about \$8,000 to Sheldon's credit with the Liberty National Bank after payment of this check. A portion of this was drawn by him in his lifetime, and none of it, so far as appears, was ever received by defendant. Within a few days thereafter Sheldon was seized with a fatal illness, and on December 25, 1909, he died. The stock hypothecated with Carter, Wilder & Co. was subsequently sold, and the surplus above the amount necessary to discharge the loan was paid to Sheldon's estate.

[1] The fact that the receipt delivered to plaintiff at the time that the stock was delivered to Sheldon is in form a receipt by the insurance company is not conclusive as to the transaction. *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 283. Even if the corporate seal had been affixed thereto, it would at most only have been prima facie evidence that it was affixed by proper authority, and would have imposed upon the party objecting thereto to show that it was affixed surreptitiously or improperly. *Quackenboss v. Globe & R. S. Ins. Co.*, 177 N. Y. 71, 69 N. E. 223. No authority by direct action of the board of directors of the insurance company to Sheldon, its president, to borrow either money or securities, was proved, if indeed under the circumstances here disclosed such action would have been sufficient to impose obligation upon the defendant.

[2] Respondent seems to rely for express authority upon a by-law of the company defining the duties of its president, which, among other things, imposed upon him the duty "to have a special supervision and care over the property and concerns of the company." It would certainly be a strange use of the words "supervision" and "care" to hold that this by-law would permit the president, in order to conceal his own defalcation, to borrow either money or securities upon the credit of the company, and make it responsible for the return thereof.

[3] Neither is there any evidence of implied authority to borrow, nor is the defendant estopped from denying, under the circumstances here disclosed, the existence of such authority. In this case we have a director dealing with his own corporation. He is chargeable with such knowledge as to its affairs as he actually possessed, or which in the discharge of his duties he should have had. *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585; *Syracuse Savings Bank v. Merrick*, 182 N. Y. 387, 75 N. E. 232.

[4] Plaintiff admitted that he knew that it was his duty as a director "to look after the assets of the company." The duty imposed upon him by the by-laws as one of the committee of accounts was "to audit the books and accounts of the secretary, and examine the assets and securities of the company at least once in every six months, and

report the condition thereof to the board of directors." If that duty had been faithfully discharged during the year 1908, it is difficult to see how it could have escaped attention that entered upon the books of the company was a long list of bonds and stocks purporting to be its property, which an examination of its "assets and securities" would disclose had nothing corresponding thereto in the company's strong-box. Although it was the duty of said committee, including plaintiff, to make such examination of assets and securities on the 1st of January and July in each year, this duty was entirely neglected in July, 1909. If it had been faithfully performed, plaintiff must have discovered that the \$200,000 of New York City bonds, which was enumerated among the company's assets, was not in fact in its possession. As it was the duty of the finance committee, of which he was also a member, "to direct the sale and transfer of any stocks belonging to the company," he was chargeable with knowledge that the sale of these securities had never been authorized. Accurately speaking, it is true that these were not "stocks," but bonds. But inasmuch as the finance committee was "to take charge of the funds of the company," it was at least within the spirit of this by-law to impose upon this committee the duty of authorizing the sale and transfer of all securities, whether technically described as stocks or bonds. It is conceded that the statement of Sheldon that there was upon the books of the company an item of "reinsurance," which would reduce its surplus, was false, and an examination of the books would have instantly disclosed that. If plaintiff, with actual knowledge of all of these facts, had put Sheldon in possession of his Sugar Refining Company's stock, it is difficult to see upon what theory defendant was bound to return the same. It is apparent that they were not borrowed for its use. His means of knowledge and his duty to acquire knowledge place him in the same position as if he had actual knowledge. *Ward v. City Trust Co.*, supra; *Syracuse Savings Bank v. Merrick*, supra.

Unless defendant was bound to return him his stock on demand, it cannot be held liable in an action for conversion, for only out of such obligation and a refusal of compliance can conversion arise. *Chankalian v. Powers*, 89 App. Div. 395, 85 N. Y. Supp. 753. In addition, plaintiff knew that in September, 1909, when he moved the adoption of a resolution for the payment to the stockholders of a dividend of 5 per cent. on the capital stock of defendant, it had on hand, in addition to stocks and bonds amounting to several millions of dollars, cash in excess of \$800,000. Under such circumstances he was at least put upon his inquiry as to why he should be called upon to loan to the company his securities to enable it to raise cash thereon to dispose of its reinsurance account, instead of using its own cash and securities for that purpose. The only possible explanation is the one offered, that the loan was to carry out a secret agreement between Sheldon and himself to at least mislead the representatives of the insurance department in the examination which they were then making. If the cash and securities of the company were used for the purpose of getting rid of this item of reinsurance, its assets would by just so much be reduced, and consequently its surplus. If his securities were to be used for

that purpose upon an open and recognized loan thereof by him to the company, the books of the company must show a liability to him equal to the amount of the loan, and again by just so much would its liabilities be increased and its surplus correspondingly reduced. Plaintiff did not at that time disclose the fact of this loan to any of his fellow directors, and the only inference to be drawn from the transaction is that this loan was not to be entered upon the books of the company, and to that extent said books would not represent the true state of its affairs, and to the same extent the examiners would be misled. This was not only against good morals, but in express violation of the duty imposed upon him as one of the directors of the company.

"A director * * * of any corporation * * * who * * * makes or concurs in making any false entry, or concurs in omitting to make any material entry in its books or accounts, * * * is guilty of a misdemeanor." Penal Law (Consol. Laws 1909, c. 40) § 665.

"The superintendent of insurance shall, as often as he deems it expedient, examine into the affairs of any insurance corporation doing business in this state, * * * and the officers and agents of such corporation shall facilitate such examination and aid the examiners in making the same so far as it is in their power to do so." Insurance Law, supra, § 39.

The purpose of such examination is to obtain accurate information as to the affairs of the company in the interest of the stockholders, its policy holders, and the public who might deal with it. Can a director be said to facilitate such examination and to aid the examiners, who connives at the omission to make material entries in the books of said company as to its liabilities for the sake of creating a fictitious surplus?

"All contracts or agreements which have for their object anything which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void." *Bell v. Leggett*, 7 N. Y. 176; *Wheeler v. Russell*, 17 Mass. 257, on page 281.

While it is true that an agreement will be enforced even if it is incidentally connected with an illegal transaction, provided that it is supported by an independent consideration, and the plaintiff does not need the aid of the illegal transaction to make out his case (*Gray v. Hook*, 4 N. Y. 449; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Dennehy v. McNulta*, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609; *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352, 56 N. W. 864, 39 Am. St. Rep. 902; *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 56 Ill. App. 248; *Washington Irrigation Co. v. Krutz*, 119 Fed. 279, 56 C. C. A. 1), such is not the case where the party does require aid from the illegal transaction to establish his claim (*Gray v. Hook*, supra; *Woodworth v. Bennett*, supra; *Materne v. Horwitz*, 101 N. Y. 469, 5 N. E. 331).

In the case at bar, the loaning agreement was not made with the express purpose of enabling defendant to repossess itself of its securities of which it had been defrauded by Sheldon. To prove his debt, plaintiff had to show the improper transaction out of which the obligation to return the stock grew. It seems to us that, even if the directors of the company had expressly authorized the making of the agreement which plaintiff asserts was made, defendant could not, within the authorities above cited, be held thereon in conversion for a fail-

ure to return said stock. The respondent contends that, because the proceeds of plaintiff's securities were in fact used by Sheldon to buy back and restore to defendant property which he had purloined from it, defendant thereby became responsible for his agreement to return these securities on demand. The conclusion does not follow from this fact alone. The case of *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698, greatly relied upon by respondent, is clearly distinguishable from the case at bar. In that case one Gray was the treasurer of both corporations. He had embezzled money from the plaintiff. To cover this deficiency, he took money from defendant's treasury and paid it into plaintiff's treasury, and it was held that plaintiff could not retain it. But the vital distinction is that in that case plaintiff came into possession of the money "through the act of no person other than Gray himself." In that case defendant did not voluntarily part with its funds for any purpose. In the case at bar, plaintiff did. Whether his securities could be reached in an action in equity to trace assets to which all those connected with the transaction should be parties, we need not now determine. This is an action at law, and aside from the fact that Sheldon had no authority, express or implied, to borrow plaintiff's stock for the purposes of the company, the contract of borrowing is so connected with and dependent upon an illegal transaction that the whole of it, including the promise to return, is unenforceable.

We are of opinion that at the close of the entire case the complaint should have been dismissed. Within the authority now conferred upon us, instead of ordering a new trial, we direct that the judgment and order appealed from be reversed, and the complaint dismissed, with costs of the action and of this appeal.

JENKS, P. J., and CARR and RICH, JJ., concur. THOMAS, J., concurs upon the ground that the bonds were loaned for an illegal purpose in which the plaintiff knowingly participated.

EISEMANN v. HAZARD.

(Supreme Court, Appellate Division, First Department. March 13, 1914.)

1. ATTORNEY AND CLIENT (§ 130*)—COMPENSATION—RIGHT TO COMPENSATION.

Defendant retained plaintiff, an attorney, to protect her interests in a firm which was financially embarrassed. Plaintiff, who was also attorney for creditors of the firm, filed an involuntary petition in bankruptcy against the firm, and as representative of the creditors effected an advantageous composition; at the same time compelling others in the firm to give defendant control of the new corporation which was to succeed the firm by threatening to prevent the composition if they did not accede to his demands. *Held*, that plaintiff cannot recover compensation for services rendered under such circumstances, for an attorney may not represent adverse interests or undertake to discharge conflicting duties.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 292, 293; Dec. Dig. § 130.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. ATTORNEY AND CLIENT (§ 130*)—COMPENSATION—RIGHT TO.

The fact that plaintiff disclosed to his associate members of the committee of creditors, who determined on the composition, that he was representing defendant, will not entitle him to compensation; the disclosure not being to all of the creditors, and the law not allowing an attorney to act in any capacity inconsistent with his office.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 292, 293; Dec. Dig. § 130.*]

3. ATTORNEY AND CLIENT (§ 165*)—DEFENSES—NECESSITY OF PLEADING.

It is unnecessary for one sued for an attorney's fee to set up the illegality of the attorney's action in representing conflicting interests, where the facts appear from the testimony given in support of the attorney's case.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 365-367; Dec. Dig. § 165.*]

Appeal from Trial Term, New York County.

Action by Frederick F. Eisemann against Florence A. Hazard. From a judgment for plaintiff and an order denying her motion for new trial, defendant appeals. Reversed, and complaint dismissed.

See, also, 144 N. Y. Supp. 1114.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, DOWLING, and HOTCHKISS, JJ.

James A. Gray, of New York City, for appellant.

Jerome Eisner, of New York City, for respondent.

HOTCHKISS, J. The plaintiff, an attorney at law, brought this action to recover a balance alleged to be due him for legal services. The answer was a general denial. The defendant is the widow of one Hazard, who, at the time of his death, was a partner and apparently the holder of the major interest in the firm of E. C. Hazard & Co. of this city, to which interest defendant has apparently succeeded on the death of her husband. Some time in August, 1907, the defendant retained plaintiff to represent her interests in the firm, which had become embarrassed and the affairs of which were then in a precarious state; the creditors numbering about 500. After examining with some particularity into its affairs, plaintiff advised that he should be permitted to put the firm into bankruptcy with a view to effecting a settlement with its creditors on a basis which would save sufficient of its assets to permit the business to be continued, and with the understanding that, incidentally, in the course of the proceedings, plaintiff would endeavor to compel the active partners in the firm to relinquish to defendant sufficient of their interest in the business to restore to defendant shares or interests which she claimed these partners had unjustly obtained from her after the death of her husband. Having secured the consent of firm creditors to the necessary number and amount, all or a majority of whom were clients of the plaintiff, an involuntary petition in bankruptcy was filed against the firm and a receiver of its property was appointed. Shortly thereafter, the plaintiff caused a meeting of creditors to be called for the purpose of securing a composition, at which meeting, at plaintiff's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

suggestion, a committee of creditors was appointed to investigate and advise the general body of creditors with respect to the proposed composition, to which committee plaintiff was added as a member. At its first meeting plaintiff informed this committee that he was the attorney for this defendant Mrs. Hazard, and at the same time he explained the reasons for and urged upon the committee the desirability of a composition which "would be sufficiently small" to leave the firm adequate capital with which to continue business. Opposition to this plan was at once developed; several of the committee being in favor of closing the business out in the regular course of bankruptcy. There were a number of conferences among the creditors at which plaintiff represented, "for the purpose of the argument," William Lanahan & Son, regular clients of plaintiff, large creditors of the bankrupt firm, one of the petitioning creditors, and the consent of whom to the proposed composition was important. This consent plaintiff informed the committee would be given to a composition on the basis of 60 cents, of which 10 cents should be paid in cash and a like amount every two months thereafter, the same to be represented by five notes of a new corporation to be formed to take over the business. The consent of a substantial number of creditors having been secured to this composition, plaintiff prepared for the committee a written report recommending the same, which they signed, and plaintiff proceeded to secure the necessary consents of other creditors. To this end, plaintiff at one time called a meeting which was attended by many of the creditors, and to these he submitted the committee's report and strongly recommended its acceptance, and ultimately he succeeded in obtaining the consent of a sufficient number of creditors in value and in amount to make the composition effective. The plaintiff secured the consent of the partners of the bankrupt firm to a readjustment of interests so as to give the defendant control of the new corporation by threats that, unless they consented to such readjustment, he would advise the committee not to accept the composition, thus defeating the proposed reorganization. Having secured powers of attorney or similar authority from sufficient of the creditors, a creditors' meeting was held in the bankruptcy proceedings, at which meeting plaintiff elected himself trustee and as such, under orders of court, operated the business until the reorganization was completed and the business turned over to the new company.

In January, 1908, the plaintiff first took up with the defendant the matter of his compensation, and he then asked her how much of his bill she wished him "to charge against the partnership and [how much] against the bankruptcy proceedings," to which defendant answered: "Well, how much can I charge? How much are you going to charge me first?" To this plaintiff responded that he would charge \$10,000 for all his services and would, if defendant wished, put the entire charge upon the bankrupt estate. It was finally arranged that plaintiff should receive from the estate of the bankrupts \$3,000 for his services as trustee, and \$500 for his services as attorney for the petitioning creditors, for which two amounts he agreed to give de-

defendant credit on account of his proposed fee of \$10,000 which she was to pay to him. Plaintiff subsequently induced the other partners of the bankrupt firm to consent that he should receive the foregoing \$3,500 from the bankrupt estate, because, "of course, there was no way for them [to object]; Mrs. Hazard having control."

[1, 2] All of the foregoing appeared from the plaintiff's own testimony. It is unnecessary to comment on the ethics of plaintiff's conduct as thus disclosed, further than to say that it plainly appeared that plaintiff undertook to represent conflicting interests and that, while acting as attorney for this defendant, he used the opportunities afforded as a member of the committee of creditors, aided by his apparent ability to control or favorably influence important creditors, who were among his general clients and who apparently served as decoys, to bring about a composition and settlement favorable to this defendant, his particular client, which settlement was the chief end and purpose of his retainer. The law will not assist him in recovering compensation for services rendered under such circumstances. It is an elementary proposition, founded on one of the oldest and soundest maxims of good morals, that an attorney may not represent adverse interests or undertake to discharge conflicting duties, and that, if he does so, he cannot receive compensation from either party. The rule is designed not only to prevent dishonest practitioners from fraudulent conduct, "but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests rather than to enforce to their full extent the rights of the interest which he should alone represent." *Strong v. International B. L. & I. Union*, 82 Ill. App. 426. It is of no importance that the plaintiff informed his associate members of the committee of creditors that he represented this defendant. There is nothing to show that any such disclosure was made to any of the numerous creditors other than those who were members of the committee. But even if such disclosure had been made, the situation would not be changed, because the matter is not one wholly within the control of the parties. For reasons of public policy, the courts will not allow an attorney to act in any capacity or assume any duty inconsistent with his office of attorney. *Anonymous*, 7 Mod. 47; *Herrick v. Catley*, 1 Daly, 512; *White v. Haffaker*, 27 Ill. 349; *Spinks v. Davis*, 32 Miss. 152.

[3] It is true that the original retainer under which plaintiff was employed did not necessarily involve services of an 'illegal nature'; but, to accomplish the purposes of his retainer and to secure a reorganization of the business and the control thereof by defendant, the plaintiff voluntarily assumed a position and rendered services materially affecting the success of the task he had undertaken and of a character which the court will not recognize as the basis of compensation. It was not necessary for the defendant to plead this defense, because the facts appeared from testimony given in support of plaintiff's case. *Milbank v. Jones*, 127 N. Y. 370, 28 N. E. 31, 24 Am.

St. Rep. 454; *Drake v. Lauer*, 93 App. Div. 86, 86 N. Y. Supp. 986, affirmed 182 N. Y. 533, 75 N. E. 1129.

The judgment should be reversed, and the complaint dismissed, with costs. All concur.

ORTH V. ANDERSON et al.

(Supreme Court, Appellate Division, Third Department. March 13, 1914.)

1. MORTGAGES (§ 417*)—PERSONS ENTITLED TO FORECLOSE.

If defendant was really the debtor and plaintiff merely signed for defendant's accommodation, the fact that plaintiff's name appeared upon a renewal note as maker with defendant's name as indorser would not affect their actual relations to each other, nor put plaintiff in a situation, as the payer of the renewed note, which defendant's wife had made and secured by mortgage on her property for defendant's accommodation, and which plaintiff had indorsed for the same reason, to foreclose the mortgage against the wife.

[Ed. Note.—For other cases; see Mortgages, Cent. Dig. §§ 1227-1236; Dec. Dig. § 417.*]

2. PRINCIPAL AND SURETY (§ 112*)—RELEASE OF SURETY—PAYMENT.

A note executed by defendant and plaintiff, and signed by defendant's wife for his accommodation, became due on August 3, and went to protest, and on August 4th a new note for the same amount was signed by plaintiff and indorsed by defendant, which plaintiff thereafter placed to his own credit in a bank, and gave the bank his check for the amount of the original note, paying interest with money furnished by defendant, and the bank marked the original note "paid" and delivered it to plaintiff. *Held*, that the acceptance by plaintiff of the new note extinguished the wife's obligation as surety on the original note.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 226-234; Dec. Dig. § 112.*]

3. BILLS AND NOTES (§ 430*)—PAYMENT—PAYMENT BY NOTE.

The substitution of a note signed by a third person in place of a prior note constitutes a payment of the prior note, if that was the intention of the parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1251-1256; Dec. Dig. § 430.*]

4. PRINCIPAL AND SURETY (§ 104*)—DISCHARGE OF SURETY—EXTENSION OF TIME OF PAYMENT.

An extension of the time of payment to the debtor discharges a known surety on a note, who did not consent to such extension.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 186-190, 193-195, 197-199, 200; Dec. Dig. § 104.*]

5. MORTGAGES (§ 86*)—VALIDITY—DURESS—EVIDENCE.

Evidence *held* to show that the note and mortgage involved which were signed by a married woman were executed by her through duress.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1350, 1355, 1364; Dec. Dig. § 86.*]

Smith, P. J., and Lyon, J., dissenting.

Appeal from Special Term, Sullivan County.

Action by Philip Orth against Frank S. Anderson and others. From a judgment for plaintiff, defendants appeal. Reversed, and complaint dismissed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

John D. Lyons, of Monticello, for appellants.
James H. Curtis, of Callicoon, for respondent.

JOHN M. KELLOGG, J. If we assume that Mrs. Anderson executed the note and mortgage without duress, the plaintiff's testimony, the uncontradicted evidence, and the reasonable inferences therefrom put him out of court.

The defendant Frank S. Anderson is a lawyer, and was a director in the Callicoon National Bank. The plaintiff was his life-long friend and his client. Anderson had conveyed his house and lot to his wife and infant son, by a deed which for some time was not recorded. It was, however, recorded some time after May 3 and before August 6, 1910. He and his wife had domestic troubles, and he left her before the note in question became due. He had arranged with the plaintiff for the indorsement of his note at the bank. His wife signed the note and mortgage in question for her husband's accommodation solely, under the agreement that he was to indorse it and pay it when due, without renewal. The note was dated May 3, 1910, and payable to the plaintiff's order, for \$2,500, three months from date, with interest. Anderson took it to the plaintiff, who indorsed it at his request and solely for his accommodation. The plaintiff says he gave directions that the mortgage should be recorded. It was recorded and remained in Anderson's possession. He told the plaintiff when the note was indorsed that he could not indorse it for the reason that he owed the bank \$2,500, which was the limit of his liability under the law. He took the note to the bank. The cashier suggested that he indorse it, but he did not, and it was passed to his credit some time during the day of May 3d. It became due August 3d, when he had to his credit in the bank \$2,477.12. The note went to protest. Nothing was said to the wife about it. The plaintiff knew that she was to receive none of the money from the note; that the debt was the debt of the husband; that the wife had made the note solely for his accommodation; and that as between the husband and wife he was in fact the principal debtor, she the surety. A new note was prepared and dated August 4th for the same amount, which was signed by the plaintiff and indorsed by Anderson. The plaintiff took it to the bank August 6th, had it placed to his credit, gave the bank his check for \$2,500, the face of the original note, and paid the interest with money furnished by Anderson. The bank marked her note paid and delivered it to the plaintiff. Upon the same day the summons and complaint in foreclosure were served upon the wife and the infant son. The summons and complaint, the papers in foreclosure, together with the affidavits for a receiver, were prepared in Anderson's office, and he admitted personal service. When the note upon which Anderson was indorser became due, November 4th, it was renewed in like manner; the plaintiff receiving credit for the new note, giving his check, and receiving the old note. The note was renewed from time to time. The last renewal became due November 8, 1911, before which time Anderson had left for

parts unknown. He was evidently a man of means, and had at different occasions during the time in question quite large sums on deposit in the bank. The transaction at the bank August 6th, when the husband's name was substituted on the note and the wife's name left off, is properly characterized by the plaintiff when he swears "after this note was due he (Anderson) went on a note in this same bank and created a new obligation to take up this note."

[1, 2] The fact that plaintiff drew his check for the wife's note is entirely unimportant. The renewal of the husband's note was made in the same manner, and it is conceded that it was a mere renewal and not a payment. It is common experience that in making renewals a bank gives credit for the new note, delivering the old one upon receipt of a check, and at times no check is given. It is a mere matter of bookkeeping and convenience which method is adopted; the effect of the transaction is the same. The fact that upon the note the plaintiff appears as a maker and Anderson as an indorser does not affect their actual relations to each other. It is evident that Anderson did not indorse the note for the plaintiff's accommodation, but because he was the actual debtor, the party who had the money, the party for whose accommodation the plaintiff had indorsed the first note. Both maker and indorser had in mind that Anderson was making the renewal, as he paid the interest. The relations of the parties, therefore, were that Anderson was the principal debtor, the plaintiff his surety for his accommodation solely, while the wife had no knowledge whatever of the transaction. Her note was extinguished by the acceptance of the new note; her principal and his surety had relieved her from further obligation. At the time he indorsed Mrs. Anderson's note, the plaintiff claims he did not know of the unrecorded deed. The complaint shows that at the time her note was taken from the bank and the new note substituted he had knowledge of that deed. With such knowledge, he and Anderson replaced her note in the bank with their obligation, payable in three months time, and from time to time made renewals thereof. The plaintiff well understood that Anderson was the party liable for the payment of the renewal notes. Referring to the last renewal, he was asked: "Q. Why didn't you take steps to compel Frank Anderson to pay that note?" He answered: "That note was not due at that time; it did become due shortly after."

We have seen that the bank indorsed the wife's note as paid. The cashier and the plaintiff swear it was paid. It was evidently deemed important by Anderson and the plaintiff that the wife's note should be paid in order to lay the foundation of this action to foreclose the mortgage. There can be no question therefore but that it was contemplated by the bank and by both parties to the new note that the old note was paid by substitution of the new one.

[3] It is familiar law that where a note, with a third person upon it, takes the place of a former note, it will be considered a payment if the transaction indicates that such was the intent of the parties. It is clear that the plaintiff and Anderson were acting in concert to take from the wife and infant son their home in payment of the husband's debts. In carrying out the conspiracy it was overdone, and resulted in substi-

tuting for the wife's note a note of the principal debtor intended to act as payment, and which actually extinguished the obligation of the wife. The note, however, was not paid by the plaintiff's check, or by the plaintiff, but was in fact paid, so far as Mrs. Anderson is concerned, by the note which the original debtor caused to be substituted in place of it. Anderson agreed with his wife to pay the note when due. In substituting the new note for the old, it may be that Anderson and the plaintiff had an ulterior purpose; but in considering an act done by them we are not bound to give them the benefit of their fraudulent intentions, but may construe their acts according to their obligations, giving the transaction the effect which it naturally would have if honestly undertaken. The transaction therefore should be considered not as a payment by the plaintiff on account of his indorsement of the wife's note, but as the substitution by Anderson and plaintiff of their note, thus extinguishing the liability of the wife. He understood the mortgage was upon the husband's property. His understanding therefore was that he and the wife were sureties for the husband, and they were secured by a mortgage of the husband's property. If this understanding was right and the wife had been compelled to pay the note, she could have been subrogated to the plaintiff's rights in the mortgage. If the transaction at the bank August 3d did not discharge the wife and her property, then the extension of the time of payment of the obligation freed her and the property. The real loan which the bank made to the husband on the note of May 3, 1910, was never paid to the bank until after November 8, 1911. During that time it held different notes extending the loan.

[4] Where it is known that a party to a paper is not the real debtor but is surety for another, an extension of time of payment to the real debtor discharges the surety who did not consent thereto. *Bank of Albion v. Burns*, 46 N. Y. 170; *National Park Bank v. Koehler*, 204 N. Y. 174, 97 N. E. 468.

In *Dibble v. Richardson*, 171 N. Y. 131, 63 N. E. 829, the defendant had borrowed from his wife's mother certain securities, and with her consent pledged them to his bank. The bank requiring payment of the loan, the mother-in-law furnished him the money to liquidate it, receiving therefor the bond of his wife, secured by a mortgage upon her real estate. He joined in the mortgage but not in the bond. The mother's will provided that any indebtedness from her son-in-law should be treated as a legacy to him. The executor of his deceased wife defended an action to foreclose the mortgage, claiming that the bond was forgiven by the provision in the will. The court held that in a way the son-in-law, by requesting the loan of the securities, became indebted to the testatrix, and that the wife was a surety only, and that therefore the will terminated her liability upon the bond, as the discharge of the principal carried with it a discharge of the surety. That case is quite similar to the case at bar. Here the wife gave the note and mortgage as an accommodation to the husband and he thereby became obligated to pay it. Here the husband agreed with her to indorse and pay the note. If the wife in the *Richardson Case* was a surety for the husband and entitled to protection as such, it

must follow that Mrs. Anderson was a surety and is entitled to all the consideration given to a surety when her relation was known to the parties interested. The wife and the plaintiff, in a way, were sureties for the husband. If the note and mortgage were otherwise valid, the extension of time would clearly extinguish them. The mortgage was given solely to provide for the payment of the note which she had made. The action of the plaintiff and Anderson, which destroyed her liability upon the note, effectually disposed of the mortgage. The husband was clearly solvent at the time; she was prevented from taking any proceedings to indemnify or protect herself; and the law presumes damages from such an extension.

In any event, the action is prematurely brought. The loan was not paid to the bank by plaintiff until November 8, 1911, and was kept alive until then by successive time renewals. The plaintiff swears that after he received the wife's note from the bank he took it to Anderson's office and directed the foreclosure. At that time he and Anderson had substituted a new note, on three months' time, in place of the note in suit. If the plaintiff and Anderson had not been acting in collusion, the acceptance by the bank and the plaintiff of the three months' note in place of the other would have been a complete defense for the husband and wife. The fact that the husband was acting in collusion with plaintiff does not deprive the wife and the son of that defense.

[5] The assumption, however, that the wife was ever liable upon the note and the mortgage is not warranted. The jury found from the evidence that they were obtained by duress; the court disregarded the verdict and made findings to the contrary. In my judgment the verdict is well sustained by, and indeed required by, the evidence. If her story is true, the note was clearly obtained by duress. She is corroborated by a neighbor who, as Anderson was leaving the house, heard her ask him to return the papers. Also by the fact that as soon as he left the house she telephoned the bank not to take the note. The fact that the husband was deceiving her as to the purpose of her note and, if the plaintiff's story is true, was also deceiving him, indicates that he was in a frame of mind to do anything which was necessary to accomplish his purpose. The bringing of the action to foreclose the mortgage against himself, with an application for a receivership, and all the circumstances, are in her favor. The cashier did not make it clear in his direct evidence whether she telephoned him not to take the note before or after he received it. That the note was finally taken by the bank with knowledge of its infirmity is shown by his evidence when recalled for cross-examination that later in the day, about 4 o'clock, he had another conversation with her in which he asked her if the bank should take the note, and that she assented. She denies that she consented. The cashier was unfriendly to her and had an action pending with her with reference to the rent of this same house. It would seem to be unusual for a bank to place a note to the credit of a customer without his indorsement. The cashier says he requested it; but he was evidently controlled by Anderson, who had secured his position for him. These circumstances may well be con-

sidered in weighing his testimony. It is not probable that after she had notified him not to take the note that she subsequently consented. The bank became the owner of the note, with notice of its infirmity. The plaintiff swears that Anderson said that he did not indorse the note as he already was owing the bank \$2,500 and could not make a further loan. This note was placed to his credit, and any notes due the bank were evidently liquidated. The statement, if made, was untrue. His credit with the bank was apparently good. The bank had not asked for an indorser; the plaintiff asked for no security; there was no talk between him and the plaintiff about security; the note of the wife, the mortgage and indorsement by the plaintiff were entirely unnecessary; they were simply a part of the scheme which he was putting in force to deprive the wife and son of their home. The bank apparently would have discounted his note if he had needed the money, as in times past. There is no evidence that he actually needed any money. The testimony of the domestic, called by the plaintiff, is not convincing. It is not clear that she was in a position to overhear the conversation. She evidently heard too much. She admits that Mrs. Anderson accused her of stealing certain things; it is evident that some things belonging to Mrs. Anderson were found in her suit case, and her explanation of the occurrence is weak. The notary who took the acknowledgment was a clerk in Anderson's office, probably more or less under his influence, and cannot be considered entirely disinterested.

The complaint alleges that the deed to the wife and son were recorded before action brought. The plaintiff, on cross-examination, was unable to explain when and where he obtained that information. The conduct of the plaintiff with reference to this entire transaction is so unjust and fraudulent that it cannot be well characterized. It reflects upon his manhood and his credibility as a witness. He was evidently in collusion with Anderson to defraud the wife and infant son out of their property. It is unnecessary to spend much time in determining at what time he entered into the illegal conspiracy; it is better to assume that he was a party to it from the beginning. He says he had no knowledge of the unrecorded deed at the time he received his mortgage. He is not entitled to credit in that statement. He certainly had knowledge of it August 6th. Her ownership of the property was the cause of the conspiracy. There was no reason why Anderson should want to foreclose the mortgage upon his own house. All parties to a conspiracy to defraud may fairly be chargeable with knowledge of the purpose sought to be accomplished thereby. The fact therefore that the deed was unrecorded is of no advantage to him.

The plaintiff, in making out his case, has established the fact that the note and mortgage had no further validity and that the action in any event was prematurely brought. It may be said that Anderson would naturally keep from the cashier and the plaintiff a knowledge of the intended wrong. He was trying to do a sharp and dishonorable act, but did it in a bungling way. The note became due August 3d. The new note was not substituted until the 6th, on which date this action was brought. The scheme as attempted to be worked out was crude, and perhaps some parts of it hastily formed. If Anderson was

really a lawyer, he may have planned differently. He knew that a National Bank could not take a mortgage as security for an original loan, but that the bank might be subrogated to any security held by any party to the note, for its payment. Perhaps it was contemplated that the bank, by right of subrogation or assignment, should bring the action of foreclosure. If so, apparently some one connected with the bank would not permit it to be used in that way, especially when it was discovered that the cashier, before the bank altered its position with reference to the note, had knowledge of its infirmities. It may have required that it be relieved from the situation, with the result that the substitution of a new note became necessary. We are not, however, interested in the operations of his mind. It is sufficient that he attempted a gross fraud upon his wife and infant son, that the plaintiff was assisting him, and that the scheme failed.

The judgment should be reversed upon the law and the facts, and the complaint dismissed, with costs.

The findings to the effect hereinafter named are reversed:

That the bank took the note in good faith; the seventh and eighth findings of fact; that the plaintiff had no knowledge of the existence of the unrecorded deed and that he had no notice that Adelaide M. Anderson claimed any interest in the property aside from an inchoate right of dower; that plaintiff took the mortgage in question in good faith and for a valuable consideration; the twelfth finding of fact and the thirteenth finding of fact. In lieu thereof the court finds that the bank, when it received said note, had knowledge of its infirmities; that the plaintiff had knowledge of the unrecorded deed at the time he indorsed the note and received the mortgage; that the plaintiff and Frank S. Anderson entered into a fraudulent conspiracy to defraud Adelaide M. Anderson and her infant son of their home by compelling its sale for the husband's debt; that the note and mortgage were obtained by duress and were not the voluntary act of Adelaide M. Anderson; that when the note became due Frank M. Anderson, the original debtor, and the plaintiff put their note, running for three months, in the bank in place of and in payment of it, with the intent that such note should be paid thereby; that the receipt of said new note was an extension of time of said mortgage and of the note of Adelaide M. Anderson; that it was known by the plaintiff that she was a surety thereon for the said Frank S. Anderson, and the extension of time discharged her from her liability; that the action was prematurely brought, the time of the said mortgage having been extended from time to time until November 8th "without her knowledge or consent."

All concur, except SMITH, P. J., and LYON, J., dissenting.

ULMAN v. NEWMAN et al.

(Supreme Court, Appellate Division, First Department. March 13, 1914.)

1. REFORMATION OF INSTRUMENTS (§ 45*)—EVIDENCE—SUFFICIENCY.

In a suit to reform an endowment insurance policy, evidence held to show that the policy was taken out wholly for the wife's benefit with intent for her to receive the proceeds, whether her husband lived or died.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

2. INSURANCE (§ 143*)—RIGHT TO REFORM.

Plaintiff had her husband's life insured, under an agreement that she should pay the premiums, and the policy should be her sole property. The agent who took the application secured the issuance of an endowment policy, which provided for payment to plaintiff only in case of her husband's death before maturity of the policy. Held that, as there were no intervening rights, plaintiff was entitled to a reformation of the policy, so that the proceeds would come to her regardless of her husband's death or survival, for the issuance of a policy which was different from the one plaintiff desired was a constructive fraud upon her, regardless whether the insurance agent was the agent of plaintiff or the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 265-272; Dec. Dig. § 143.*]

3. INSURANCE (§ 143*)—GROUNDS FOR REFORMATION—MISTAKE. TAKE.

Where it was the intention of a husband and wife that an endowment policy applied for by the husband should be payable to the wife at all events and the insurer through mistake made the policy payable to the husband in case he survived until its maturity, a reformation of the instrument will be granted at the suit of the wife.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 265-272; Dec. Dig. § 143.*]

4. LIMITATION OF ACTIONS (§ 96*)—RUNNING OF STATUTE.

A wife took out a 20-year endowment policy on the life of her husband under an agreement that she should pay the premiums and should receive the proceeds. Through mistake the insurer made the policy payable to the husband in case he survived until its maturity. The wife did not discover the mistake for over 10 years, but during that time the husband asserted no rights in the policy. Held, that limitations had never begun to run, the policy not having matured, and that the wife was entitled to reformation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 337, 475, 476; Dec. Dig. § 96.*]

Appeal from Special Term, New York County.

Action by Augustina Ulman against Max H. Newman, as receiver, and others. From a judgment for plaintiff, defendant receiver appeals. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, DOWLING, and HOTCHKISS, JJ.

Charles J. Belfer, of Brooklyn, for appellant.

Abraham P. Wilkes, of New York City, for respondent.

HOTCHKISS, J. The policy is a \$5,000, 20-year endowment, dated March 29, 1901. In case of death it is payable to plaintiff, and in case of Ira's surviving until 1921 it is payable to him. The judgment ap-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pealed from eliminates from the policy the phrases giving Ira an interest therein. The appellant's receivership dates from June, 1911. The action was begun February 26, 1912. The insurance company answered, denying knowledge of the facts on which the claim of reformation was based, and alleged that it was indifferent in the premises. The substance of the court's findings was as follows:

[1] The parties were married in May, 1892. In March, 1901, Rosenberg, an insurance agent, urged plaintiff to have her husband's life insured. Thereupon plaintiff consented, and Ira gave his consent on the understanding that the policy was to be plaintiff's sole property and that she was to pay all the premiums. Plaintiff then instructed Rosenberg to obtain a policy of the general type in question. Rosenberg secured from the insurance company an application blank which he filled out and which Ira signed without reading, and thereupon the policy was issued and handed to Rosenberg, who delivered it to plaintiff, who retained possession of it until possession was surrendered to appellant on his demand. Plaintiff did not examine the policy and was ignorant of its language until such demand. Plaintiff from her separate estate paid all the premiums, aggregating \$2,816.55. It was at no time plaintiff's intention to give to Ira, nor was it his intention to acquire, any rights or privileges with respect to the policy, and it was the design and purpose of both that plaintiff should have the sole benefit of its surrender value and endowment features as well as the benefit flowing to her as payee in case of death.

I think the findings of fact are supported by the evidence. Having regard for all the circumstances of the parties, my conclusion is that the policy was taken out wholly for the wife's benefit with intent to give her the proceeds whether her husband lived or died.

It is true there is no finding of fraud in fact or of mutual mistake on the part of plaintiff and the insurance company. Nor do I think this was necessary. The court found that Rosenberg was the agent of the insurance company and not of the plaintiff. This finding, although vigorously assailed, I think was justified. Rosenberg was evidently a solicitor of insurance and as such was under a statutory duty to procure a certificate of authority. Laws 1889, c. 282, § 2. He was the medium and the sole medium through which the company's proposal to insure and the plaintiff's "application" for insurance ripened into the contract evidenced by the policy. But the point is not of determinative importance.

[2] The case may be made to rest on the doctrine of constructive fraud, resulting from Rosenberg's disobedience of plaintiff's directions to apply for a policy the benefits of which would run wholly to plaintiff, who paid the consideration therefor. To entitle plaintiff to relief, it makes little difference whose agent Rosenberg was. If, as the court found, he was defendant's agent, it was constructive fraud for the company to draft the contract in form different from plaintiff's instructions. *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607; *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige, 278, 19 Am. Dec. 431; *Weed v. Schenectady Ins. Co.*, 7 Lans. 452; *Goldsmith v. Union Mut. L. Ins. Co.*, 18 Abb. N. C. 325. If Rosenberg was plaintiff's agent,

the result of his disobedience worked a similar fraud, because, by error and without her consent, plaintiff's property was diverted to a stranger, who paid nothing and has no rights in the premises. If the case were one presenting equities in either the insurance company or plaintiff's husband, the situation would be different; but here no rights are urged in opposition to plaintiff, save such as are set up in her husband's behalf, and he has none. For him, under such circumstances, to be decreed to be the beneficiary of what was agreed should be plaintiff's and for which she alone has paid, but the legal title to which was, by the error of another, put in his name, would be a fraud indeed. In *Gillespie v. Moon*, 2 Johns. Ch. 585, 599, 7 Am. Dec. 559, one of the earliest cases in this state on the subject of reformation, Chancellor Kent on the authority of English cases said:

"Defects in mortgages, contrary to the intention of the parties, have also been made good against subsequent judgment creditors, who came in under the party, * * * bound in conscience to correct the mistake."

See, also, *Gouverneur v. Titus*, 6 Paige, 347.

Actual fraud is not necessary, and where, as here, there has been a mistake by one, and where the other party to the contract, being himself indifferent as to who should be the beneficiary of his obligation, has so drawn his promise as to cause it to run in favor of a stranger whom the other party never intended to be benefited, and who on no conceivable ground has any interest in the promise, and who is "bound in conscience to correct the mistake," I think his refusal or failure so to do presents a case of constructive fraud clearly within the principles on which jurisdiction to reform is based.

[3] But from another point of view, the case is clearly brought within the well-established rules for the reformation of written instruments. It has been found as a fact that Ira, plaintiff's husband, intended that the insurance should be wholly for plaintiff's benefit. The application was signed by Ira. In thus signing an application in the form supplied by Rosenberg and in securing a policy different from that agreed, the policy, as between Ira and plaintiff, was the result of mutual mistake, or mistake on plaintiff's part and constructive fraud on the part of Ira. In principle, the case is similar to *Haack v. Weicken*, 118 N. Y. 67, 23 N. E. 133.

[4] Unless the action is defeated by the statute of limitations, the fact that plaintiff failed for over ten years to discover the error in the provisions of the policy is not of itself sufficient to bar her right to relief. *Treadwell v. Clark*, 190 N. Y. 51, 82 N. E. 505; *Chittenango First Nat. Bank v. Morgan*, 73 N. Y. 593; *Andrews v. Gillespie*, 47 N. Y. 487. In *Welles v. Yates*, 44 N. Y. 525, reformation of a deed was decreed after a delay of 19 years. In *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559, the mistake was not discovered for 14 years. In *Hay v. Star Fire Ins. Co.*, supra, *Bidwell v. Astor Mutual Trust Co.*, 16 N. Y. 263, and *Anderson v. Met. Life Ins. Co.*, 18 Wkly. Dig. 192, there was a delay of 8 years, and in *Goldsmith v. Union Mut. Life Co.*, supra, the delay was 10 years. In *Avery v. Equitable Life Soc.*, 117 N. Y. 451, 23 N. E. 3, a delay of 15 years was held to deprive plaintiff of the right to equitable relief; but the circumstances

were such as to clearly distinguish the case from the present. The principles governing laches as grounds for denying equitable relief in cases like the present have been so recently declared by the Court of Appeals that no further discussion on this point is necessary. See *Groesbeck v. Morgan*, 206 N. Y. 385, 389, 99 N. E. 1046; *Pollitz v. Wabash R. R. Co.*, 207 N. Y. 113, 130, 100 N. E. 721.

The respondent concedes that, if the statute of limitations applies in favor of her husband, the defendant has succeeded to his right to plead it as a defense. Assuming the law to be such, I do not think the statute has run. The policy has not yet matured, and nothing has become payable under it, nor has the husband ever asserted any right to or interest in the policy adverse to plaintiff. Under such circumstances, the statute never began to run, or at least did not begin until this defendant set up a claim to the policy. *De Forest v. Walters*, 153 N. Y. 229, 240, 47 N. E. 294; *Greenly v. Shelmidine*, 33 App. Div. 559, 564, 82 N. Y. Supp. 176. Furthermore, inasmuch as the ground for the relief invoked rests on fraud, the statute would not begin to run until the fraud was discovered. *Gallup v. Bernd*, 1 N. Y. Supp. 478,¹ affirmed 132 N. Y. 370, 30 N. E. 743.

The judgment should be affirmed, with costs. All concur.

(161 App. Div. 442)

TAYLOR v. GLENS FALLS AUTOMOBILE CO.

(Supreme Court, Appellate Division, Third Department. March 13, 1914.)

1. HIGHWAYS (§ 184*)—INJURIES—ACTIONS—JURY QUESTION.

In an action by one run down by an automobile, the question of whether the driver was negligent *held* under the evidence for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

2. APPEAL AND ERROR (§ 977*)—REVIEW—NEW TRIAL.

While the appellate court will be very slow to reverse a trial court in granting a new trial, the rule does not apply with the same strictness where there have been two verdicts in favor of plaintiff; defendant having been granted one new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

3. APPEAL AND ERROR (§ 977*)—REVIEW.

It is not only the power of the Appellate Division, but it is its duty, to review the discretionary act of the trial judge in granting a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

4. APPEAL AND ERROR (§ 1174*)—REVIEW—VERDICTS.

In a personal injury action by one run down by an automobile, the first jury awarded \$500 damages and the second \$900. It appeared that the injuries were not serious or permanent. *Held*, that an order granting defendant a new trial on the ground of excessiveness of damages will be reversed on appeal if plaintiff will stipulate to reduce the damages to \$500; two juries having found for that amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4525; Dec. Dig. § 1174.*]

Lyon and Kellogg, JJ., dissenting.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 49 Hun, 605.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Warren County.

Action by Emma L. Taylor against the Glens Falls Automobile Company. From an order granting defendant a new trial, plaintiff appeals. Order reversed on consideration that plaintiff will stipulate to reduce the verdict; otherwise affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Chambers & Finn, of Glens Falls (Walter A. Chambers, of Glens Falls, of counsel), for appellant.

J. Edward Singleton, of Glens Falls (Lyman Jenkins, of Glens Falls, of counsel), for respondent.

SMITH, P. J. This action is brought to recover damages for plaintiff's injury caused, as she claims, by the negligence of the defendant in running her down with an automobile. A new trial has been granted apparently upon the ground that the evidence is not sufficient to establish any cause of action against the defendant.

[1] The plaintiff, with others, was in a sleigh going from Glens Falls to Lake George. The harness broke, and the driver turned up to the side of the road and got out to fix the harness. There is some dispute as to whether he was upon the right or left side of the road going north, but the preponderance of the testimony would seem to indicate he was upon the left side of the road and within three or four feet of the fence. The stop was made at a fork of the road where the road to Luzerne branches off to the west. The plaintiff and another got out of the sleigh, as it may be found, because of their fear of the automobile approaching of which they were warned by the lights. They went to what is called Howe's blacksmith shop, which was in the space in the fork of the two roads leading to Lake George and to Luzerne. This blacksmith shop was from 12 to 15 feet from the Luzerne road and 20 feet from the Lake George highway. The claim of the plaintiff is that, within five feet of this blacksmith shop—where she had gone for safety—the automobile came up behind the sleigh and turned to the left and ran her down. She was struck by the automobile, carried a couple of feet, and went under the automobile, from which place she was afterwards taken by raising the automobile. She claims to have suffered certain injuries by reason of this accident for which the jury have given her a verdict of \$900, which the court has set aside. There is abundant evidence from which the jury could have found that the plaintiff was struck while outside of the road and within a very few feet of the blacksmith shop, and from which the jury could have found that the automobile was driven at an excessive speed so that it was compelled to turn into this Luzerne road for the purpose of avoiding collision with the sleigh. The defendant's car was not going to Luzerne, but was going straight on, and the jury may well have found that the sudden turn into this Luzerne road was made necessary only because the car was not under sufficient control to keep upon the road and avoid the accident. The learned trial judge submitted to the jury two questions of negligence: First, the question of excessive speed. The plaintiff had sworn in her judgment the car

was going from 30 to 35 miles an hour, but had stated that she could not tell positively because she was not accustomed to judge of the speed of cars while standing upon the ground. No other witness swore to any specific rate of speed, but all of the plaintiff's witnesses agreed that the speed was not at all diminished until the car got right upon them, when it was turned into the Luzerne highway. Another ground submitted to the jury was whether the accident was caused by the failure of the defendant's servant to have the car under proper control.

The order vacating the verdict does not state the ground upon which the same was vacated. In the opinion which accompanied the order, however, the trial justice says that in his judgment it was incredible that the car, going at the rate of 30 to 35 miles an hour, could make the sudden turn which appears was made, and stop within 10 or 12 feet upon the Luzerne road. He further states:

"It is impossible for me to see how any automobile going at an excessive rate of speed can make a turn at a right angle and remain upon its wheels, or be stopped within ten feet of the turn."

He further says that when the charge of excessive speed is eliminated from the case there is no other ground remaining upon which to support a verdict. By fair interpretation of the evidence the automobile did not turn at right angles, but on a curve. It came, under defendant's evidence, within four or five feet of the shop which by the map is 23 feet west of the sleigh if the sleigh were on the west side of the road. There is evidence that the car was within 10 feet of the side of the road when it stopped. It might well have gone a considerably greater distance, however, after the breaks were applied before coming to that point. As I read his opinion, if this case should be retried upon this same evidence, the trial court would be compelled to grant a nonsuit. When this car came up behind plaintiff's sleigh, the lights should have revealed the existence of the sleigh. The defendant's servant may have been negligent in failing to observe this obstacle in time to get his car under control; any speed may be excessive speed which is so great as to prevent the driver from getting his car under control when he approaches an unknown danger. It is true that the chauffeur swears that he had his car under perfect control and turned into this Luzerne road for the purpose of stopping to see if he could aid the driver of the sleigh, who was in apparent trouble. Some doubt is thrown upon this testimony by the improbability of his turning off into a side road for the purpose where he would have to back up to get into the road proper leading to Lake George in order to continue his journey. In any event, his explanation of the circumstances was for the jury in view of all the other facts in the case, because he was interested as having been the one at fault if the defendant be charged with damages in the action. The crucial fact remains that plaintiff was run down by this car while lawfully either in the edge of the highway or beyond its bounds.

In my judgment it will always be a question for the jury whether the accident was not caused by the negligence of the defendant in

failing to have the car under proper control at whatever speed it was running as he approached this sleigh.

[2-4] This is the second verdict of a jury in favor of the plaintiff. It has been a rule in this department that the Appellate Division will be very slow to reverse the trial judge in the granting of a new trial where he has exercised his discretion in so doing. He has opportunity to see the witnesses, and if he be of the opinion that an injustice has been done he should properly exercise his discretion, and this discretion should probably be exercised more often than it is. Not only does this court have the power, but it has also the duty, to review the discretion of the trial judge. But in this review the fact is recognized that the trial judge has a viewpoint superior to that of the appellate court by his better opportunity at the trial to judge of credibility of the evidence and the justice of the verdict, and due weight is given to that fact. While this rule has been adhered to with reference to the granting of a new trial after a single verdict, it has less force when applied to the granting of a new trial after a second verdict; and where, as in the case at bar, a new trial has been granted apparently not because the verdict is against the weight of evidence, but as without evidence the rule would seem to be inapplicable. The trial judge in his opinion granting the new trial has stated that no bones of the plaintiff were broken and no serious injuries were sustained; and this was apparently one of the grounds upon which the new trial was granted. With his opportunity to see and hear the witnesses, and judge of the credibility of their stories, and with the fact that upon a former trial a verdict of \$500 only was obtained, the size of the verdict would seem to be sufficient reason for disapproving of the verdict. Without anything to indicate, however, that the plaintiff would not recover upon another trial, and in view of the fact that two juries have assessed her damages at \$500 or more, we are of the opinion that if the plaintiff will stipulate to reduce the verdict to \$500 that the verdict, as thus reduced, should be allowed to stand.

Order affirmed, with costs, unless plaintiff stipulates to reduce the verdict to \$500; if she shall so stipulate, the order is reversed, and the verdict, as thus reduced, reinstated, without costs to either party.

Order affirmed, with costs, unless the plaintiff will stipulate to reduce the verdict to \$500; if the plaintiff will so stipulate, the order is reversed, and the verdict, as so reduced, is reinstated, without costs to either party.

HOWARD and WOODWARD, JJ., concur. LYON, J., dissents in opinion in which KELLOGG, J., concurs.

LYON, J. (dissenting). The verdict in this action was based upon injuries received by plaintiff to her person and property by being struck by defendant's automobile in the early evening of December 28, 1910: The place of the collision was at the angle formed by the intersection of the Glens Falls and Lake George highway, an improved state highway, which ran northerly, and the Luzerne highway, which ran northwesterly. It appears that upon this occasion the plaintiff, in the company of several persons, was traveling by sleigh from Glens Falls to

Lake George, and that when near the intersection of the two highways the driver halted his team for the purpose of repairing his harness, whereupon the plaintiff and two other occupants of the sleigh left the highway and went to the angle formed by the intersecting highways, and, while standing within or just without the angle, the driver of defendant's automobile, which was also bound for a point farther north on the Glens Falls and Lake George highway, seeing the team and sleigh ahead in the highway, undoubtedly on the left-hand side of the road, with the driver standing at the heads of the horses, decided, as he testified, to stop to see what the trouble was, and in order to take his lights off the horses turned his car into the Luzerne highway to the left, and in doing so struck the plaintiff, inflicting the injuries complained of. Several witnesses called by the plaintiff testified that the automobile did not make the turn into the Luzerne highway until it had come close to the sleigh, and then made the turn at nearly a right angle and at an unreasonably high rate of speed, and passing up the Luzerne highway struck the plaintiff while standing within the angle and within a few feet of the shop located therein, and at a point 8 or 10 feet northerly of the north line of the Luzerne highway and 12 or 15 feet westerly of the west line of the Glens Falls and Lake George highway. Upon this point one of the plaintiff's witnesses testified:

"When he made this turn he was very close to the sleigh, about two feet; it may have been less than that; it was very close, not over two feet. I saw this machine come up the road at a very rapid pace, go within two feet of this sleigh in which I had been sitting, and then turn suddenly to the left. Apparently he did not slacken the speed of the car from when I first saw him until he struck Mrs. Taylor."

Another of plaintiff's witnesses testified:

"As the automobile approached us from the rear I did not observe that it slowed up at all. When the automobile got very near to the sleigh it turned sharply to the left and ran into the plaintiff."

The plaintiff herself testified:

"The automobile was coming very rapidly when it made the turn; when it struck me it was going about 30 or 35 miles an hour. * * * I could see the lights of the automobile a considerable distance south of the Hudson Valley tracks and saw the machine. It was coming very fast. It did not slacken its speed as it approached me. I do not know what the speed was when it struck me. * * * He must have slackened to turn. * * * I do not know the rate of speed of the car just before it struck me, as it came down the State road to the Luzerne road."

The plaintiff and some of her witnesses testified that the place where the plaintiff was struck was outside the bounds of the Luzerne highway. Upon the other hand, the driver of the car testified that he approached the sleigh at the rate of from 3 to 5 miles per hour, and that he made the turn into the Luzerne highway, not at a sharp angle, but that he turned off from the main highway into the Luzerne highway when about 40 feet from the sleigh according to his recollection, and that he did not go within 18 feet of the shop, and that the collision resulted from the plaintiff running in front of the car while within the limits of the highway. The driver of the car and the president of the

defendant testified that on the evening of the accident they examined the impressions made by the wheels of the car and the body of the plaintiff, which were plainly visible in the freshly fallen snow, and that the front end of the car had stopped within 10 feet of the main highway, and that the plaintiff had fallen within the bounds of the Luzerne highway. Relative to her injuries, the plaintiff testified to having suffered various serious bodily injuries and that one of the results of the collision was a miscarriage five or six days thereafter. The plaintiff testified that she was attended by no physician at the time of the miscarriage, although there was a physician in the immediate neighborhood. The testimony of her husband was her only corroborative evidence upon that subject. The claim that plaintiff had suffered a miscarriage was positively contradicted by two women, with one of whom plaintiff boarded in November, and with the other in December. The testimony of plaintiff that she sustained serious injuries was not supported by the medical testimony. The family physician, who treated her on the evening of the injury and thereafter, testified:

"At the time I examined the plaintiff, I did not think she was suffering from any permanent injury. I could not find anything that I thought would be permanent. Q. The injuries that you found were in your opinion trivial in character? A. Yes, I thought she would get over them in a few days."

At the close of the evidence, plaintiff's counsel stated, answering the motion for a nonsuit, that plaintiff claimed that the negligence of the defendant consisted in the driver of the car turning the corner into the Luzerne highway at a high rate of speed, and also claimed that the plaintiff was struck after she had gone to a place of safety where she had the right to go, outside the limits of the highway. The court submitted the question as to defendant's negligence to the jury upon both propositions, saying as to the latter:

"Then there is a claim made by the plaintiff that the chauffeur was negligent because he did not have his car sufficiently under control to stay within the bounds of the Luzerne highway; that he went off that highway and struck the plaintiff, who was outside of the traveled portion of that road. Concerning that question there is a difference between the witnesses in the case. Those who examined the marks upon the ground that following day or the night of the accident tell you that the marks of a person lying upon the ground were seen by them and that they were well within the bounds of the traveled portion of the highway. I assume it to be true that a prudent man in making a turn off a main road into a side road of this character must have his car under such control that he can keep it within the limits of the highway down which he is going. Therefore if he did take his car outside of those limits he may have been negligent, and that negligence may have been the cause of the injury."

In the opinion setting aside the verdict and granting a new trial upon the ground that the verdict rendered was against the weight of evidence, the court said:

"As I understand the case for the plaintiff, the sole charge of negligence made against this defendant was that the automobile was being driven at an excessive rate of speed. Although testimony was given to the effect that the automobile was traveling at the rate of from 30 to 35 miles an hour, and at this rate of speed made a turn from one highway into another, yet this testimony seems utterly incredible for the reason that the turn made was almost at a right angle, and for the further reason that according to the undisputed

proof the automobile did not go up the highway into which the turn was made more than ten feet. It is incredible also from the fact that the plaintiff, according to her own testimony, when struck by the automobile was carried by it only 2 feet, and according to all the proof in the case, although she was thrown down upon the road and a portion of her body went under the car between the two front wheels, no bones in her body were broken and no serious injuries were sustained. It is impossible for me to see how any automobile going at an excessive rate of speed can make a turn at a right angle, and remain upon its wheels or be stopped within 10 feet of the turn. When the charge of excessive speed is eliminated from the case, there is no other ground remaining upon which to support the verdict."

Thus the action of the trial court in setting aside the verdict was based, in part at least, upon the positive belief upon his part that the jury had been wrongly influenced by the testimony upon the part of plaintiff's witnesses as to the rate of speed of the car when it turned into the Luzerne highway, and as to the seriousness of the injuries sustained by the plaintiff. The court was plainly of the opinion that portions of the testimony upon both of those subjects were greatly exaggerated and unreliable, and had led the jury to render an improper verdict, and hence that in the interests of justice the verdict should be set aside and a new trial had. The law is well settled that only the abuse of discretion by the trial judge in setting aside a verdict as against the weight of evidence will be interfered with, as is evidenced by the following authorities:

"While the General Term doubtless has power to review the discretion of a trial judge, as exercised upon a motion for a new trial, upon the ground that the verdict was against the weight of evidence, it is not in its policy to interfere with such discretion in awarding a new trial, unless it is apparent there has been an abuse thereof." *Slater v. Drescher*, 72 Hun, 425, 25 N. Y. Supp. 153.

"A trial judge is invested with power to set aside a verdict and grant a new trial on the ground that the verdict is against the weight of evidence or because the damages are excessive or insufficient or when for any other reason substantial justice would be promoted thereby; and it is at all times a serious matter for an appellate court to reverse on the ground of error an order made by a trial judge setting aside a verdict as against the weight of evidence." *Glassford v. Lewis*, 82 Hun, 46, 31 N. Y. Supp. 162.

"We think a trial judge is invested with power to set aside a verdict and grant a new trial on the ground that the verdict is against the weight of evidence, or because the damages are excessive or insufficient, or when, for any other reason, substantial justice would be promoted thereby. This power we think an important one, and one that ought perhaps to be more exercised by trial courts for the proper protection of the rights and interests of litigants." "Great, if not conclusive, weight must be given to the action of a trial justice who sets aside a verdict as against the weight of evidence, because of the peculiar advantages he has in seeing the witnesses and in hearing their testimony, while the Appellate Division is confined to printed testimony reduced to a narrative form." *Suhrada v. Third Ave. R. R. Co.*, 14 App. Div. 361, 43 N. Y. Supp. 904.

"An order setting aside a verdict as against the weight of evidence, made by the judge who presided at the trial, will not be reversed unless it appears beyond all cavil, that great injustice has been done to the defeated party." *Lund v. Spencer*, 42 App. Div. 543, 59 N. Y. Supp. 752.

"The opportunity of the trial court to see and hear the witnesses sworn at the trial gives to it such a peculiar advantage over the appellate court that the latter court will give great, if not conclusive, weight to the action of the former court in setting aside a verdict as against the weight of evidence." *Silverman v. Dry Dock, E. B. & B. R. Co.*, 69 App. Div. 22, 74 N. Y. Supp. 481.

"The order made by the justice who presided at a jury trial, setting aside the verdict as against the weight of evidence, will not be reversed by an appellate tribunal unless it appears, beyond all cavil, that great injury has been done to the defeated party, or unless there has been an abuse of discretion." *Serwer v. Serwer*, 71 App. Div. 415, 75 N. Y. Supp. 842.

"Upon the question of whether the learned trial court erred in setting aside a verdict, we must keep in mind the rule which controls an appellate court in approaching the consideration of that question, and which requires that it should not disturb the disposition made unless it appears that the discretion vested in the trial judge has been exceeded or abused. * * * In addition, the trial judge had the advantage of seeing the witnesses and their manner of testifying, an advantage which is not to be lightly disregarded where the question is presented as to the right which is vested in him to exercise his discretion on a motion to set aside a verdict. The character of witnesses as affecting their credibility is also an element, the force of which can with greater certainty be determined by the trial judge. * * * We have not the disposition, even if we had the power, to lightly interfere with the discretion of a trial judge in setting aside a verdict, because it is a power which is rightly vested in him and which he is justified and should exercise in every case where he believes that the jury have been affected either by prejudice or passion, or where, upon all the facts, he thinks that in the interest of justice there should be a new trial before another jury." *Robinson v. Interurban Street Ry. Co.*, 113 App. Div. 46, 98 N. Y. Supp. 918.

"As a trial justice, in determining whether a verdict is or is not contrary to the weight of evidence, has the advantage of observing the demeanor of the witnesses, etc., his decision will not be disturbed unless it is perfectly clear that his discretion has been improperly exercised." *Azzara v. Nassau Electric R. Co.*, 134 App. Div. 167, 118 N. Y. Supp. 830.

This doctrine was reiterated in the following cases: *Russell v. Rhinehart*, 137 App. Div. 848, 122 N. Y. Supp. 539; *Burns v. N. Y. & Long Island Traction Co.*, 139 App. Div. 145, 148, 123 N. Y. Supp. 474; *Nowakowski v. N. Y. & N. S. Traction Co.*, 158 App. Div. 949, 143 N. Y. Supp. 1133.

"We have but recently expressed our opinion of the proof which should justify interference on our part with the discretion of the trial court. *Azzara v. Nassau Electric R. Co.*, 134 App. Div. 167, 118 N. Y. Supp. 830. After a careful examination of the record before us, we feel that we should not be justified in overruling in this case the discretion exercised by the trial court in granting a new trial." *Arker v. Cohen*, 136 App. Div. 871, 122 N. Y. Supp. 4.

Thus, by an unbroken line of decisions for more than 20 years, it has been held that only in the event of an abuse of discretion in setting aside a verdict and granting a new trial upon the ground that the verdict was against the weight of evidence will the appellate court interfere with the decision of the trial justice. While this court would not be justified in arbitrarily refusing to review or reverse such an order or in failing to scrutinize the action of the trial justice in granting the order, the court should be governed by this long established rule, and not interfere with the action of the trial justice in granting the order, unless in the opinion of the court his act was an abuse of discretion, in which event the court would be fully justified in reversing the order. A careful consideration of the evidence in the case at bar, a brief review of material portions of which has been given herein, is convincing that there was no abuse of discretion upon the part of the trial justice in making the order appealed from. Indeed, the action of this court in affirming the order of the trial court in setting aside the verdict and

granting a new trial, unless the plaintiff will stipulate to reduce the verdict by nearly one-half, is an admission by this court that in its opinion the verdict was not warranted, and that the trial court should not have permitted the verdict as rendered to stand. Furthermore, it assumes that this court is better able to judge from the printed record before it what verdict the jury should have rendered, than the able and conscientious judge before whom the case was tried, who had the advantage of seeing the witnesses upon the stand and hearing them testify. Applying a far less stringent rule than that laid down by the preceding authorities would require an affirmance of the order appealed from. Although a third trial of this action will be rendered necessary in case the order of the trial justice be affirmed, and while an end of litigation is desirable, yet it is far more important that the case when decided shall be rightly decided than that another trial should be avoided.

The order appealed from was right and should be affirmed.

KELLOGG, J., concurs.

(161 App. Div. 525)

In re SCHEUER et al.

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

EXECUTORS AND ADMINISTRATORS (§ 241*)—CLAIMS—PAYMENT—CONTEMPT.

Under Code Civ. Proc. § 2552, providing that a decree directing payment by an executor, administrator, or testamentary trustee is, except on appeal therefrom, conclusive evidence of sufficient assets in his hands to make such payment, and section 2555, providing for enforcing a decree for payment of money by an executor by contempt proceedings, a final decree ordering executors to pay to themselves as trustees a certain sum was conclusive that there was sufficient assets in the executors' hands to pay the sum, and, if they did not pay, they were liable as for a contempt.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 827, 849; Dec. Dig. § 241.*]

Appeal from Surrogate's Court, New York County.

Accounting by Max Scheuer and Ralph Scheuer, as executors of Simon Scheuer, deceased. From an order of the Surrogate's Court adjudging Ralph Scheuer guilty of contempt, he appeals. Affirmed.

See, also, 146 N. Y. Supp. 709.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Olcott, Gruber, Bonyng & McManus, of New York City (Walter E. Ernst, of New York City, of counsel), for appellant.

Thomas E. Rush, of New York City (Effingham N. Dodge, of New York City, of counsel), for respondent.

CLARKE, J. The executors under the last will and testament of Simon Scheuer, deceased, having filed their accounts, to which ob-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

jections were interposed, reference was had and a final decree entered confirming the report of the referee. It was specifically adjudged that:

"The pretended sale of the business recited in the said account was fraudulent and against the interest of the parties to the accounting, and was a conversion by the said executors to their own use of the same, and that the account of the said executors be surcharged" in certain specified amounts.

It was further ordered:

"That the executors pay over to themselves as trustees for the benefit of Sarah Friedman the sum of \$28,374.05, to be held by said trustees pursuant to the terms of the will of Simon Scheuer, deceased, and that said trustees pay unto Sarah Friedman the accrued annual income thereof, pursuant to said will, with interest thereon, being the sum of \$47,046.69, less \$17,000 paid to said Sarah Friedman to date hereof, to wit, the sum of \$30,046.69, within 20 days from the service of a copy of this decree, with notice of entry thereof, upon the said trustees."

No appeal has been taken from said decree. Due service thereof and demand was made upon the appellant, Ralph Scheuer. Subsequently proceedings were instituted by an order to show cause to punish him for contempt, resulting in the order appealed from. This order adjudges and determines "that the said Ralph Scheuer is guilty of a contempt of court in having willfully disobeyed" said decree, "in that he has wholly and willfully refused and neglected to pay upon, and after due demand, the said sum of \$30,046.69; * * * that said misconduct, refusal, neglect, and disobedience were calculated to and actually did defeat, impair, impede, and prejudice the rights and remedies of the said Sarah Friedman to her actual loss and injury" in the said sum; "that the said Scheuer for said misconduct is hereby fined" the said sum; and that a warrant be issued to the sheriff commanding him to take the body of said Scheuer and commit him to the common jail and to keep him therein under his custody until he shall pay said fine with interest thereon from April 25, 1913, to the said Sarah Friedman.

Section 2552 of the Code of Civil Procedure provides that:

"A decree, directing payment by an executor, administrator, or testamentary trustee, to a creditor of, or a person interested in, the estate or fund, * * * is, except on an appeal therefrom, conclusive evidence that there are sufficient assets in his hands, to satisfy the sum which the decree directs him to pay. * * *"

Section 2555 thereof provides that:

"In either of the following cases, a decree of a Surrogate's Court, directing the payment of money, or requiring the performance of any other act, may be enforced, by serving a certified copy thereof upon the party against whom it is rendered, or the officer or person who is required thereby, or by law, to obey it; and if he refuses or willfully neglects to obey it, by punishing him for a contempt of court: * * * (4) Where the delinquent is an executor, administrator, guardian, or testamentary trustee, and the decree relates to the fund or estate, in which case the surrogate may enforce the decree as prescribed in this section, either without issuing an execution, or after the return of an execution, as he thinks proper."

Therefore the final decree is declared to be conclusive evidence that there are sufficient assets in the executor's or testamentary trustee's hands to pay the sum decreed, and if he does not pay he is liable as

for a contempt. *Matter of Strong*, 111 App. Div. 281, 97 N. Y. Supp. 459, affirmed 186 N. Y. 584, 79 N. E. 1116.

The proceedings to charge the appellant with contempt having been regularly conducted, there is presented for consideration the question only whether the court had jurisdiction to make the order with which his disobedience was charged. *Matter of Pye*, 18 App. Div. 306, 46 N. Y. Supp. 350, affirmed on opinion below 154 N. Y. 773, 49 N. E. 1103. No question is raised as to the jurisdiction of the Surrogate's Court to make the decree.

The decree at bar not having been appealed from, the order adjudging the appellant guilty of contempt for his willful disobedience thereof was made by the surrogate in the exercise of his discretion and clearly within his express power.

The order appealed from should be affirmed, with \$10 costs and disbursements to the respondent. All concur.

(161 App. Div. 528)

In re SCHEUER et al.

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

CONTEMPT (§ 82*)—RELEASE FROM PUNISHMENT.

The Judiciary Law (Laws 1909, c. 35; Consol. Laws, c. 80) § 775, provides that, where an offender imprisoned as prescribed herein cannot endure the imprisonment or perform the act required to entitle him to be released, the court may in its discretion direct him to be discharged. Appellant, an executor, was imprisoned for disobeying an order directing him and another executor to pay to themselves as trustees a certain sum pursuant to the will. Appellant is 53 years of age and was declared bankrupt in September, 1913, after which he was employed at a salary of \$4,800 a year, until December 31, 1913, and he is not now employed and is shown by the affidavit of physicians to be suffering from serious disease, so that a continuation of his confinement will prove fatal in a comparatively short time. *Held*, that appellant should in the exercise of the court's discretion be discharged from imprisonment under the statute.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 275-284; Dec. Dig. § 82.*]

Appeal from Special Term, New York County.

In the matter of the judicial settlement of the account of Max Scheuer and another, as executors of Simon Scheuer. From an order denying a motion for an order discharging Ralph Scheuer from the custody of the Sheriff and from an order denying a motion for re-argument, Ralph Scheuer appeals. Order reversed and motion for discharge granted.

The executors were punished for contempt for disobedience of an order directing them to pay to themselves, as trustees, a certain sum pursuant to the will.

See, also, 146 N. Y. Supp. 707.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Olcott, Gruber, Bonyng & McManus, of New York City (Walter E. Ernst, of New York City, of counsel), for appellant.

Thomas E. Rush, of New York City (Effingham N. Dodge, of New York City, of counsel), for respondent.

CLARKE, J. The appellant was taken into custody October 7, 1913, under a commitment issued by the surrogate upon the order adjudging him guilty of contempt, the appeal from which order was decided by the opinion handed down herewith. 146 N. Y. Supp. 707. On December 9, 1913, he made a motion to be released from custody upon the ground of his inability to pay and the precarious state of his health. His motion was denied by an order made on the 19th of January, 1914, and a motion for reargument was denied by an order made on January 24, 1914, from which orders this appeal is taken.

In the Matter of Strong, 111 App. Div. 281, 97 N. Y. Supp. 459, affirmed 186 N. Y. 584, 79 N. E. 1116, this court said:

"If as a matter of fact the executor is really unable to pay the amount imposed as a fine for his default, the provisions of section 2286 of the Code of Civil Procedure may be invoked."

That section is now section 775 of the Judiciary Law (chapter 30, Consol. Laws, c. 35, Laws 1909), which provides as follows:

"Where an offender, imprisoned as prescribed in this article, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court, judge or referee * * * may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment."

It appears from the papers that the appellant is 53 years of age, that in 1912 the business of Simon Scheuer & Sons was petitioned into involuntary bankruptcy, and in September, 1913, the appellant filed a voluntary petition in bankruptcy. Both Simon Scheuer & Sons, a corporation, and Ralph Scheuer, have received their discharges as bankrupts. Thereafter he was employed as a traveling salesman and, as appears by the affidavit of one of his employers, at the rate of \$4,800 per year, but that said employment ceased on December 31, 1913, and appellant is not now in the employ of or in any way connected with said firm or has any interest whatsoever therein. It appears by the affidavits of two physicians that he is suffering from arterio sclerosis, pains about the heart, vertigo, diabetes, and Bright's disease; that the symptoms clearly indicate that a continuation of the patient's enforced confinement will result in gradual exhaustion and blood poisoning, leading to stupor and coma; that his condition is most serious. The physician duly appointed to attend the jail corroborates the diagnosis of the appellant's attending physician and states:

"From his experience that the further confinement of the said appellant will undoubtedly lead to most serious and probably fatal results in a comparatively short time."

The appellant has now been confined for about five months. He has lost his employment, he is in a serious physical condition, and his present inability to pay the fine which has been imposed upon him is

established. There are other matters presented in the record unnecessary to enumerate, which tend to support our opinion that the case as presented comes within the purview of section 775 of the Judiciary Law, and that this court ought to exercise the power conferred, and that the appellant should be discharged from imprisonment as unable to endure the same or to pay the sum required.

The order appealed from should be reversed, and the motion for his discharge granted, but, as the section referred to authorizes the court in its discretion to make such order upon such terms as justice requires, with leave to renew the application to punish as for a contempt, if the moving party can hereafter establish a change in his condition and ability to pay. All concur.

(161 App. Div. 366)

**MESSIAH HOME FOR CHILDREN IN CITY OF NEW YORK v.
ROGERS et al.**

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

1. SPECIFIC PERFORMANCE (§ 114*)—ORAL CONTRACT—SUFFICIENCY OF COMPLAINT.

The complaint averred that the father of defendant offered to buy land and to erect a building thereon as a "Home," for children, which offer was accepted by minutes entered in plaintiff's record; that the father thereafter purchased land for \$100,000, and, in accordance with plans approved by plaintiff's board, erected a building thereon at an expense of \$350,000, on which plaintiff's name was put, and which, in 1908, plaintiff formally and publicly accepted and dedicated as a gift, entering into possession and using it in carrying on its work, and incurring expenses for its maintenance and improvement; that the donor, however, retained the record title, and by a dummy transaction in 1909 conveyed one-half of the land without consideration to an office associate, who immediately mortgaged it to defendant for \$600,000 at 6 per cent. and reconveyed it to defendant, which conveyances were recorded without actual notice to plaintiff; that, at the same time, defendant conveyed the title to plaintiff subject to the mortgage lien. *Held*, that the complaint stated a cause of action for specific performance of the oral contract free from any cloud or lien.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-370, 372; Dec. Dig. § 114.*]

2. SPECIFIC PERFORMANCE (§ 47*)—ORAL CONTRACT—IMPROVEMENTS.

An oral contract for the gift or conveyance of property which the donee has accepted and partly performed by going into possession and making improvements will be specifically enforced in order to prevent a fraud being practiced upon him by inducing him to expend money upon improvements upon the faith of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 132; Dec. Dig. § 47.*]

. Appeal from Special Term, New York County.

Action by the Messiah Home for Children in the City of New York against Henry H. Rogers, Jr., and others. From an order sustaining demurrers to the complaint, plaintiff appeals. Order sustaining the demurrer reversed, and motion for judgment on the pleadings denied.

Argued before LAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Conway, Williams & Kelly, of New York City (Henry W. Jessup, of New York City, of counsel, and Eustace Conway, of New York City, on the brief), for appellant.

Shearman & Sterling, of New York City (John A. Garver, of New York City, of counsel), for respondents.

CLARKE, J. The complaint alleges that the Messiah Home for Children was incorporated to provide a home for minor children, who are dependent upon working mothers for their support, or who are orphan, pauper, or destitute, or who need temporary care or shelter, and to educate and care for such children as may be committed to its custody and to assist such children to obtain suitable situations when fitted therefor. The certificate of incorporation was filed May 15, 1889.

Prior to the said incorporation and since the year 1884, the same or similar charity has been conducted under the same name by the members of the Church of the Messiah, as a part or annex of the charitable and Sunday school work of said church.

November 2, 1898, Mrs. Emilie Rogers, a member of said church, the second wife of Henry H. Rogers, Sr., was unanimously elected president of the plaintiff and served as such president until her death.

On April 6, 1901, the charity then occupying as its home the house at 490 Mott avenue, at a meeting of the board of managers, at which Mrs. Rogers presided, she communicated to the plaintiff through said board, in the name of her husband and of herself, a gift he had promised her for the Home, and which she and he proposed accordingly to make to the Home, of land, including the offer to build thereon a "Messiah Home" for the plaintiff, which proposition was recorded upon the minutes of the board. And this additional minute was made:

"This proposition was received as a most generous gift on the part of Mr. and Mrs. Henry H. Rogers, and a unanimous and heartfelt vote of thanks was given to them."

On March 25, 1902, Mr. Rogers purchased the site for the Home theretofore promised, on which stood an old house, in good condition. The gift of said land and Home was thereafter made to the plaintiff and, on or about the 12th day of March, 1902, Mrs. Rogers presiding reported to the plaintiff through its board of managers, for herself and Mr. Rogers, that Mr. Rogers had purchased for plaintiff the said site for the new Home, and that the house then standing should be used for a temporary Home until the new Home was completed, and thereupon a vote of thanks was accorded to Mr. and Mrs. Rogers for their kindness to the "Messiah Home," and the said gift was accepted.

Mr. Rogers, pursuant to said offer and acceptance, put the said house in order for the plaintiff, and on May 7, 1902, Mrs. Rogers presiding, it was announced to the plaintiff through its board of managers that the said house and the new site were to be delivered to and come into the possession of the Home on or about May 8, 1902; the permanent building to proceed to completion as soon as practicable.

Pursuant to said announcement, at the end of May, 1902, the house and premises upon which it stood were delivered by Mr. Rogers to

and came into possession of plaintiff. The plaintiff moved from its then home at Mott avenue and 147th street, and bought new furniture, much of it contributed by Mrs. Rogers, for its said temporary quarters, and incurred an increased budget of maintenance and expense. The Messiah Home carried on its work there and on the grounds adjacent until the completion of its new Home.

At this time Mr. Rogers employed an architect to make plans for the new building for the Home, and these being prepared Mr. Rogers on November 8, 1902, sent them to the board for its consideration and approval. These plans, the architect later, on the completion of the building, returned and delivered to this plaintiff as the owner thereof.

The plans were carefully examined and considered by said board, certain suggestions and criticisms were made which were communicated to Mr. Rogers and to the architect, which were adopted in whole or in part. On the 1st of November, 1905, Mrs. Rogers, presiding, reported to the plaintiff, through the board of managers, that ground had been broken for the new Home and that the architect hoped to have it finished in one year.

Early in 1908 the edifice was completed by Mr. Rogers for this plaintiff; over its front portal he had caused to be deeply cut into the stone the words "Messiah Home" in large letters.

On March 4, 1908, plaintiff, through its board of managers, entered into possession of and accepted, dedicated, and held its first meeting in the new Home which Mr. Rogers had thus built for and dedicated to the uses of the plaintiff on the said premises, into possession of which it had already entered, as aforesaid, and then and there such Home was also delivered to them in accordance with the previous announcements and promises, and thereupon, by formal action of the board:

"A hearty vote of thanks was given to Mr. and Mrs. Rogers for the exquisite Home which we are taking possession of, expressing the thorough appreciation of the board for the gift."

And thereupon and on the same day the new Home was dedicated, the Rev. Dr. Collyer, pastor emeritus of the Church of the Messiah presiding, by formal exercises, and the acceptance and appreciation of the plaintiff through its board of managers and Dr. Collyer was cabled to Mr. Rogers, who at that time was abroad in Bermuda.

Ever since that time the plaintiff has been and still is in undisturbed possession of said premises thus secured by gift to the plaintiff and dedicated to the purposes of its work, and the said Henry H. Rogers and his wife, so long as they lived, ratified the gift and also contributed to its support and to the carrying on of its work at the place, possession of which had been thus formally given to it by Mr. and Mrs. Rogers.

The record title to the land hereafter described was for a time left in the name of said Henry H. Rogers, who held such record title in trust for the plaintiff; and his wife in his name repeatedly assured the plaintiff that, when the new building was fully completed, Mr. Rogers would transfer such record title to plaintiff. That plaintiff relied on said assurance and on the public gift and dedication to its

work, by said Mr. and Mrs. Rogers, of the premises, and received it and made no effort to expedite the performance of this trust duty.

Said premises were purchased for \$100,000 from the Fordham Morris estate and were promised to the plaintiff for the uses and purposes of its work and were situated in Bronx borough and bounded by Tremont avenue, Montgomery avenue, West 176th street, and Andrews avenue. Thereafter it was announced to the plaintiff through its board of managers, by Mrs. Rogers in her name and that of Henry H. Rogers, that the formal record title in the premises thus given to the plaintiff and so for a time held in trust by Mr. Rogers, and which had been thus dedicated to the purposes of its work, and into possession of which it had thus entered, had been formally conveyed to the plaintiff by deed. Plaintiff again relied upon this assurance and believed it and made no search of the records in regard thereto, and, relying on said assurances and on the public gift and dedication of the premises by said Mr. and Mrs. Rogers, the managers and members of said plaintiff operated said Home and carried on its work therein by subscriptions and voluntary donations as well as by individual work; also relying on said assurances and dedication, as aforesaid, plaintiff made various improvements on the premises at its own expense and paid out moneys and incurred expense to a large amount, as the owners of the property.

Thereafter Mr. Rogers died on the 19th of May, 1909, leaving a last will and testament, and his wife died on the 30th day of August, 1912.

Thereafter and during the year 1912 this plaintiff was advised for the first time by Henry H. Rogers, Jr., that he held a mortgage on the premises conveyed to the plaintiff by his father, in the sum of \$600,000, and which he stated had been transferred to his father's estate, and that he thereupon stated that the said premises would be given over to some other purpose except and unless the plaintiff should comply with certain conditions in respect to the management and direction of the charity and trust committed to it, which were impossible of being complied with, onerous, and burdensome, and which plaintiff alleges the said defendant, Henry H. Rogers, Jr., had no right, power, or authority to impose or exact. Thereupon, upon a search of the record, in regard to the said alleged mortgage of \$600,000, the following facts were developed and are alleged on information and belief:

There are on record three several instruments recorded on the 9th day of January, 1909, at intervals of five minutes apart. .

The first was an indenture dated December 29, 1909, between Henry H. Rogers and Emilie R. Rogers, his wife, parties of the first part, and one George Keiser, of the second part, acknowledged January 7, 1909. This deed purported to convey to the said Keiser the premises therein described, being the more northerly half approximately of said block hereinbefore described upon which the said Messiah Home had then been erected. This deed was executed at the time when, as aforesaid, said Rogers held the record title in trust for plaintiff, as aforesaid, but contained no reference to said trust.

The second was an indenture dated December 29, 1908, by and be-

tween George Keiser and Amelia M. Keiser, his wife, of the first part, and Henry H. Rogers, Jr., of the second part, the defendant above named, acknowledged January 7, 1909. This purported to be a purchase-money mortgage to said Henry H. Rogers, Jr., to secure the sum of \$600,000.

The third was an indenture dated December 30, 1908, acknowledged January 7, 1909, between George and Amelia M. Keiser, his wife, of the first part, and Henry H. Rogers, of the second part, which instrument purported to convey back to said Henry H. Rogers the said property conveyed to Keiser by said Rogers and wife by Exhibit B. At the same time and by an instrument dated January 7, 1909, and acknowledged the same day, the said Henry H. Rogers and Emilie R. Rogers, his wife, of the first part, conveyed to this plaintiff, as party of the second part, the premises described in said Exhibits B, C, and D, with a habendum clause followed by the words "subject to all liens." That such "liens" appear to include such mortgage to Henry H. Rogers, Jr., sought to be impressed on the premises in violation of the trust in behalf of plaintiff as aforesaid.

Said instruments were all recorded on the same day. The said George Keiser was a mere office associate of Knox & Dooling, the attorneys for Henry H. Rogers in this and other matters. He had actual notice of the fact that said Rogers held the record title in trust for plaintiff. The said Keiser had no intent to acquire this land, entered into no negotiation whereby the price or any price was fixed, and therefore he acted as a dummy or mere convenience for creating a cloud upon the title. He never in fact received the sum of \$600,000 mentioned in said mortgage, nor any sum, nor paid the same, or had any intention of paying the same to the defendant Rogers, Jr., under Exhibit B, and it was never intended he should receive consideration for said mortgage, Exhibit C, or should pay any consideration for the instrument, Exhibit B.

Said defendant Henry H. Rogers, Jr., did not in fact pay or lend the sum of \$600,000 to him, or any consideration for said mortgage given to him and described as a purchase-money mortgage by the said George Keiser and his wife, that it was not in fact contemplated or intended that he should make any such loan, no such loan was in fact ever made by this defendant, Henry H. Rogers, Jr., or by any one in his behalf or interest.

The said Henry H. Rogers, Sr., never received any consideration for the deed to Keiser, and the whole transaction was not a transaction representing the transfer and retransfer of any interest or pecuniary right, nor were these transactions intended to vest in any of the parties thereto any title or assertible right against the premises, and that it was a mere device on the part of Henry H. Rogers, Sr., in attempted furtherance of his desire to benefit and help the plaintiff in the carrying out of the gift already made to them and into possession of which they had already entered, but in actual violation of the trust in favor of the plaintiff under which he held the record title, and hence invalid and inoperative to create any right or assertible title in Keiser or the defendant Rogers or any one else, as against the plaintiff donee.

Mrs. Emilie R. Rogers, as the president of the plaintiff, while taking part in the execution of the instrument above referred to, as the wife of Henry H. Rogers, Sr., and at his direction, never communicated to the plaintiff nor was it given notice of the fact that any limitation or restriction or cloud or lien or claim had been made of record affecting the entirety and completeness of the gift of the land and of the building which she and Mr. Rogers had previously made, as aforesaid, and turned over to the plaintiff. No claim was ever made during the lifetime of Henry H. Rogers or his wife, Emilie R. Rogers, by the said Henry H. Rogers, Jr., to be the mortgagee in the premises as aforesaid. The said Henry H. Rogers, Jr., has never demanded any interest on said mortgage, nor has he demanded the principal sum of \$600,000 which became due in December, 1911, according to the terms of the mortgage. In the fall of 1912, in response to a request for a contribution in aid of the maintenance of the work and the Home, made to the defendant Henry H. Rogers, Jr., he for the first time disclosed that he held a mortgage of \$600,000 upon the Home and its property.

Plaintiff alleges that it has been for one year and more in possession of the property and claims to be the owner thereof in fee and entitled to the entire, unclouded, and undiminished interest in and to the said premises, but that it appears from the public records and from the claim above referred to of said Henry H. Rogers, Jr., that there is an incumbrance upon said property, the said mortgage in the amount of \$600,000 with interest thereon, which constitutes a claim to the said real property belonging to the plaintiff, and that the source of the plaintiff's title is by gift from Henry H. Rogers, the purchaser and owner of certain lands, which said gift was intended to be in fee; that the said defendant Henry H. Rogers, Jr., unjustly claims, and it appears from the public records that he has, a lien or incumbrance thereupon, to wit, the said mortgage of \$600,000.

Plaintiff further alleges that the said Henry H. Rogers never intended that said mortgage should be an enforceable lien on the premises nor to violate his trust; neither to limit nor impair the entirety of his gift to the plaintiff, and that said fact more fully appears from the facts above alleged, and especially that he paid for the entire block purchased by him as aforesaid for the plaintiff of which about half is included in the premises conveyed to plaintiff, \$100,000, and that he paid, as the plaintiff is informed and verily believes, for the erection of the Home upon the more northerly part of the block purchased by him for the plaintiff, not more than \$350,000, and also said Henry H. Rogers reserved by his deed award by the city for a street opening adjacent, leaving to the Messiah Home, as owner, the obligation to pay its assessment therefor to the city, so that the total pecuniary value of his record gift to the plaintiff at the time was \$450,000, including the value of the balance of the block, which, after the death of said Henry H. Rogers, Sr., and his wife, plaintiff for the first time learned had not entirely been conveyed of record to this plaintiff.

Therefore the plaintiff demands judgment that the defendants and every person claiming under them and each of them be barred from all

claim to any estate in the property described, and that the said Henry H. Rogers, Jr., be directed to deliver up the said mortgage and the bond, if any, collateral thereto, and that this court direct said mortgage to be canceled of record, and that said Henry H. Rogers, Jr., his heirs, assigns, etc., be enjoined from taking any proceedings at law or in equity for the enforcement of said mortgage or for the collection of any of the moneys purporting to be secured thereby, or by the bond accompanying same.

The gentlewomen of the congregation of the Church of the Messiah who had instituted and carried on this charity for little children, in connection with its Sunday school work, had incorporated the society, had procured a building, and were in successful operation in a small way when Mrs. Rogers became its president. As she and her husband became interested in the work, she as his agent and on his behalf offered a gift by which the work could be enlarged and extended. He offered land and a building to be erected. The proffered gift was formally accepted by the adoption of minutes by the board of managers. He purchased a parcel of land on which a house was standing. The Home was removed from its existing quarters to this house, and remained there for a number of years. But it was used as a temporary home until the completion of the new building. Mr. Rogers had the plans for the new building submitted by the architect to the board of managers, and their criticisms and suggestions were acted upon. On the completion of the building, undoubtedly intended for the plaintiff, with its name deeply cut in the stone over its portal, he caused the plans to be delivered to them by the architect. It was publicly dedicated as the gift of Mr. Rogers and his wife. Formal resolutions of appreciation and thanks were adopted and cabled to him at Bermuda. The plaintiff, which had been in possession of the property for years, moved from its temporary house to its new building so erected, accepted, and dedicated. Its board of managers believed, and was entitled to believe, that the property was owned as well as possessed by it. Relying upon all these facts, the assurances, and dedication, it "made various improvements on the premises at its own expense and paid out moneys and incurred expenses to a large amount, as the owners of the property."

[1, 2] If the foregoing were all the facts, I think the complaint would sufficiently set forth a cause of action for specific performance, and be demurrer proof. There would be thus presented an oral accepted gift of real property upon which the donee had acted by going into possession and making improvements. Under the New York cases a cause of action is stated.

The leading case is *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657. Grover, J., said:

"The question then is whether a parol promise by one owning lands to give the same to another will be enforced in equity, when the promisee has been induced by the promise to go into possession, and, with the knowledge of the promisor, make comparatively large expenditures in permanent improvements upon the land. It is, and must be conceded, that if the promise by parol was to sell the land for a valuable consideration to be paid therefor by the promisee, such promise under this precise state of facts would be enforced.

The ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, really is to prevent a fraud being practiced upon the parol purchaser by the seller, by inducing him to expend his money upon improvements upon the faith of the contract, and then deprive him of the benefit of the expenditure, and secure it to the seller by permitting the latter to avoid the performance of his contract. In the case supposed, there has been no part performance of the contract, strictly speaking, except the taking possession, no part of the purchase money having been paid, and yet the cases are numerous where performance of such contract has been decreed in equity, where possession has been taken under the contract and large expenditures upon permanent improvements made. In the present case, possession has been taken under the promise and the expenditure upon improvements made, yet it is insisted that equity will not enforce the promise for the reason that it was to give, instead of having been to sell, the land for a valuable consideration. Permitting the promisor to avoid performance operates as a fraud as much in the latter as in the former case, so far as expenditures upon improvements are concerned. The counsel for the appellant insists that there has been no part performance of the contract to give the land. The answer to this is that possession has been taken, and valuable improvements made upon the faith of the promise. These acts constitute part performance by the respondents. It is true that the plaintiff has done nothing by way of performance on his part. It is not necessary that he should. Part performance by the party seeking to enforce the contract is sufficient. It is further insisted that an executory promise, not founded upon any valuable consideration, is a mere nude pact, furnishing no grounds for an action at law, and that performance of such a promise will not be enforced in equity. This is true so long as the promise has no consideration. Anything that may be detrimental to the promisee or beneficial to the promisor in legal estimation will constitute a good consideration for a promise. Expenditures made upon permanent improvements upon land with the knowledge of the owner, induced by his promise, made to the party making the expenditure, to give the land to such party, constitute in equity a consideration for the promise. *Lobdell v. Lobdell*, 33 How. Prac. 347; *Id.*, 32 How. Prac. 1; *Crosbie v. McDaul*, 13 Vesey, 147; *Shephard v. Bevin*, 9 Gill. (Md.) 32; 3 *Parsons on Contract*, p. 359. The statute of frauds has no bearing upon the case. If the promise reduced to writing could, under the circumstances, be enforced in equity, it may be, although by parol. 2 Statutes at Large, 139, § 10."

In *Young v. Overbaugh*, 145 N. Y. 158, 39 N. E. 712, plaintiff brought ejectment to recover the possession of land and a dwelling thereon, occupied by the defendant and her husband. It was conceded that the legal title was in plaintiff's testator at the time of his death. Defendant claimed that she was the equitable owner by reason of promises made by plaintiff's testator to her and of acts done by her in reliance upon these promises. *Gray, J.*:

"Where there has been a parol promise to convey, a taking of possession under such promise, and the making of permanent improvements upon the property upon the faith thereof, the mere value of the occupation during the time is not to be set off against the expenditures made. I think it would not be within the spirit of the rule in equity, that its application should be made to depend, not upon the fact of a consideration for the promise being shown to have existed and to have been performed, but upon the question whether, when specific performance by the donor is claimed, the use has not compensated the donee and relieved the donor's obligation."

After quoting from *Freeman v. Freeman*, *supra*, the opinion continues:

"It was stated by *Parker, J.*, in *Lobdell v. Lobdell*, 36 N. Y. at page 330: 'If the promisee, on the faith of the promise, does some act, or enters into some engagement, which the promise justified, and which a breach of the prom-

ise would make very injurious to him, this equity might regard as confirming and establishing the promise, in much the same way as a consideration for it would.' In such a case as this, to constitute a good consideration in equity, it is, of course, essential that it be substantial; in the sense that the promise shall rest upon a performance by the promisee, which evidences acceptance of and reliance upon the promise and consists in expending moneys in permanent improvements upon the land. * * * If there was the promise to give the property, accompanied by the delivery of possession to the defendant and expenditures in permanent improvements made, in reliance upon the promise, injury will be presumed to follow by a failure to perform it. In enforcing such a promise, equity aims at preventing a fraud upon the donee and regards the case as taken out of the operation of the statute by the part performance."

In *Miller v. Ball*, 64 N. Y. 286, Judge Earl used this language:

"The principle upon which courts of equity hold that part performance is sufficient is that a party who has permitted another to perform acts on the faith of an agreement shall not be allowed to insist that the agreement is invalid because it was not in writing, and that he is entitled to treat those acts as if the agreement in compliance with which they were performed had not been made; in other words, upon the ground of fraud, in refusing to execute the parol agreement after a part performance thereof by the other party, and when he cannot be placed in the same situation that he was in before such part performance by him. Taking possession under a parol agreement, with the consent of the vendor, accompanied with other acts which cannot be recalled so as to place the party taking possession in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute."

In *Ball v. Ball*, 97 App. Div. 347, 89 N. Y. Supp. 1046, Hirschberg, J., said:

"The action is in equity, and the right to judgment depends only upon a determination of the equitable title. The plaintiff would have acquired such title upon the mere oral promise of the defendant to give her the property, followed by the delivery of possession and the making by her of substantial improvements such as she unquestionably did make. Her possession in such circumstances even without a deed could not be afterwards disturbed by him, and a court of equity would compel the execution and delivery to her of a promised conveyance. * * * Her equitable title was, in fact, acquired from the defendant notwithstanding that the deed to her was executed by another, and the circumstances of the case, unqualified and uncontradicted, require that the deeds by which he has since sought to obtain title and the right to possession should be canceled and annulled."

In *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446, Follett, Ch. J.:

"The plaintiff testified that it was orally agreed between himself and his father that the former should take possession of the property, have the use of it, and when he had paid the mortgage he was to have a deed. The son was to make such improvements as he chose, with the right of removing them if he failed to pay the mortgage and acquire the property. Under this contract the son occupied the property for nearly eight years, and added to it some new buildings and machinery. Under this contract the plaintiff became the equitable owner of 18 acres, and on paying the mortgage could have compelled a conveyance of the legal title by his father. *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657. The plaintiff could have devised the land, and, had he died intestate, his interest held under this oral contract would have descended to his heirs subject to the dower right of the widow."

But these are not all the facts. The plaintiff is not compelled to rely solely upon an oral gift. As convincing proof of that gift, Mr. Rogers, his wife joining, executed and had recorded a deed of the property to

the plaintiff. So that it is in possession, it has changed its situation, it has incurred enlarged liabilities, it has expended its money on improvements, and it holds the record title. But there is a cloud upon that title—a cloud of which it had no knowledge till years after the taking of possession, the change of situation, the making of improvements, the recording its deed, and the death of the donors, Mr. and Mrs. Rogers. Assuming that the donors had perfected their accepted gift by a deed giving a clear and unincumbered title in fee, they find an overdue alleged purchase-money mortgage for \$600,000, \$150,000 more than the cost to Mr. Rogers of the property and building, carrying a yearly obligation for \$36,000 interest. It was not a purchase-money mortgage. It was an instantaneous transaction by which the property ostensibly got out of the ownership of Mr. Rogers just long enough to place a mortgage thereon, when it came back to his ownership permitting him to convey to plaintiff with this grievous burden, which did not represent a dollar of expenditure or indebtedness between any of the parties to the transaction. What his purpose was is unknown. It was never disclosed to the plaintiff in his lifetime.

It is a cloud upon the plaintiff's title. It was without consideration. It was a dummy transaction. It was perpetrated long after the taking of possession by the plaintiff. All this is admitted by the demurrer. There is no other way of characterizing the transaction than as a fraud on the plaintiff. Adopting resolutions of appreciation and thanks with public dedication, it finds its supposed generous donor has saddled it with the onerous burden of a \$600,000, 6 per cent. mortgage which does not represent a dollar of actual money or indebtedness. To say that, such facts being conceded, as they are by the demurrer, no cause of action is stated in equity, is to leave a court of equitable jurisdiction helpless and useless. If these facts are established upon the trial, the court will have no difficulty in dispelling this most substantial and threatening cloud on plaintiff's title.

The order sustaining the demurrers to the complaint should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs to the appellant, with leave to the respondents to withdraw demurrers and answer over within 20 days and upon payment of said costs. All concur.

(161 App. Div. 341)

NORTH BRITISH & MERCANTILE INS. CO. v. MERCHANTS' NAT. BANK.

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

1. BANKS AND BANKING (§ 154*)—DEPOSITS—PAYMENT OF FORGED CHECKS—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action by a bank depositor to recover the proceeds of checks fraudulently drawn by plaintiff's employes against plaintiff's account, evidence *held* to make it a jury question whether plaintiff by reason of its negligence in not examining its books should recover.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 502-512, 515, 516, 518-533; Dec. Dig. § 154.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

2. BANKS AND BANKING (§ 119*)—DEPOSITS—RELATION.

The relation between a depositor and a bank is that of debtor and creditor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 289-292; Dec. Dig. § 119.*]

3. BANKS AND BANKING (§ 148*)—DEPOSITS—DUTY OF BANK.

A bank must know the signatures of its depositors and is primarily liable if it pays out money on forged checks unless the depositor's negligence contributed to the payment without any negligence upon the part of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-446, 451, 452; Dec. Dig. § 148.*]

4. BANKS AND BANKING (§ 148*)—PAYMENT OF FORGED PAPER—ESTOPPEL OF DEPOSITOR.

Defendant bank submitted to a depositor for execution an instrument by which defendant was authorized to deliver to the person named the depositor's passbook and take such person's receipt for the same in the form printed on the reverse side, and the depositor's cashier signed the instrument, which provided that, unless written notice to the contrary was given within 10 days from the date of the receipt, it was to be considered as accepted by the depositor as correct, and the agreement was acted upon by both parties until the fraudulent act of the depositor's employes in forging checks on the depositor's account was discovered. *Held*, that the depositor could not repudiate transactions under the agreement on the ground that its cashier had no authority to sign the agreement and the messenger to whom the passbook was delivered had no authority to sign the receipt, especially where the depositor was guilty of neglect in taking ordinary precautions to prevent the bank from being defrauded by the use of canceled vouchers called for by the passbook.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-446, 451, 452; Dec. Dig. § 148.*]

5. BANKS AND BANKING (§ 148*)—DEPOSITS.

The fact that a bank, which paid checks fraudulently drawn on a depositor's account by the depositor's employes, received the checks for payment from other solvent banks, so that if required to again pay their amount to the depositor it could seek reimbursement from the other banks, would not be ground for requiring it to again pay checks.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-446, 451, 452; Dec. Dig. § 148.*]

Hotchkiss and Dowling, JJ., dissenting.

Appeal from Trial Term, New York County.

Action by the North British & Mercantile Insurance Company against the Merchants' National Bank. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, DOWLING, and HOTCHKISS, JJ.

George A. Strong, of New York City, for appellant.

William H. Van Benschoten, of New York City, for respondent.

McLAUGHLIN, J. In addition to the facts set forth in the opinion of Mr. Justice HOTCHKISS, it should be stated that for some time prior to August 1, 1907, and during all of the time covered by the transactions here involved, the defendant, by the course of dealings between the parties, kept an account of all moneys received and paid out on checks, and on or about the 1st day of each month made

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 146 N.Y.S.—46

a detailed statement of all deposits and payments during the preceding month and delivered it, with the checks and passbook, to the plaintiff. The checks in question here were paid between the 1st of September, 1907, and the 15th of September, 1910. The first bogus check, for \$44.99, was dated the 24th of August, 1907. It was paid by the defendant about that time, the amount charged to plaintiff's account, and a statement to that effect, together with the checks returned to the plaintiff about the 1st of September. The next one was in September, for \$55.01; two in October, aggregating \$41.77; two in November, aggregating \$60.05; two in December, amounting to \$34.03; and all amounting to \$235.85. These checks were all negotiated by Bradford, as were all of those during the following months up to July, 1908, when Walker commenced operations. At first both Bradford and Walker purloined but few checks each month. Apparently, having ascertained how easy it was to defraud the plaintiff, they increased the number so that one month, acting either separately or together, they negotiated 23. Between August 1, 1907, and the 15th of September, 1910, the plaintiff deposited with the defendant \$7,377,903.78, and during the same time defendant paid out on checks drawn by plaintiff \$7,367,151.56, and in addition it paid the checks here involved, which it is conceded bore the genuine signature of the plaintiff, amounting to \$13,176.74.

Plaintiff's counsel conceded at the trial that there were returned by the defendant to it each month an average of over 600 check vouchers of an average aggregate amount of \$200,000. No objection was made to the statements returned by the defendant to plaintiff, or to the payment of the checks here in question, until the 20th of September, 1910. The fraud was discovered by a check being presented to the plaintiff's cashier for signature, payable to the order of one Bauman. The cashier's assistant called his attention to the fact that they had only a few days before drawn a check for some thirty-odd dollars, payable to the order of a man named Bauman. On looking at that check they found Walker's name indorsed on it. This resulted in an examination, and Walker's confession also disclosed the frauds committed by Bradford. Many of the checks negotiated by him bore the indorsement of E. B. Wood. A further investigation followed, which showed that Bauman's indorsement appeared on forty-one checks, some of which had been returned to plaintiff by the defendant each month during 1909 and 1910, save January and March of the former year, and 87 checks which bore the indorsement of Walker, extending over the period of two years beginning July, 1908, and ending with August, 1910; that 218 checks bore the indorsement of Wood, which involved Bradford's fraud; and that the first fraudulent check bore Bradford's own indorsement. Had the slightest examination been made by the plaintiff of its books and the evidence in its possession, the fraudulent acts of Bradford would have been discovered when the bank returned the first bogus check with the other vouchers. And the same is true of the bogus checks returned each time when the passbook was written up. The plaintiff, however, did nothing for upwards of three years, and the result was that these two dishonest clerks

purloined 362 checks, put them into circulation, and the same were paid by the defendant, concededly acting in good faith.

[1-3] Under such circumstances, I am of the opinion that a question was presented which should have been submitted to the jury, whether the plaintiff ought to recover upon any of the checks. The relation between a depositor and a bank is well understood. It is that of debtor and creditor. By reason of this relation a reciprocal duty is imposed. A bank is bound to know the signature of its depositors and pay out the money only on their orders. If it does otherwise, the bank, primarily, and not the depositor, must stand the loss. A bank, however, is permitted to escape liability for repayment of amounts paid out on forged, raised, or fictitious checks, by establishing that it made the payment in good faith, without negligence upon its part, and that the payment was brought about or contributed to by the negligence of the depositor; in other words, that the payment was made by reason of the neglect of the depositor to do "those things dictated by ordinary business customs and prudence and fair dealing toward the bank, which if done would have prevented the wrongdoing which resulted from their omission." *Morgan v. U. S. Mortgage & Trust Co.*, 208 N. Y. 218, 101 N. E. 871. The facts here presented demonstrate very clearly the reasonableness of this rule. Commercial transactions are now carried on largely by means of checks. The plaintiff, as indicated, used in its business at least 600 each month, aggregating in amount something like \$200,000. It therefore owed a duty not only to the defendant, but, I think, to the public generally, to exercise at least reasonable care that the checks which it signed were genuine and not fictitious transactions. If it failed to do this, then it ought not to be permitted to assert their invalidity against either the bank upon which they were drawn or any one else taking them in good faith and for value. When the first fictitious check was returned, and it is not here sought to recover on that one, if an examination had been made such as ordinary prudence would have seemed to dictate, Bradford's dishonesty would have been disclosed, and measures could have been taken would thereafter have prevented similar transactions either by him or Walker. The purpose of having the passbook written up was to ascertain what checks had been paid out and what the defendant claimed as to the plaintiff's account.

As said in *Morgan v. U. S. Mortgage & Trust Co.*, supra:

"When they submitted their passbook to be thus written up, they in effect called for a statement of their account as kept by the bank, and, when this was furnished to them, is it to be thought that they satisfied the requirements of common prudence and fairness to the bank by absolutely disregarding the passbook and check list which could not be easily falsified, and simply comparing a bundle of vouchers which might be much more easily manipulated by ready abstraction of vouchers? The passbook is the statement of the bank's version of the account and the fundamental basis for comparison with the depositor's own records. The paid checks which are returned are the vouchers of the bank for its account as written on the passbook, and, if they are to be made the medium of comparison of accounts, the depositor at least ought to endeavor to know that they tally with the passbook. Otherwise he has made no reliable comparison or verification. Therefore it seems to me that, when the appellants relied for verification merely on a comparison of vouchers without any effort to verify these by comparison with the check list or passbook,

they did not exercise reasonable methods. On the other hand, it seems to me that when, having obtained from the bank a list of vouchers and balanced passbook which were intended to give and did give them a correct basis for comparison and verification, they disregarded these, they were guilty of such obvious oblivion of their duties that no extended argument can make plainer their negligence than does the mere recital of the facts."

[4] In connection with the duty imposed on the plaintiff to examine the returned canceled vouchers, so that any irregularity in their issue could be at once corrected, both for the protection of the defendant and the banking community in general, the defendant, in August, 1909, submitted to the plaintiff for execution by it an instrument by which the defendant was authorized to deliver to the person named the plaintiff's passbook and take his receipt for the same in the form printed on the reverse side thereof. The plaintiff, by its cashier, signed this instrument and delivered it to the defendant. This receipt was to show the balance at the close of business on the day specified, together with the list of canceled vouchers called for by the passbook, and, unless written notice to the contrary were given within 10 days from the date thereof, it was to be considered as accepted by the plaintiff as correct. Thereafter, on receipt of the passbook and vouchers, plaintiff's representatives signed such receipt. The plaintiff, however, seeks to repudiate this agreement on the ground that the cashier had no authority from the plaintiff to sign it and that the messenger to whom the passbook and vouchers were delivered had no authority to sign such receipt. But the agreement was acted upon by both of the parties from the time of its execution until the fraudulent acts of Bradford and Walker were discovered, and during such time it was not even suggested that the cashier did not have authority to make whatever arrangements were necessary with defendant as to its banking account. It was too late for the plaintiff, after thus receiving the canceled vouchers and statement of the account as shown by them, and the same had been acted upon by plaintiff, to thereafter repudiate the transactions, especially when it appeared that all of the checks were issued under circumstances which would justify a finding that the plaintiff had neglected to take even ordinary precautions to prevent the defendant or others from being defrauded by their use.

The plaintiff was resorting to the use of checks for the purpose of doing its business, and every one of those in question bore its genuine signature. The bank, of course, was bound to know that the maker's signature was genuine, and it is possible it was also bound to know that the indorsement on the first check was genuine; but, when no objection was made to it when returned, it had a right to treat other checks coming in as it had that one; in any event, after the statement and vouchers had been returned and no objection made within a reasonable time, then it seems to me it certainly was a question for the jury to determine whether or not the plaintiff was not bound by an implied ratification of the statements rendered. *Dana v. Nat. Bank of the Republic*, 132 Mass. 156.

If the plaintiff knew of the fraud, then it was bound to inform the defendant of it. It did, in legal effect, know of it, because its own records showed it, as the slightest examination of them disclosed.

Fair dealings require, under such circumstances, that it should be held to the statements as rendered, on the ground that it adopted the payments made and impliedly ratified them. *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; *Myers v. S. W. Nat. Bank*, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672.

[5] But, it is said, the defendant ought not to escape liability because it received the checks for payment from other banks which are solvent, for which reason it will not be damaged. I do not think this conclusion follows. Defendant has paid the checks once, and, plaintiff having called upon it again to pay them, it has a right to resist the payment, irrespective of whether or not it may, in case it does pay, be reimbursed by some one else. A loss has been sustained, which, if occasioned solely by plaintiff's negligence, should be borne by it, and the defendant is in position to assert such defense—this upon the theory that one who, by his own neglect, is responsible for or the cause of a loss, should bear it instead of an innocent party. *First Nat. Bank v. American Exch. Nat. Bank*, 49 App. Div. 349, 63 N. Y. Supp. 58, affirmed 170 N. Y. 88, 62 N. E. 1089.

I am of the opinion that there was at least a question for the jury as to the negligence of the plaintiff that would prevent a recovery. The judgment should therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event.

INGRAHAM, P. J., and LAUGHLIN, J., concur.

HOTCHKISS, J. (dissenting). The plaintiff was a depositor with the defendant and brought this action for a balance of account. What, if any, balance exists, depends upon certain checks which plaintiff claims were improperly paid by the defendant because of the alleged forgeries of the indorsements of the payees. The number of checks in dispute is 362, covering a period from August 1, 1907, to September 15, 1910. The plaintiff is an English company which maintains a principal office in the city of New York under the charge of a general manager, and through which plaintiff's business, including its many agencies in the United States, is directed. During the period in question, nearly 800,000 policies were sent from the New York office to the plaintiff's various agencies, and there was at all times outstanding on its books policies approximating 300,000 in number. When a policy was canceled before it had expired, it became necessary to pay to the holder a return premium representing the unearned portion of the original premium. The policies on account of which such payments were made amounted, during the period in question, to some hundreds of thousands. The individual amounts of the sums so returned were comparatively small; but, because of their great number, the aggregate amounted to about \$90,000 a month, all of which was apparently drawn from the plaintiff's account with the defendant. The territory in which plaintiff transacted business was divided into districts, and, when an application for a return premium was received, it would be given over to a clerk who had charge of the returns within the district to which the policy concerned belonged, and thereupon it became his

duty to proceed as follows: From the canceled policy, the "daily report," and the "policy register," it was the duty of the clerk to make out on a printed form what was called an "account," showing certain particulars of the policy, the amount of the return premium, etc. The same clerk would also prepare an "order" on plaintiff's cashier for a check on defendant for the amount to be returned. The clerk would then pass the "account" and the "order" to the head of the accounting department, who would sign the "order" and send it to the cashier, with the voucher papers on which the order was based, attached. A check having been prepared by the cashier, it would be sent to the proper officers of the plaintiff for signature, after which the check would be returned to the head of the accounting department, and from him it would come to the hands of the clerk who had prepared the vouchers on which the check was based, and thereupon it became the duty of the clerk to see that the check was transmitted to the person entitled to receive the same.

Among the clerks employed in plaintiff's accounting department and whose business it was to prepare vouchers and checks for return premiums were Bradford and Walker, who, when the checks in question came back into their hands duly signed, purloined them and converted their proceeds to their own use. This conversion was accomplished in the following manner: In every case, the checks represented a fictitious transaction upon which no return premium was owing by the plaintiff, and each of the checks had been procured from plaintiff by means of fictitious vouchers on the faith of which the checks were signed. In some instances, the names of the payees of the checks were those of existing persons, some of whom were customers of the plaintiff, but to whom plaintiff owed nothing, and some were personal creditors of Walker, who took this method to pay his personal debts. The remaining payees represented persons having no existence. Of the checks payable to the order of existing payees, some were in fact indorsed by such payees; but on the others the indorsements were forged. The indorsements so forged and as well the indorsements of the checks payable to nonexistent payees were made by Bradford or by Walker or by the procurement of one of them. The frauds were discovered by plaintiff, and the defendant was notified early in September, 1910. Prior to August 2, 1909, it had been defendant's custom to return to plaintiff its passbook with canceled vouchers and to take a mere receipt for the same; but on that day defendant gave to plaintiff's bank messenger a new form of signature card with directions to have it signed by some one duly authorized and to return the same to defendant. On one side of this card was an order designating the individual to whom defendant should deliver returned vouchers, "taking his receipt for same in my behalf in form as on reverse hereof." On the reverse side was printed the following form of receipt:

"New York, 190 .

"Received, from the Merchants' National Bank of the City of New York passbook for the account of the undersigned, showing balance \$ at the close of business, together with canceled vouchers called for by passbook and list of vouchers which are hereby accepted as correct and gen-

uine, and the account approved as stated, unless written notice to the contrary is given within ten days from this date."

This blank card was by the messenger delivered to Ketcham, an employé of the plaintiff with the title of cashier, and among whose duties was the making up of the daily deposits with defendant and the receipt and custody of all returned vouchers when the same were brought to plaintiff's office by the messenger. Ketcham was not an officer of the plaintiff and his duties were clerical only. Without calling the attention of any of plaintiff's responsible officers to the receipt of the card or to the new system of receipting for canceled vouchers which the terms of the card suggested, Ketcham filled in the name of the messenger, Thomas Baxter, as the one authorized in the future to receive from defendant and receipt for canceled vouchers, and so filled in, Ketcham signed the card in the name of the plaintiff, per "D. R. Ketcham, Cashier." The signed card was on August 2d returned to the defendant, from which date all of plaintiff's canceled vouchers were receipted for in the foregoing form. The fact that Ketcham had signed the card and authorized the giving of the form of receipt evidenced thereby was never brought to the knowledge of any representative of plaintiff authorized to contract in its behalf. On the trial much testimony was given both by plaintiff and defendant on the subject of plaintiff's alleged negligence in uttering the checks and as well in failing to adopt and enforce such a system of examination or audit as was adapted to disclose the fraudulent practices of its clerks.

At the conclusion of the trial, both sides moved to direct a verdict. Defendant's motion having been denied, it asked to go to the jury on a variety of questions including those raised on this appeal.

An analysis of the checks as they appear in the record shows that they were drawn to the order of payees and bore indorsements which are divisible into the following classes: (a) Checks to the order of existing persons; (b) checks to the order of nonexistent persons; (c) checks of class A indorsed by the identical payees named therein; (d) checks of class A bearing forged indorsements of payees.

The plaintiff recovered on all the checks of the several classes, on the theory that the payees' indorsements were forgeries, and counsel so argues on this appeal. In the case of checks to the order of and indorsed by existing payees, the theory is that, as to plaintiff, they are to be regarded as forgeries because plaintiff never intended to draw checks to such payees. The bank has thus been held liable not only in the case of nonexistent payees, but also in cases of existing payees whose indorsements were genuine.

(1) No argument is necessary to show that the court erred in cases of the latter class. As to these, the bank paid according to its instructions. If plaintiff was led by fraud or mistake into unintentionally giving to the bank orders to pay to persons to whom it owed nothing, the loss should fall on plaintiff whose error caused the payments to be made.

(2) The case of nonexistent payees is apparently covered by *Hartford v. Greenwich Bank*, 157 App. Div. 448, 142 N. Y. Supp. 387, decided by this court in June last. In that case, an employé of a tea com-

pany; a depositor in defendant bank, fraudulently induced his employer to sign checks to the order of a nonexistent person, in payment of bills which the employé led his employer to believe were owing by him to such pretended creditor. In fact, the name of such payees was one assumed by the employé himself and under which he had rented an office and received his mail in a distant part of the city. Under his assumed name, the employé opened an account with the Greenwich Bank. Having thus fraudulently procured the checks from his employer, the employé indorsed the same in his assumed name, and, so indorsed, deposited them with the defendant bank, from which he drew the proceeds. By a divided court, the bank was held not liable to the tea company for the loss. The reasoning of the court is summed up in the following sentences (at page 451 of 157 App. Div., at page 389 of 142 N. Y. Supp.):

"This is not strictly speaking the case of a check drawn to a fictitious or nonexistent person. * * * What we have here is a successful fraud perpetrated upon the tea company by one of its own employés, by which it was induced to believe that it owed that employé certain sums of money. The checks in suit were intended to be paid in satisfaction of this supposed debt and were in fact paid to the person for whom they were intended. No liability attaches to the bank under these circumstances."

The minority of the court pointed out that, while the majority assumed to base their decision on the intent of the drawer, they had in fact confused the matter of such intent with that of the identity of the payee, and in working out their legal conclusion had substituted the latter for the former. The error in a result thus obtained was pointed out in *Philips v. Mercantile Nat. Bank*, 140 N. Y. 556, 562, 35 N. E. 982, 983 (23 L. R. A. 584, 37 Am. St. Rep. 596), where Judge Gray, writing for the court, said:

"The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name."

The minority in the *Greenwich Bank Case* placed their dissent on the ground that the indorsement of the name of the payee should be treated as a forgery, and that "the rule that a check payable to a fictitious payee is deemed payable to bearer has no application where the drawer of the checks is not aware that the payee is fictitious." At page 454 of 157 App. Div., at page 392 of 142 N. Y. Supp. (citing *Shipman v. Bank of State of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821). As I read the *Shipman Case*, it decided exactly that on a state of facts indistinguishable from those in the *Greenwich Bank Case*. In the *Shipman Case*, plaintiffs were by the fraud of their clerk induced to sign checks to various classes of fraudulent payees, including some wholly fictitious who plaintiffs were induced to believe were clients of plaintiffs, to whom the sums represented by the checks were owing. But the question would seem settled by *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829, 22 L. R. A. (N. S.) 499. In that case, one Pennock, an employé of *Babcock & Co.*, a depositor of the *Federal Bank*, presented to that bank a check purporting to have been drawn on it by

Babcock & Co. to the order of "N. Y. Draft," but which check was in fact forged. In exchange for this check, the employé received from the Federal Bank a draft on plaintiff to the order of Carroll Bros. whose name Pennock indorsed on the draft which he deposited to his credit in the Mellon Bank. Carroll Bros. was an existing firm and dealers with Babcock & Co., but to whom the latter owed nothing. Plaintiff, having reimbursed the Federal Bank, brought action to recover the amount of the draft from defendant, the correspondent of the Mellon Bank, to which plaintiff had paid the draft, and judgment in plaintiff's favor was sustained. The court refused to treat Carroll Bros. as fictitious payees because, under subdivision 3 of section 28 of the Negotiable Instruments Law (Consol. Laws, c. 38) of this state, such an instrument payable "to the order of a fictitious or nonexistent person" is to be considered as payable to bearer only when "such fact was known to the person making it so payable." After pointing out that in this fact of knowledge lies the difference between our act and certain others, including the English Bills of Exchange Act, the court cites numerous commentators, who recognize the "New York rule," and also quotes with approval (at page 35 of 193 N. Y., at page 832 of 85 N. E. [22 L. R. A. (N. S.) 499]) the following very apt language from the Shipman Case:

"Hence if the maker or drawer supposes the payee to be an actually existing person (as for instance, where he is induced by fraud to draw the instrument to the order of a fictitious person whom he supposes to exist), the instrument will not be payable to bearer, and no person can acquire the title thereto by delivery. And where the instrument is drawn payable at a bank, the bank cannot charge the same to the account of its customer, since the instrument is not in such case payable to bearer and the instrument is a forgery."

The reason for the so-called "New York rule" is apparent and supports its propriety, and incidentally discloses what I deem to be the basic error of the decision in the Greenwich Bank Case. A check payable to a nonexistent person, necessarily, can never bear a genuine indorsement. Hence the drawer who is aware of such nonexistence cannot intend the check to be indorsed by the payee named and must be taken as intending it to be payable to bearer. But, if the fact of the payee's nonexistence is unknown to the drawer, presumably he relies on the drawee to see to it that payment is made as directed, and this casts the burden on the drawee to ascertain by identification or otherwise to whom he pays, and to pay only on a genuine indorsement. Naturally, if such an indorsement be impossible, the drawee should not pay at all.

It has been suggested that the Seaboard Bank Case is to be distinguished from that of the Greenwich Bank, because in the former the check of Babcock & Co. in exchange for which the Federal Bank issued its draft, was a forgery, but this fact the court took pains to point out (at pages 31 and 32 of 193 N. Y., 85 N. E. 829, 22 L. R. A. [N. S.] 499), was quite immaterial. The case of the Seaboard Bank was neither cited by counsel nor referred to in either of the opinions in the Greenwich Bank Case, and seems to have wholly escaped attention. If, however, it is, as I deem it to be, a controlling authority binding upon and which it was the duty of this court to follow when

deciding the Greenwich Bank Case, then I conceive it is no less our duty to accept it now. I conclude therefore that the defendant prima facie is liable on the class of checks in question.

(3) We have remaining, checks drawn to the order of existing payees whose indorsements were forged. This, among other points, brings directly up the question of plaintiff's negligence, to which subject the testimony at the trial was largely directed. The bank claims that, notwithstanding it may be liable prima facie on this class of checks and as well on any of the other classes on which, as I have hereinbefore pointed out, it is similarly liable, nevertheless it was error to direct a verdict against it, because:

(1) As to all the checks in dispute, the question of plaintiff's negligence should have gone to the jury.

(2) Defendant was released by the 10 days' limitation contained in the returned voucher agreement signed by Ketcham.

(3) As to all checks on which a claim was not made within one year after the return of the vouchers, defendant is released by section 326 of the Negotiable Instruments Law.

I take these questions up in inverse order.

(3) The statute says:

"No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised."

On the face of the statute, it clearly does not apply. It is perfectly clear what forged and raised checks are. When we speak of a forged check, we mean that the maker's name is forged; a raised check is one the amount of which has been increased. Defendant attempts to extend the statute to the case of forged indorsements, on the theory that under the Penal Law forgery of a check includes the forgery and circulation of an indorsement. Obviously, if by the phrase "forged check" it was meant to include everything which the Penal Law defined as such, then there was no sense in using the term "raised" check, because that equally is a "forged" check. But defendant argues that its construction of the statute is reasonable because the depositor is much better able than the bank to ascertain the validity of an indorsement. This is manifestly untrue. The law is settled that ordinarily a depositor owes no duty to the bank to examine the indorsements on his returned vouchers, inasmuch as the obligation is upon the bank to make payment according to the drawer's directions, and hence it is the bank's duty to ascertain that it is making payment to the right person—a duty which the depositor may assume it has fulfilled when his checks are returned. Section 326 was originally enacted in 1904. There had shortly previous been a number of cases, including the Critten Case, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529, involving the liability of banks for forged and raised checks. There was much dicta and some language more or less equivocal in the books, but never until *Morgan v. U. S. Mtg. & Trust Co.*, 208 N. Y. 218, 101 N. E. 871 (1913), was it squarely and finally settled that the depositor (as maker) owed to the bank the duty to make a reason-

ably careful examination of his returned vouchers, and more especially had it never been decided within what exact time he must notify the bank of errors. The law was that the notice must be within a reasonable time, which necessarily depended upon the circumstances of the case. Section 326 was adopted to settle both of these questions by making it incumbent on the part of a depositor whose signature to a check had been forged or whose check had been raised, to notify the bank within a year. It was a codification of substantive law. *Shattuck v. Guardian Trust Co.*, 204 N. Y. 200, 97 N. E. 517. There may be a good reason for a statute requiring a depositor to notify the bank within a limited time of any irregularity in indorsements on returned vouchers; but, in the light of the law which relieves the depositor of any duty so to do (except as hereinafter considered), I think it useless to argue that the phrase "forged" check includes a forged indorsement.

(2) Prior to August 2, 1909, plaintiff had been doing business with defendant under a system by which returned vouchers were simply receipted for. Shortly after the decision in the Critten Case, there was a general movement among banks to protect themselves. This led to the adopting of a more stringent form of receipt for returned vouchers. Thus, this defendant adopted a form of receipt which, after acknowledging the return of the passbook with canceled vouchers as per list attached, said that the same "are hereby accepted as correct and genuine and the amount approved as stated, unless written notice to the contrary is given within ten days from this date." This new agreement was on August 2, 1909, signed in plaintiff's behalf by Ketcham, its cashier. The original seems to have been retained by defendant, and no copy was kept by or delivered to plaintiff. Although Ketcham held the title of cashier, he was in fact no more than a clerk whose duties included caring for the current cash, making deposits, and receiving returned vouchers. He never had actual authority to sign the new and modified returned voucher contract, and he never informed any one in authority that he had done so. Previous to the adopting of this new form as above stated, it was, plaintiff's custom to give a simple receipt for the returned vouchers. I do not think that any express contract can be predicated of these facts. Ketcham had no authority to make such a contract. But do not the facts raise an implied agreement on plaintiff's part identical with the terms of the paper signed by Ketcham? I think so. When defendant sent to plaintiff, by Baxter, plaintiff's messenger, the new contract with directions to have it signed by some one in authority, and when that form of contract, accompanied by defendant's message, was presented to Ketcham, the communication came to an agent who represented plaintiff in the matter of returned vouchers. This amounted to notice to plaintiff of defendant's desire and intention, in the future, to be bound by and to do business only on the basis of the terms contained in the paper so presented to plaintiff for its acceptance. It then became plaintiff's duty to act in the premises. It could not remain silent and continue to do business with defendant, unless it was willing to accept defendant's conditions.

In the face of this notice, the subsequent transactions, defendant believing that it had a valid contract—must be deemed to have been pursuant to an implied contract between the parties, in short, a contract by offer and acceptance. See 1 Cyc. 256, 257, 258. If defendant's president had notified plaintiff's president that their future business must be done on the basis of the conditions set forth in the paper signed by Ketcham, and if after this, without dissent, plaintiff had continued to transact its banking business with defendant, can there be any doubt that the notice would have bound plaintiff? I think the notice delivered to Ketcham had the same effect. True, he had no power to enter into any express contract in the premises, but he was an agent representing plaintiff in the business in question, and, as such, it was proper for defendant to convey through him a notice to plaintiff with respect to this business, and, inasmuch as it thereupon became the duty of Ketcham to communicate this notice to plaintiff, he is presumed to have done so. *Shattuck v. Guardian Trust Co.*, 204 N. Y. 200, 207, 208, 97 N. E. 517. Plaintiff having failed to dissent from, and defendant having relied on, this apparent acquiescence, the contract resulting is one made not by Ketcham, but by plaintiff itself. It is argued that the effect of any such notice was not to conclude plaintiff, but at most to establish an account stated, which it could open for fraud or mistake. I cannot so regard it. Any such construction would disregard the words "hereby accepted as correct and genuine," which precede the words "and the account approved as stated." These words refer back to "canceled vouchers." As "vouchers," the returned checks included the indorsements of the payee. Plaintiff's ratification and adopting of these "vouchers" and its release of defendant from responsibility for their genuineness and sufficiency as valid charges, unless objection should be made within ten days, was the manifest purpose of the new form of contract and the clear purpose of the language used therein. No words of this character were necessary if the intent of the contract was merely to effect an account stated. A mere return of the balanced passbook and the canceled vouchers would have accomplished this. No receipt, much less any words of express contract, was necessary. Plaintiff was bound by the limitation of ten days. In *Matter of New York L. & W. R. R. Co.*, 98 N. Y. 447, 453.

(1) The negligence asserted is of two kinds: Negligence in signing and uttering the checks, in that plaintiff failed so to safeguard its system for their issuance as to afford reasonable protection from such frauds as those by which it was victimized, and, as well, negligence in failing to take any reasonably adequate means to discover the extensive and long-continued frauds after they had begun. If, in any view of the case, either of those questions was material, I should advise reversal on this ground, because I think, in that event, the evidence of negligence was such as to require the facts (except as to the checks which bore genuine indorsements of existing payees on which I deem defendant not liable in any event), to be submitted to the jury.

But in my opinion, any negligence on plaintiff's part is quite immaterial. In the *Shipman Case*, Judge O'Brien said (at page 327 of 126

N. Y., at page 372 of 27 N. E. [12 L. R. A. 791, 22 Am. St. Rep. 821]]):

"Payments made upon forged indorsements are at the peril of the bank, unless it can claim protection upon some principle of estoppel or by reason of some negligence chargeable to the depositors."

To hold plaintiff responsible for negligence in failing to discover and notify defendant of the frauds would present difficulties, the mere suggestion of which at once discloses their importance. See *Knox v. Eden Musee Co.*, 148 N. Y. 441, 458, et seq., 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; *People v. Bank of North America*, 75 N. Y. 547, 556, 562; *Bigelow on Estoppel* (6th Ed.) 710 to 716. But for other reasons, I think the question of any negligence on plaintiff's part, whether in the inception of the checks or thereafter, is unavailable to defendant.

The answer contains no allegation that the defendant has suffered or that it will eventually suffer any loss in case it is forced to respond to its prima facie liability on any of the checks. On the contrary, it was conceded that in each and every instance plaintiff is protected from loss by the prior indorsement of a solvent bank through which the checks passed in the course of their collection from defendant. The *Critten Case* (171 N. Y. 219, 229, 63 N. E. 969, 57 L. R. A. 529) is express authority for the proposition that, under such circumstances, a bank which has paid checks to which the maker's name has been forged is not relieved from liability, even though the drawee of the check is chargeable with negligence in the transaction. In such case, the bank may only recoup for its damages, if any; this because the rule in all cases where negligence is asserted is that, to be an effective basis of legal right, damage must have resulted. This is equally true where negligence is alleged as ground of estoppel, for the only basis of estoppel is injury of some kind. Having suffered no injury and anticipating none, any negligence on plaintiff's part is quite beside the case. Nor may we speculate as to whether, in the case of some prior indorser, near or remote, the defense of plaintiff's negligence may not be good. No such indorser is now before the court, and our judgment should be based solely on the rights of the parties to the cause in hand.

If the foregoing views are correct, they lead to the following result: Defendant is in no event liable on checks to the order of existing payees and indorsed by them; defendant is prima facie liable on checks to the order of nonexisting payees; it is likewise so liable on checks to the order of existing payees whose indorsements were forged; but, because of the returned voucher agreement, it is not liable on any checks drawn after the date of that agreement and returned to plaintiff more than 10 days before defendant was notified of the frauds.

DOWLING, J. (dissenting). I concur in the dissenting opinion of Mr. Justice HOTCHKISS, except in so far as it holds that the defendant is not liable on checks drawn after the date of the alleged agreement made with the plaintiff, namely, August 2, 1909. As Ketcham, termed a cashier, was no more than a clerk, with duties extremely limited in their nature, and as he had no authority to make such an

agreement as that by which the plaintiff is sought to be bound, I fail to see how, in the absence of power to make an express agreement, he was vested with power to create such a situation by his acts that plaintiff would be bound by an implied agreement to the same effect as that of the claimed express agreement.

For these reasons I do not concur in the dissenting opinion in so far as it holds the defendant not liable on any checks drawn after the date referred to.

(161 App. Div. 469)

LANCASTER SEA BEACH IMPROVEMENT CO. v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. March 20, 1914.)

1. MUNICIPAL CORPORATIONS (§ 977*)—TAXES—RECOVERY OF PAYMENT—EVIDENCE.

In a suit to recover taxes paid on the ground that the assessment was invalid, evidence *held* sufficient to show that a reduction of the assessment was passed upon by the board of taxes and assessments, and not by one commissioner only.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2099-2103; Dec. Dig. § 977.*]

2. MUNICIPAL CORPORATIONS (§ 977*)—TAXES—RECOVERY OF PAYMENTS—BURDEN OF PROOF.

A taxpayer, suing to recover a tax paid, on the ground that the assessment was invalid because reduced by one commissioner only, and not by the board of taxes and assessments, has the burden of proof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2099-2103; Dec. Dig. § 977.*]

3. TAXATION (§ 442*)—TAX RECORDS—PRESUMPTIONS.

Where the formal tax record shows that a tax assessment was reduced by the board of taxes and assessments, the presumption against the contention that one commissioner only reduced the assessment, rendering it invalid, is very strong, and direct negative proof is called for.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 774-780; Dec. Dig. § 442.*]

4. STIPULATIONS (§ 14*)—CONSTRUCTION—DOCUMENTARY EVIDENCE—REDUCTION.

A stipulation, in a suit in which a tax assessment was attacked because reduced by one commissioner only, and not by the board of taxes and assessments, that the annual record prepared by the commissioners, showing under the column "Remarks" that the reduction was made "by Comms.," was so written by the deputy commissioner, who reported the original tax, and, in favor of the reduction, was insufficient to show that the board did not pass upon the reduction.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.*]

5. MUNICIPAL CORPORATIONS (§ 972*)—TAXES—CHARTER PROVISIONS—OATH OF COMMISSIONER.

Tax books constituting the annual record need not embody the oath of the deputy commissioner in assessing taxes required by New York Charter (Laws 1901, c. 466) § 889.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2075, 2078-2082; Dec. Dig. § 972.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. MUNICIPAL CORPORATIONS (§ 974*)—TAXES—REDUCTION OF ASSESSMENT—INTRODUCTION OF TESTIMONY.

Under New York Charter (Laws 1901, c. 466) § 898, a deputy commissioner, or the board of taxes and assessments, in reducing a tax assessment need not hear testimony as to the reduction, in the absence of a request of the applicant for the reduction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2083-2086; Dec. Dig. § 974.*]

7. MUNICIPAL CORPORATIONS (§ 974*)—TAXES—REDUCTION—BOARD OF COMMISSIONERS—MINUTE BOOK.

The board of taxes and assessments need not keep a minute book to show its official action in passing on an application for a reduction of a tax assessment, as the record of the assessment roll and the annual record is sufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2083-2086; Dec. Dig. § 974.*]

8. MUNICIPAL CORPORATIONS (§ 971*)—TAXES—RECORDS—FORM OF TAX ROLL.

Charter of New York (Laws 1901, c. 466) § 910, requires the placing of the sum in dollars and cents of the tax to be paid in the fifth column of the assessment roll. The general scheme of taxation prescribes that the first column must contain the name, the second the real property, the third the full value thereof, the fourth the full value of all taxable personal property, and fifth the tax. In the city of New York personal property taxes are separate from taxes on land, and placed on a different roll. *Held*, that a contention that a tax on property was void because placed in the fourth column, caused by the omission of the personal property column, was too technical to be considered.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2075-2077; Dec. Dig. § 971.*]

9. MUNICIPAL CORPORATIONS (§ 971*)—ASSESSMENT OF TAX—MAPS—PRESUMPTION.

In a suit attacking a tax assessment, in which a tax map made in conformity to New York Charter (Laws 1901, c. 466) §§ 890, 892, is introduced in evidence, which map bears date prior to Laws 1892, c. 542, applicable to the territory of Greater New York, and providing that maps shall be made, etc., it will be presumed, in the absence of contrary evidence, that the map in evidence was the only map made, and the one on which the tax was assessed, as Laws 1892, c. 542, does not require maps to be made forthwith, and there is implied permission, in section 4 of such law, to use maps in possession of the tax officer.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2075-2077; Dec. Dig. § 971.*]

10. TAXATION (§ 421*)—TAX RECORDS—DESCRIPTION OF PROPERTY.

Where the annual record and assessment roll gave the ward, block number, lot number, and relative location with respect to the streets stated, though not the name of the owner of an outlying parcel of land, never subdivided into city lots, but within the limits of New York City, and from which description the premises could be found by reference to the description in the tax map, the description was sufficient.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 720-727, 729-735; Dec. Dig. § 421.*]

Appeal from Trial Term, Queens County.

Action by the Lancaster Sea Beach Improvement Company against the City of New York. From a judgment dismissing the complaint on the merits, plaintiff appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued before JENKS, P. J., and THOMAS, RICH, STAPLETON, and PUTNAM, JJ.

Edward M. Grout, of New York City (James F. McKinney, of New York City, on the brief), for appellant.

Curtis A. Peters, of New York City, for respondent.

JENKS, P. J. This action was begun in 1912, to recover the amount paid by the plaintiff to relieve its lands from an advertised sale therefor for the taxes for 1899. It was tried by the court without a jury. At the close of the case the plaintiff was dismissed on the merits, and appeals from the judgment. The contention of the plaintiff is that the tax was illegally imposed. As the result of the procedure now attacked by the plaintiff, the plaintiff substantially has but paid the tax, and the rule that governs the disposition of this kind of action is perhaps not as stringent as that which would have obtained if the plaintiff had been actually divested of the land by a tax sale. *Matter of Adler & Co.*, 174 N. Y. 287, 66 N. E. 929; *Matter of Veith*, 165 N. Y. 204, 58 N. E. 886. I shall consider the several objections raised by the plaintiff.

[1] The land is situate in the Fifth ward of the borough of Queens of the city of New York. It is contended, first, that the reduction of the assessment was "passed upon" by only one commissioner, and not by the board of taxes and assessments, in Queens borough, not in Manhattan, all contrary to law, and that therefore such a reduced valuation was not a legal basis for the tax levied thereon. It appears that the land was originally assessed at \$141,000. Thereupon the plaintiff filed written application to the commissioners for a reduction. Thereafter a deputy commissioner, who had been assigned to the impost, and who had reported the assessment at \$141,000, reported to the board in writing that he had re-examined the property referred to in the application; that the assessment was high and out of proportion to surrounding property, and recommended a reduction to \$120,000. The Annual Record (section 892, Greater New York Charter), under the column headed "Value of Real Estate" shows the figures "\$141,000"; under the column headed "Corrected Amount," "120,000," and under the column headed "Remarks," the words "By Comms.," and the assessment roll (section 892, Id.) shows under the column headed "Value of Real Estate in Dollars," "\$120,000." But to sustain its said contention the plaintiff called a commissioner of taxes and assessments, Mr. E. C. Sheehy, in reliance of the rule enunciated in *Doughty v. Hope*, 3 Denio, 594. Assuming that his testimony was competent in contradiction of the official records of the board of which he was a member, it is insufficient. On the said report, upon the application for reduction, there is a printed indorsement with blanks. A part of the indorsement is:

"New York, ——— 189—. The assessed valuation of the property referred to in this petition is hereby fixed at \$——. Commissioners of Taxes and Assessments."

These blanks are not filled. Another part of that indorsement as filled reads:

"Assessed at \$141,000.00 April 19 1899 120,000. G. W. O. R. A. H."

The importance attached to this indorsement by the plaintiff is in the fact that below the said words, "is hereby fixed at \$——," and above the said words "Commissioners of Taxes and Assessments," are written the words "Report of deputy confirmed E. C. S."—and that Mr. Sheehy testifies that the said initials are his, were put there by him after the said words, "Report of deputy confirmed," were written, that he left the report remaining in the office in Queens, where it had been received, and that is the only place he ever saw it. He further testifies that he did not know what happened to the document after it was filed in the Queens borough office.

"Q. Did you ever see it? A. I signed it; yes. Q. Don't you know what happened to that extent? A. The usual course. Q. What was done to it? Did it come to you? * * * A. No; certainly not."

The witness testifies that he did not have charge of the assessments in that borough, but of certain matters; that he called to the attention of the commissioners any matters that might occur; that he did not know what happened to this report after it was filed in that office; that he had no personal recollection of the application or anything contained therein; and that there were thousands of such applications there. He further testified that the board of taxes and assessments had stated meetings and kept minutes; that he did not know whether this application was considered by the board in Manhattan; that he did not remember whether it was considered at any meeting when he was present; that the board was in session every day, and held weekly meetings, at which a majority was always present.

[2, 3] The burden of proof was with the plaintiff. *Cooley on Taxation*, 816; *Tingue v. Village of Port Chester*, 101 N. Y. 294, 4 N. E. 625. In the face of the formal records, the presumption against the contention of the plaintiff is very strong, and in the nature of things direct negative proof was called for. *Downing v. Rugar*, 21 Wend. at page 184, 34 Am. Dec. 223, cited in *Doughty v. Hope*, supra. The initialing by Mr. Sheehy and his testimony fall far short of establishing that he, in usurpation of the power of the board, acted alone in the reduction of the assessment, especially when we recall that he united with the other members in certificate of the assessment rolls, which contain the reduced figures of the assessment. Section 907. That initialing was not necessarily contrary to, even less contradictory of, the fact that the reduction was made by the board itself; for it indicates nothing more than a memorandum, perhaps of identification, or possibly that this commissioner in the first instance had examined or had approved the report of the deputy, which it must be remembered was addressed to the board itself. When we consider that Mr. Sheehy's testimony was adduced in 1912 as to an isolated official act purporting to have been done by the board 13 years before, and are mindful of the many thousands of similar applications, it would seem strange indeed if the memory of any man could recall any of the particulars of this or any other particular application.

[4] The plaintiff also relies somewhat upon the fact that it was stipulated that upon the book of the Annual Record prepared by the commissioners the figures 141,000 were written in by the deputy "or

under his direction, and under his oversight, and that the words, under the column 'Remarks,' 'By Commrs.'" were made by said deputy "at the time of the entry of the figures in red ink '120,000' in the column 'Corrected Amount.'" The deputy himself was not called as a witness, and the reason stated by one of the counsel for the plaintiff is:

"Mr. Connelly is very ill, and we are going to get along without him."

Giving full value to the stipulation, it but appears that the deputy in charge of the assessment, who reported in favor of the reduction of the commissioners, made or supervised insertion of the purported action of the commissioners in an official record that showed a reduction by them, and made therein the writing of the statement that such action was taken by his superiors. For whatever this deputy did is not regarded as the act of an independent official, but as a subordinate of the commissioners, and hence the mere proof that he prepared or superintended the statement in a record of the action of the commissioners does not establish that he himself acted, or attempted to act, contrary to his duties, in violation of the statute and to the exclusion of his principals. *People ex rel. Thomson v. Feitner*, 168 N. Y. 441, 61 N. E. 763.

[5] A further contention of the plaintiff is met by the statement that there is no requirement of law that the provisions of section 889 shall be embodied in the tax books. *People ex rel. Zollikoffer v. Feitner*, 34 Misc. Rep. 299, 69 N. Y. Supp. 793, affirmed, 63 App. Div. 615, 72 N. Y. Supp. 1124; affirmed 168 N. Y. 674, 61 N. E. 1133.

[6] It was not essential that under section 898 the deputy commissioner should hear testimony as to the reduction, or that the board itself should so do, in the absence of any request on the part of the applicant. *People ex rel. Sutphen v. Feitner*, 27 Misc. Rep. 384, 58 N. Y. Supp. 869; affirmed 45 App. Div. 542, 61 N. Y. Supp. 432; *People ex rel. Thomson v. Feitner*, supra; *People ex rel. Kendall v. Feitner*, 168 N. Y. 660, 61 N. E. 1133. Indeed, it appears that its application for a reduction was granted upon the showing of its application and upon a re-examination of the premises.

[7] Nor do I deem it essential that the board should keep a minute book to show its official action in passing upon an application for reduction. It appears from the testimony of Mr. Sheehy that the only record of the official acts of the board appeared in the Annual Record and in the assessment roll. I think that such record is sufficient as to formality. It was not at all strange that as the only "minute book" produced recorded but the executive work of the board, it did not contain any entry of the official act of the board in determination of this amount. I think, then, that the contention that the assessment was not made by the commissioners cannot prevail. Authorities supra; *Matter of Peek*, 80 Hun, 122, 30 N. Y. Supp. 59; 37 Cyc. pp. 1276, 1279; *Am. & Eng. Ency. of Law* (2d Ed.) vol. 27, p. 728; *Desty on Taxation*, 615, 616; *City of New York v. Vanderveer*, 91 App. Div. at page 308, 86 N. Y. Supp. 659; *Adams v. Osgood*, 60 Neb. at page 782, 84 N. W. 257.

[8] Another contention of the plaintiff is that the commissioners of taxes and assessments did not prepare a fifth column in which to place

the tax required by law, and that the municipal assembly did not place the said tax in a fifth column, as prescribed by law. This contention rests upon section 910 of the charter. The required statement under the "fifth column" is the sum "in dollars and cents, to be paid as a tax thereon." As there is a column headed "Tax in Dolls. Cts.," which contains the amount of the tax, this contention rests upon the fact that such column cannot, by correct enumeration, be described as "fifth." The reason is obvious. The general scheme of taxation in the state prescribes that the first column must contain the name, the second the real property, third, the full value thereof, the fourth, the full value of all taxable personal property owned by such person after deducting the just debts, and the fifth the tax. But as in the city of New York personal taxes are separated from taxes on land, and are placed on a different roll (see *Haight v. Mayor, etc., of City of N. Y.*, 99 N. Y. 280, 1 N. E. 883), the entry assigned to the fourth column would be useless in an assessment roll that relates to lands only. If that fourth column is eliminated, then the column headed "Tax in Dolls. Cts." as counted in its order would be fourth instead of fifth. To my mind, no such Chinese fidelity to the letter of the law is required as to provide a column necessarily blank, and that can serve no purpose whatever, in order that he who counts the columns may find that the tax is stated in a fifth column. This variation did not affect the impost. See *Bennett v. Robinson*, 42 App. Div. 412, 59 N. Y. Supp. 197; *People ex rel. Mohawk & M. R. Co. v. Garmon*, 63 App. Div. 530, 71 N. Y. Supp. 826.

[9] Still another contention of the plaintiff is that the Annual Record did not sufficiently describe the assessed premises according to law. The plaintiff asked the defendant to produce the tax map. The record shows that the defendant "produced the map requested," and that it was read in evidence. The entire map book was offered by the defendant, and, although the page that contained the premises had theretofore been offered by the plaintiff to show "the situs," the remarks of its counsel at the time of the offer of the defendant indicate that the plaintiff had offered this page itself in evidence as the map of the premises. It does not appear when this map was prepared. It is entitled "Department of Taxes and Assessments, Maps of the Borough of Queens, 5th Ward, Formerly Town of Hempstead, Volume 1, January 1899," and bears the signatures of the commissioners of taxes and assessments and of the secretary. These words "January 1899" are neither explained by the context nor by the evidence. They do not necessarily mean that the map, or at least its contents, were not in existence before that time and were not used before that time. On the other hand, this map seems to have been regarded by both parties as the map used in the matter of the assessment. I think that chapter 542 of the Laws of 1892 is applicable to the territory of the Greater New York (sections 1608, 1610, Charter). But, as I read its terms, they do not require that the maps therein contemplated must be prepared forthwith. They may be prepared so as to embrace the entire territory, and *when* this is done, *then* they supplant any map or maps used theretofore. There is no indication that the map in this case was

prepared in accord with the provisions of this statute and many indications to the contrary, both in the character of the map and in the absence of any certification or filing thereof. But section 890 of the Charter in part provides that the maps, etc., pertaining to the department of taxes and assessments of the municipality—

"of the department of assessment of the city of Brooklyn and of each and every of the like offices in any of the municipal and public corporations, or parts of municipal and public corporations consolidated by this act * * * shall be delivered into and thereafter be in the custody and control of the department of taxes and assessments hereby constituted, to be kept in such of the offices of the said department as may be most convenient to the taxpayers and suitable to the proper discharge of the business of such department, and shall be public records, and at all reasonable times open to public inspection."

And section 891 provides for the appointment of a surveyor to make necessary surveys and corrections of the ward maps, and also to make all new maps—

"which may be required for the more accurate assessment of real estate within the territory consolidated by this act with the municipal corporation known as the mayor, aldermen and commonalty of the city of New York."

I think that we may presume that the map read in evidence was a former map of the territory, not supplanted by any map prepared under the act of 1892, but used in conformity to the implied permission of section 4 of that statute and of said section 890, and adopted or prepared pursuant to the provisions of the said section 891.

[10] The Annual Record is described, "Annual Record of the Assessed Valuation of Real Estate in the Borough of Queens, The City of New York, Ward 5, Vol. 1 1899." The entry which concededly relates to the premises in question is headed, "Edgemere Ward 5, Volume 1, Block No. 10. Between Beach & Grandview Avenues. Between Atlantic Ocean & Edgemere Ave.," and in the several columns, "Owner or Occupant, unknown"; "Description of Property, Size of Lot, X 230"; "Ward No. 1, Street No. S. E. C." (in pencil), "Avenue Beach," "Value of Real Estate, \$141,000," "Corrected Amount 120,000." Turning to the map which is described as "Volume I, Borough of Queens, 5th Ward," I find a separate tract, which is shown as a block, that contains the number 10 and also a small number 1, which lies between the Atlantic Ocean and Edgemere avenue and also between Beach and Grandview avenues, and on which are indicated the figures as of dimension 230. Mr. Rumsey in his chapter on Procedure in the City of New York, says:

"Each volume contains a certain number of blocks which are identified by reference to the maps. Assessments are entered in the proper volume, and can be found only by identification of the property upon the tax maps by its location, and reference thence to the books of record." Rumsey on Taxation, p. 67.

Thus we have the rem indicated in the Annual Record by block and lot numbers, and located in a particular ward, with the further identification of the various street boundaries, and similar data is afforded by the assessment roll. It appears that these premises are in an outlying part of the territory of the city adjacent to the Atlantic Ocean,

and constitute a tract 230 by 630 feet. It does appear that this land contained a hotel, cottages, and a stable. It does not appear that it was ever subdivided into city lots, or that there were any street numbers given to any of the property. It seems to me that the description was sufficient, and that those of the record and of the roll sufficiently conformed. He who consulted the description of the roll found the ward, the block number, the lot number, and the relative location with respect to the streets stated, and apparently was directed to the map with sufficient definiteness. The omission to name the owner was not a defect. Section 894, Greater New York Charter; *People ex rel. Myers v. Moynahan*, 130 App. Div. 46, 114 N. Y. Supp. 417; *Haight v. Mayor, etc., of City of N. Y.*, supra. In the city of New York the assessment is by lot and block numbers. *Haight v. Mayor, etc., of City of N. Y.*, supra; *People ex rel. Myers v. Moynahan*, supra; *Rumsey on Taxation*, 67, 68, and authorities cited; see, too, section 4, chapter 542 of the Laws of 1892, supra. In *Cooley on Taxation* (page 405) it is said:

"The purposes in describing the land are, first, that the owner may have information of the claim made upon him or his property; second, that the public, in case the tax is not paid, may be notified what land is to be offered for sale for the nonpayment; and, third, that the purchaser may be enabled to obtain a sufficient conveyance. If the description is sufficient for the first purpose, it will ordinarily be sufficient for the others also."

And again it is said (page 407):

"A more satisfactory rule would seem to be that 'the designation of the land will be sufficient if it afford the means of identification, and do not positively mislead the owner,' or be calculated to mislead him."

See, too, *Kane v. City of Brooklyn*, 114 N. Y. at page 594, 21 N. E. 1053. The plaintiff's witness Larcher, who was connected with the company, when shown the map, stated, when interrogated as to the block and lot numbers, that the premises were shown upon it, and testifies that the property "which you have identified on the tax map" is the property, and the plaintiff, when it applied for the reduction, showed:

"To the Commissioners of Taxes & Assessments. The undersigned represents that it is the owner of real estate known as No. ——— Beach Avenue in Volume I of the 5th Ward District of Rockaway Beach of the Borough of Queens of the City of New York, designated on the Tax Map as Lot No. 1 in Block No. 10. He finds that the same has been assessed on the Assessment Roll of 1899 at a valuation of \$141,000."

The judgment is affirmed, with costs. All concur.

IN RE AVRUTIS.

(Supreme Court, Appellate Division, First Department. March 20, 1914.)

ATTORNEY AND CLIENT (§ 44*)—MISCONDUCT OF ATTORNEY—DISBARMENT.

Where an attorney, knowing that his client had obtained \$11,000 from her husband's life insurance, induced her to turn over \$10,000 to him on the false representation that he would invest it on real estate security, so that she would be paid \$150 a month profit, but he in fact used it in his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

own real estate speculations and lost it, he was guilty of professional misconduct justifying disbarment, though he intended and attempted to pay back the money, and did repay a small portion thereof.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

Disbarment proceedings by the Association of the Bar of the City of New York against Aaron Avrutis, an attorney, for professional misconduct. Application granted.

See, also, 151 App. Div. 937, 135 N. Y. Supp. 1098.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Isidor J. Kresel, of New York City, for petitioner.

Warren Leslie, of New York City, for respondent.

INGRAHAM, P. J. The respondent, who is an attorney of this court, was charged with obtaining from his client, Mrs. Anna Newman, two sums, one of \$4,000 and another of \$6,000, to invest upon bond and mortgage, that he made no such investment as he represented that he would make and was instructed to make, and that he received the money and appropriated it to his own use, and that the result was the loss of a large portion of the money. The official referee has reported that the charges have been proved that the respondent obtained said money by false representations and appropriated the same to his own use. The respondent admits obtaining the money, but alleges that he received it to invest in a joint venture or speculation, in which he and Mrs. Newman were interested, and that he lost the money as a result of the financial panic of 1907. The official referee has reported that, since he lost the money, the respondent has repaid Mrs. Newman various sums of money, and has endeavored to make good the loss to her.

It appears by the evidence before the official referee that the respondent was engaged almost entirely in real estate operations, that among the clients with whom he had dealings was one Jacob M. Newman, who died in August, 1906, and to whom at the time of his death the respondent was indebted in the sum of \$1,500; that said Newman had two policies of insurance upon his life, under which \$11,000 was payable to Mrs. Newman. The respondent ascertained that Newman left this insurance, and called upon Mrs. Newman in respect to it, and at the same time paid to her \$200 on account of the money that he owed her husband, and Mrs. Newman consulted the respondent about obtaining the insurance money from the insurance companies. In his interview with Mrs. Newman, after he ascertained that the policies of insurance existed, the respondent told her that when she received the \$11,660 he would help her to invest it, and he advised her to invest it in second mortgages, stating that it was the best investment after the first, and best for private people, and told her that she would be paid \$150 a month profit from the \$11,000. Mrs. Newman was a woman without acquaintance with business transactions, and seems to have relied entirely upon the respondent for advice in regard to investment

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of this money. Shortly after she received this money, in September, 1906, the respondent applied to her for the sum of \$4,000, stating that he would invest it for her, and she delivered that sum to him for that purpose. He deposited the money in a bank in his own name, and used it to pay off judgments and other liens on the property, 77 Columbia street, belonging to one K., upon which there were three prior mortgages aggregating \$11,000. He subsequently gave her a bond and mortgage on this property, for \$4,700, stating that the \$700 was for part of the money which he owed her deceased husband. He received back the mortgage to record, and promised to record it, but he did not record it until July 9, 1908, at which time the prior mortgages on the said property had been increased to \$18,000. Subsequently the first mortgage on the property was foreclosed, and Mrs. Newman's mortgage lien thereon was rendered valueless. Mrs. Newman at some time received about \$750 on account of this mortgage.

In relation to this charge the respondent's defense was that he had received this \$4,000 for investment as he saw fit, and that she relied upon his individual responsibility and written guaranty for interest on the money, and its ultimate payment, and that it was in effect a loan to him personally. But the official referee finds that Mrs. Newman never understood that she was investing her money in a joint venture with the respondent, but that, on the contrary, she believed, and was justified in believing from the statements made to her by him, that she was getting a good mortgage on real estate for the \$4,000 she had paid over to him, and was induced to part with the \$4,000 by the statements and representations of the respondent that she would receive such security. The official referee says:

"The conclusion must be that she was deceived and misled in the transaction by the respondent, and that the first charge set forth in the petition must be sustained."

As to the second charge, it appears that in October, 1906, after the respondent in September, 1906, had obtained \$4,000 of the \$11,000 which Mrs. Newman had received from the policies of insurance upon the life of her deceased husband, he applied to Mrs. Newman for an additional \$6,000 for investment. To secure this amount, he stated that he had a very good investment of \$6,000 on a second mortgage; that the gentleman who wanted the money was sitting in his office and waiting for it; that he had no time to wait; and that it was very important to make the investment, as it was a good proposition; and that if she did not do it right away, the man would get the money somewhere else. Upon this representation Mrs. Newman advanced to the respondent the \$6,000 which he received, and deposited to his own account. He gave to Mrs. Newman a receipt, which read:

"Received of Mrs. Anna Newman the sum of \$6,000 for investment."

Instead of investing it in second mortgages on real estate, he deposited it to his own account in a bank, and checked it out as he required it. Apparently there was no man in his office waiting to give a second mortgage for the money, and, accepting Mrs. Newman's testimony as to the method by which this \$6,000 was obtained, it was

evidently a bald fraud by which he induced his client, by false and fraudulent representations, to give him her money.

In relation to this second charge, the respondent's explanation is the same as of the \$4,000 transaction, i. e., that he was to take the money and invest it as he thought best. His idea of investing it seems to have been to take the money and spend it and pay it back to her as he saw fit. However, it appeared that in July, 1907, the respondent gave Mrs. Newman a mortgage for \$7,500 on leasehold property that he owned. It appears that on June 1, 1907, the date of the mortgage, there were already three mortgage liens on the property prior and superior to the mortgage given Mrs. Newman totalling \$31,500. The prior mortgage was foreclosed and the security of Mrs. Newman was rendered valueless. The official referee reports in regard to this second charge:

"In my judgment it appears by a preponderance of credible testimony that this \$8,000 was obtained from Mrs. Newman by false representations made to her by the respondent, and the money converted by him to his own use. The second charge should be sustained."

The official referee's report is clearly sustained by the evidence. Mrs. Newman was a woman unaccustomed to business dealings, knowing nothing of real estate transactions and the security of bond and mortgage, and evidently relied upon the representations and statements of the respondent as to the methods in which her money should be invested. She had received this \$11,000 from the insurance company, and the respondent represented to her that, if she would invest the money in second mortgages on real estate, she would receive \$150 a month, and would be relieved of the necessity of working for her own support. It is perfectly clear that she understood she was investing the money and not giving it to the respondent for him to use in speculation, that she was investing it, not to make money, but to secure for herself an income for her support, and that the respondent obtained \$10,000 out of the \$11,000 which she had received from her husband's estate, and that there was really no investment of the money, but the respondent used it for his own purposes.

The fact that he gave to Mrs. Newman mortgages on real estate instead of any agreement to share in the profits of his ventures of itself disposes of his contention that the money was a personal loan to him to be used by him as he desired. To quiet her he gave her these valueless mortgages, keeping them off the record long after they were delivered to her, so that he could manipulate the property without being embarrassed by the record of these mortgages. The testimony that he gave before the official referee as to his arrangement with Mrs. Newman was clearly false, and that fact must be considered in determining the penalty that should follow his professional misconduct. The substantial fact is that he allowed Mrs. Newman, whom he knew to be ignorant of real estate transactions and investment of money, to pay him this \$10,000 on representations that he would invest it for her, and that the respondent then used the money for his own purposes and made no investments which gave to her any substantial security for the repayment of the money. The fact that he intended to pay back the money to her, if he made money in his enterprises, and

the fact that the financial panic of 1907 intervened, which swept away his own property out of which he hoped to repay Mrs. Newman, constituted no possible defense. The offense of the respondent consisted in taking substantially all the money that this woman had received for her support, and, upon the representations that he received it for investment, appropriated it to his own use, instead of investing it, and applied it in aid of his own speculations or his personal transactions, with the resulting loss to his client.

That there is here presented a case of the grossest professional misconduct is apparent, and no subsequent attempt to repair the wrong can be admitted as a defense. The respondent must therefore be disbarred; and it is so ordered. All concur.

(84 Misc. Rep. 498)

SHEPARD v. LAMPHER.

(Supreme Court, Special Term, Erie County. March 28, 1914.)

1. LIBEL AND SLANDER (§ 7*)—WORDS AND ACTS ACTIONABLE—WORDS IMPUTING IMMORALITY—"A NICE TIME."

A letter from a married man addressed and mailed to a married woman: "Mrs. Shepard: I was very much impressed with your looks, appearance, etc. * * * I am writing this to know if you would meet me at some place where we could talk with each other and make some arrangements where we could get out and have a nice time. I am a married man that you know well, * * * am highly respectable, and no one would think that I would go out for a good time, but I would like to be with you. * * * Now you will say what is there in it for me. Well if you go out with me it will be a good time, pleasant treatment the best I know how, and \$5.00 in money and a good true friend in every way one that will never say a word about this in any way"—was not libelous, though it was a proposal for future immoral conduct, yet it charged plaintiff with no improper conduct; there being nothing inconsistent with her absolutely blameless life and conduct in the past, and amounted to no more than an inquiry whether she would consent to the immoral conduct proposed.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17-78; Dec. Dig. § 7.*]

2. LIBEL AND SLANDER (§ 25*)—WORDS AND ACTS ACTIONABLE—PUBLICATION.

Where a man addressed and mailed a written proposal to a woman for future immoral conduct, and she, by her own act in laying it before the postal authorities, caused it to be made public, there was no publication by defendant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 107, 108; Dec. Dig. § 25.*]

3. LIBEL AND SLANDER (§ 1*)—MENTAL DISTRESS—PHYSICAL SUFFERING.

An action on the case to recover for the utterance of defamatory words, not actionable in themselves, cannot be sustained by proof of mental distress and physical pain suffered by the complainant as a result thereof.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 1, 10; Dec. Dig. § 1.*]

4. TORTS (§ 8*)—INJURIES.

Where a man, in mailing to a woman a proposal for future immoral conduct, violated the federal statute against mailing obscene matter, and the woman, in instituting prosecution, brought herself into publicity, injuring

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

her reputation, and causing her great mental distress, she had no right of action for the wrong and injury, since the statute conferred no right of action in favor of individuals.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 8; Dec. Dig. § 8.*]

Action by Flora Shephard against Louis G. Lamphier. Demurrer to the complaint sustained.

Louis L. Thrasher, of Fredonia, and John L. Campbell, of Brocton, in support of demurrer.

Elijah W. Holt, of Buffalo, and Arthur S. Tennant, of Westfield, opposed.

WHEELER, J. [1] The complaint alleges that on the 30th day of August, 1912, the defendant composed, addressed, and mailed to the plaintiff an anonymous letter, of which the following is a copy:

"Mrs. Shepard: I am very much impressed with your looks, appearance, etc. and have been for a long time. I am writing this to know if you would meet me at some place where we could talk with each other and make some arrangements where we could get out and have a nice time. I am a married man that you know well, live in Brocton and highly respectable, and no one would think that I would go out for a good time, but I would like to with you. If you will write me and address the letter to C. A. Bennett Dunkirk, N. Y. Box 71 before next Tuesday as I will be there at noon that day and will get it. I will tell you who I am or will call and see you or write so that we can meet each other for a good time. I am strictly in earnest about this in every way, and anything you may write me will be strictly *confidential* and expect you to treat this the same. Now you will say what is there in it for me. Well if you go out with me it will be a good time, pleasant treatment the best I know how, and \$5.00 in money and a good true friend in every way one that will never say a word about this in any way. Kindly ans. this so that we may be able to get together and talk things over and have a good time I will not sign this but will come and see you or write you all of it after I hear from you."

It is further alleged: That in and by this letter the defendant maliciously and wrongfully stated and imputed that the plaintiff was a woman of loose and immoral character and reputation, and one who would willingly consort and cohabit with the defendant in an immoral manner for gain, and of such low and degraded nature as to be without moral principles, and would therefore engage in illicit relations with the defendant. That the use of the mails for the transmission of said letter was a crime and a penal offense against the statutes of the United States. That the defendant well knew that the mailing of said letter would be, or was likely to be, investigated by the postal authorities, and that, in the event of such an investigation, said letter would come to the knowledge of public officials and others persons, so that a publication would thereby become inevitable. That the offense was investigated by said authorities, and "said letter thereby came lawfully in the possession of the public officers, whose duty it was to procure the same, and was thereafter presented to the federal grand jury, and an indictment was by said grand jury presented against the defendant," which indictment thereby became a public document. That plaintiff was compelled to appear before said grand jury as a witness and tes-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tify she was the person to whom the letter was addressed, by reason whereof the letter came to the knowledge of many persons, and the "*letter thereby became published, within the meaning of the term as applied to libels.*"

The complaint further alleges that the complaint came to the possession of the United States Attorneys Department, and that the letter was presented by the agents of said department, in company with one James Douglas, to said defendant, and he then and there stated to said persons that he had written said letter to and concerning the plaintiff, and that, by reason of said acts of the defendant, the plaintiff had been injured in her good name and reputation, and had suffered great mental distress.

A second count in the complaint alleges injury to her bodily health and business by reason of the facts above set forth.

The defendant demurs to the plaintiff's complaint, contending: First. That the letter is insufficient to sustain a charge of either libel or slander. Second. There was no publication alleged in the first count of the complaint. Third. That the second count of the complaint does not state a cause of action for the reason that the words charged are not libelous per se, and no special damage is alleged.

It is argued that the letter cannot be considered, by any legitimate innuendo, to mean a proposal to meet for purposes of improper relations. That the words a "nice time" should be given an innocent meaning rather than one suggesting a guilty liaison. In this view we cannot concur. The letter, taken as a whole, seems fairly susceptible of no other construction than an invitation to meet for immoral and criminal purposes. The question, however, still remains whether a proposal of this character from one to another can be classed as either a libel or a slander.

When we study the letter, we see that it charges the plaintiff with the commission of no offense or improper conduct. It is merely a proposal for the future conduct of both parties. There is nothing in the letter inconsistent with the absolutely blameless life and conduct of the plaintiff in the past. Can a written proposal looking to future immoral conduct, by any fair construction, be deemed a libel or slander on the character of the person to whom it is addressed? It is, in substance, nothing more or less than an inquiry as to whether the plaintiff *will* consent to the immoral relationship proposed. It contains no reflection on the propriety of her past life and conduct. It is true that it involves, to a degree, a thought or opinion on the part of the writer of the letter of the possibility that the person addressed may entertain the proposition made, and that her character is such that she would not spurn the suggestions made. However much such propositions are to be condemned, can it be said that such a letter can be termed a libel in any proper sense? The use of the mails for any such purpose has been held a penal offense, under the statutes of the United States. Such a letter was an outrage upon the plaintiff. The defendant should be severely punished for such conduct, but we are unable to discover that the writing and sending of such a communication fall within the category of libels. We have searched the books and run down the deci-

sions in vain, in an effort to find some case which would justify this court in holding that the making of a mere proposition even to commit crime can be construed into a libel. It is barely possible, under certain circumstances, the publication of such a letter might be converted into a libel, but I am unable to discover how, when sent direct to the person addressed, and where marked and intended as a confidential communication, it can be given such a construction.

The complaint, by many allegations of conclusion of intent, purpose, and innuendo, seeks to spell out from the letter a charge of immorality against the plaintiff, but "words alleged to be libelous are to be taken in the sense that is most natural and obvious, and their meaning cannot be extended by innuendo beyond what is justified by the words themselves." *Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 105; *Woodruff v. Bradstreet*, 116 N. Y. 217, 22 N. E. 354, 5 L. R. A. 555; *Verbeck v. Duryea*, 36 Misc. Rep. 242, 73 N. Y. Supp. 346.

[2] It is urged there was no publication of the libel, if one. The complaint is silent as to how, and by what means, the letter complained of reached the knowledge of the postal authorities. The pleader has evidently studiously avoided any statement as to the facts in that regard. The presumption is that, having been deposited in the mails, it reached the plaintiff's hands in due course. If the letter was made known to others, it must have been disclosed by the plaintiff herself. Certainly there is nothing in the complaint rebutting that presumption.

It is unquestionably the law that there is no publication of a libel until it has been communicated to some third person or to the public generally, and, where such a publication is the act of the person claimed to have been injured, he cannot complain of injuries caused by his own act in making the libel public. *Woodman v. Kidd*, 25 App. Div. 254, 49 N. Y. Supp. 301; *Galligan v. Kelly*, 31 N. Y. Supp. 561; *Owen v. Ogilvie Co.*, 32 App. Div. 465, 53 N. Y. Supp. 1033; *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265.

The fact undoubtedly is that the plaintiff herself laid the letter before the postal authorities, and by reason of her own complaint caused the letter to be made public. In this course she is to be highly commended. If this be true, she took a course which, as a good citizen, she owed to the public and to herself. At the same time it cannot be said the defendant caused the publication of the letter in question. The gravamen of all actions of this character is injury and loss to reputation. Injury to reputation, of course, necessarily involves the making of the matter public, and, if that comes through the act of the party claimed to have been libeled, the injury to reputation cannot be legally imputed to the other party.

[3] It is contended, however, that, aside from the question whether the letter complained of is to be deemed a libel, the plaintiff is entitled to recover upon the theory that the law will support a recovery in what is known as an action on the case.

The argument made is: That the defendant was guilty of a grave and serious offense against the plaintiff. That of necessity the receipt of such a letter would cause feelings of righteous indignation, and humiliation on the part of the plaintiff, and unavoidably cause mental

suffering. That the defendant was guilty of a criminal offense against the United States statutes, and the plaintiff owed a duty toward herself and the public to see the offender was duly prosecuted. That she could not, in justice to herself or to the public, keep silence, and that, in acting in compliance with this duty, she should not be held responsible for the consequences to herself or her reputation by instituting a criminal prosecution of the defendant, even though it involved a publication of the letter complained of.

It is urged that it is a recognized rule of law that for every wrong the law gives a remedy, and that the circumstances of this case ought and should give the plaintiff a right of action for the wrong done. It certainly is no answer to the argument made that no precedent is to be found for maintaining an action of just the character of this. The law is jealous in finding adequate remedies and giving suitable relief in proper cases. We cannot, however, depart from well-established rules of law, or well-recognized policies, simply for the purpose of righting a wrong in some particular case.

It is well established in this state that an action to recover for the utterance of defamatory words, not actionable in themselves, cannot be sustained by proof of mental distress and physical pain suffered by the complainant as a result thereof. *Garrison v. Sun Printing & Pub. Co.*, 207 N. Y. 1, 100 N. E. 430, 45 L. R. A. (N. S.) 766. So it has been held that, in an action for negligence, a plaintiff may not recover for physical sufferings, as a miscarriage, resulting purely from fright, where there was no physical injury; that to allow a recovery in such a case would be to recognize damages which are not natural and ordinary. *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 110, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604; *Hack v. Dady*, 134 App. Div. 253, 118 N. Y. Supp. 906. See, also, *Terwilliger v. Wanda*, 17 N. Y. 54, 72 Am. Dec. 420; *Wilson v. Goit*, 17 N. Y. 442.

[4] It is true that the defendant violated the federal statute against mailing obscene matter when he sent the letter to the plaintiff, but the violation of the statute does not confer a right of action, nor can the institution of a prosecution for the offense do so, or the consequences which flow from it.

Judge Cooley, in his admirable work on Torts, vol. 1, p. 25, speaking of the doctrine that the law will give redress as a rule where a right has been invaded, said:

"To what is here said there are apparent exceptions. These statutes, in many cases, forbid, under penalties payable to the state, the doing of certain acts that might be injurious to individuals, or, under like penalties, require certain acts to be done, the doing of which will be beneficial to individuals. In these cases, if it is manifest from the statute that the penalty is the only injurious consequence that is to be incurred by a violation of the law, it may be said that the individual has a right, and yet the law affords him no remedy for its infringement. Put in a strict legal sense, the statute in such cases is to be regarded as prescribing duties on public grounds only, and the party who suffers from a failure to observe them only chances to be the individual upon whom falls the consequences of a wrong done to the public."

It would, in our opinion, be pressing the doctrine too far to hold that the moral duty to make criminal complaint for a violation of a statute,

simply because the complaint involved unpleasant consequences to the complainant, for that reason conferred a right of action for the act justifying a prosecution. On grounds of public policy, we do not think the courts should go to the extent insisted on.

We have reached the conclusion, with no little regret, that the demurrer should be sustained.

So ordered, without costs of this demurrer, and with leave to the plaintiff to serve an amended complaint within 20 days after service of the interlocutory decree sustaining demurrer.

CLARK v. TRUSLOW.

(Supreme Court, Appellate Division, Second Department. March 20, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 318*)—ADVANCE PAYMENTS TO RESIDUARY LEGATEE—REFUND.

A residuary legatee, who, before the winding up of the estate, receives money on account, must refund the money if it is thereafter determined that it is needed for the payment of debts.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1319-1326, 1328-1331; Dec. Dig. § 318.*]

2. EXECUTORS AND ADMINISTRATORS (§ 318*)—ADVANCE PAYMENT TO RESIDUARY LEGATEE—REFUND—NEGLIGENCE OF EXECUTOR.

Where executors pay a residuary legatee a sum of money to apply on account, the legatee need not refund the money to pay debts if through the negligence of the executors they are unable to meet such debts.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1319-1326, 1328-1331; Dec. Dig. § 318.*]

3. EXECUTORS AND ADMINISTRATORS (§ 318*)—NEGLIGENCE—RECOVERY OF MONEY PAID TO RESIDUARY LEGATEE.

Where a testatrix left on deposit considerable money in a bank, though it had once temporarily closed its doors, and her executor left the money there temporarily awaiting the winding up of the estate, relying on a report of the bank which established its solvency, the executors were not negligent in the loss of the money by failure of the bank, so as to defeat their right to a recovery of an advance payment made to a residuary legatee before the settlement of the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1319-1326, 1328-1331; Dec. Dig. § 318.*]

4. EXECUTORS AND ADMINISTRATORS (§ 318*)—RECOVERY OF PAYMENT MADE TO RESIDUARY LEGATEE—LIABILITY FOR INTEREST.

A residuary legatee who is compelled to refund an advance made to her is liable for interest thereon, where she expressly agreed in a refunding bond for interest, though such bond was not sued on.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1319-1326, 1328-1331; Dec. Dig. § 318.*]

5. EXECUTORS AND ADMINISTRATORS (§ 318*)—RECOVERY OF PAYMENT MADE TO RESIDUARY LEGATEE—ADMISSIBILITY OF EVIDENCE.

In a suit to compel a residuary legatee to refund an advance made to her, a refunding bond executed by her, but not sued on, is admissible to show the prepayment and acceptance of the advance.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1319-1326, 1328-1331; Dec. Dig. § 318.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Kings County.

Action by Thomas E. Clark, as sole surviving executor of Mary F. Farnham, deceased, against Mary Elizabeth Truslow. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before JENKS, P. J., and BURR, CARR, RICH, and STAPLETON, JJ.

Henry W. Jessup, of New York City, for appellant.

William G. Phlippeau, of New York City, for respondent.

CARR, J. The defendant is the residuary legatee under the last will of Mary Farnham, deceased. The plaintiff is the sole surviving executor of said will. At the request of the defendant, in September, 1909, the executors made her a payment of \$5,000, in cash, on account of her residuary legacy. This action was brought to recover the amount of said payment with interest from the date thereof, because the assets of the estate proved subsequently to be insufficient to pay the general legacies, unless there was a recovery back of the amount prepaid on account of the residuary legacy. The defense was that the deficiency in the assets of the estate arose after the prepayment in question, and was due to negligence of the executors which resulted in a waste of said assets, and that therefore the defendant was not obliged to make any payment back.

[1-3] The facts involved in the action are undisputed. The case was tried without a jury, and the court found that the executors were not negligent in their care of the assets of the estate. The whole burden of this appeal rests practically upon the plea that this finding by the trial court was against the evidence. The appellant goes a little further, however, and contends that the undisputed evidence shows negligence on the part of the executors as a matter of law. It appears that Mrs. Farnham carried a considerable amount of money on deposit in the Union Bank of Brooklyn, and that after her death her executors found a large balance to her credit in that bank. Before Mrs. Farnham died, the Union Bank had closed its doors temporarily, and went into the charge of the State Banking Department. It was allowed to reopen on condition that the depositors would accept payment of their accounts in fixed installments, falling due at fixed periods. Mrs. Farnham did not avail herself of the privilege of withdrawing any part of her account at the fixed periods, up to the time of her death. Her executors drew out subsequently about \$6,000, and left a large balance remaining to the credit of Mrs. Farnham's estate on the books of the Union Bank, under an entry thereon showing her death and the appointment of executors. Things remained in this condition for some months, and the bank subsequently closed its doors again, and the amount remaining on deposit to the credit of the Farnham estate appears by concession of the respective counsel to be uncollectible. The defendant-appellant claims that, under these circumstances, the Farnham executors were negligent in that they should not have allowed any part of the funds of the estate to remain on deposit in the Union Bank, but should have withdrawn them as soon as possible. The proofs offered by the plaintiff show that Mr. Clark, the

executor, had taken notice of the reports of the Union Bank, which purported to show a large surplus, and that the institution was in an entirely solvent condition. These funds were simply temporarily on deposit, awaiting the winding up of the estate. The payment made by the executors to the defendant-appellant on account was before any judicial settlement was had of their accounts.

I am unable to find in this record proofs which would justify a reversal of the determination of the trial judge on the question of negligence. The defendant, by requesting and receiving a prepayment on account of her residuary legacy before a judicial settlement of the accounts of the executors, took such prepayment at her own risk to the extent that, in the absence of a judicial accounting, she subjected herself to the same liability to refund as if she had received the money with knowledge that the other legacies and the debts of the decedent had not been paid or provided for. *Buffalo Trust Co. v. Leonard*, 154 N. Y. 141, 47 N. E. 966. Of course, if the inability of the executors to meet the other legacies and debts of the decedent arose from their own fault, she was under no obligation to respond. But the executors were not insurers or guarantors as to the funds they held at the time of the payment to the defendant, and when they left these funds temporarily on deposit in a going bank, apparently amply solvent, they met the measure of care imposed upon them by law, viz., reasonable diligence.

There is another point made by the appellant, namely, that she should not have been charged with interest on the moneys paid to her from the time of payment. There is an allegation in the complaint that demand was made upon her for repayment before this action was brought, but there is no date of demand set forth. Neither in the findings of the trial court is there any specific finding as to the date of the demand, nor is this date of demand to be found in the evidence. Under these circumstances, the appellant contends that it was improper to allow any interest, as she was not in default in failing to make repayment until a demand was made upon her. This point is not free from doubt, but I think the circumstances, which I will state below, justified the allowance of interest.

[4, 5] The defendant introduced in evidence on her own account a letter from Mr. William N. Dykman, dated September 9, 1909, to his clients, the two executors of the Farnham estate, in which he recommended a compliance with the request of Mrs. Truslow for a prepayment on account of her residuary legacy, on condition that she give a refunding bond, and likewise a letter from Mr. Dykman to Mr. Jessup, the attorney for Mrs. Truslow, stating that the executors were willing to pay the \$5,000 in question providing that Mrs. Truslow and her husband gave a refunding bond. It appears that Mrs. Truslow and her husband thereupon gave a refunding bond, which provided for the repayment of the amount thereof with interest if such should be required for proper administration. After the delivery of this bond, the prepayment in question was made to Mrs. Truslow. The appellant contends that it was error to receive this bond in evidence over objection, inasmuch as the complaint did not claim liability upon it.

It was received, however, in evidence by the trial court, on the distinct ground that it was a part of the circumstances attending the prepayment by the executors and the acceptance thereof by Mrs. Truslow, and not to establish any independent liability thereon. I think it was properly received on such theory. If so, then the prepayment was received by the residuary legatee on the distinct understanding that, if she should be obliged to pay the whole or a part of the amount of the prepayment, it should be repayable with interest thereon to the extent that it was necessary to meet the requirements of the Farnham estate.

This is a hard case, however it be decided. But the burden of its hardness cannot be placed upon the Farnham executor unless he be in fault. The trial court has found against the defendant on this point on ample evidence.

The judgment should be affirmed, with costs. All concur.

(84 Misc. Rep. 534)

PEOPLE ex rel. WALCOTT v. PARKER et al., City Assessors.

(Supreme Court, Special Term, Tompkins County. March, 1914.)

1. TAXATION (§ 80*)—ESTATES SUBJECT TO—PROPERTY.

Where a charitable educational association built a building upon part of a university campus, itself exempt from taxation, without any written agreement, and no complete verbal agreement as to the terms and conditions of occupancy, but the university knew that it was built under the reasonable expectation that the association should have a lease at a nominal rent for a reasonable term of years and consented to a period of 20 years with the privilege of renewal for the same term, equity would prohibit the university from disappointing the association's reasonable expectation as to occupancy by expelling it from its ground and using the building for its own purposes, so that the tenure of the association for taxing purposes was that of a lessee at nominal rent for a reasonably long term, to be agreed on by the parties or fixed by the court.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 167, 168; Dec. Dig. § 80.*]

2. TAXATION (§ 251*)—EXEMPTION—BURDEN OF PROOF.

Taxation is the rule, and exemption the exception, and the burden of showing exemption rests on the one claiming it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 343-345; Dec. Dig. § 251.*]

3. TAXATION (§ 242*)—EXEMPTION—CONSTRUCTION OF STATUTE.

The statute exempting charitable and educational institutions from taxation should be read in the light of the policy of the state, established early in its history and increasing in liberality as time has passed, to encourage education.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 394-403; Dec. Dig. § 242.*]

4. TAXATION (§ 242*)—EXEMPTION—PERSONAL PROPERTY—USE.

Under Tax Law (Consol. Laws, c. 60) § 4, subd. 7, primarily exempting real property of associations, etc., used exclusively for educational or charitable purposes and also exempting the personal property of such as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 146 N.Y.S.—48

sociations, the object and use in the case of personal property must be the same as in the case of real property.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 394-403; Dec. Dig. § 242.*]

5. TAXATION (§ 242*)—EXEMPTION—CHARITABLE AND EDUCATIONAL ASSOCIATION—INVESTMENT OF PROPERTY.

That an educational and charitable association, whose constitution provided that it should endeavor, not only to preserve, but to increase, the value of its property, and to that end might invest in and "conduct commercial enterprises," invested its endowment fund, on the income of which it depended to carry on its educational work, in the security of banking, transportation, and manufacturing companies, and that as a result of such investment it had the control of a power company, in view of Tax Law, § 4, subd. 7, exempting property from taxation only to the extent of the value of the part used for educational, etc., purposes, and of the provision relating to exemption and referring to an association organized or conducted for one or more of certain purposes, did not, for purposes of exemption from taxation, prevent the purposes of the association from being exclusively educational or charitable.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 394-403; Dec. Dig. § 242.*]

6. TAXATION (§ 242*)—EXEMPTION—RESIDENCE.

A charitable and educational association, which had no principal place of business or office, and whose principal business was transacted at an annual convention held in different states, with associates residing in different states, with an association house in the state of New York necessarily subject to visitation and control by the state, had a residence for the purpose of taxation and exemption in this state and in every state where its work was carried on.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 394-403; Dec. Dig. § 242.*]

7. TAXATION (§ 242*)—EXEMPTIONS—PROPERTY OF CHARITABLE AND EDUCATIONAL ASSOCIATIONS.

Tax Law (Consol. Laws, c. 60) § 3, makes all real and personal property in the state subject to taxation, unless exempted by law. Section 4, subd. 7, exempts the property of associations organized exclusively for charitable and educational purposes, when used exclusively for such purposes. An association, organized to give free education to young men by means of scholarships out of its endowment fund, erected a building on a university campus under an agreement by which it became a tenant at a nominal rent for a considerable term. The building was used as a home for the students, some of whom took courses at the university, giving them room, board, and tuition free, and furnishing courses in various subjects for their study. The students sometimes did outside work to supply themselves with money for things not furnished them. The association employed the necessary officers to manage it and the servants to care for the building, but received no income from any part of the building. *Held*, that the building was used exclusively for educational and charitable purposes, so that the association was not liable to be taxed on it or on its leasehold interest on the ground on which it stood.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 394-403; Dec. Dig. § 242.*]

Action by Sidney S. Walcott, as president of the Telluride Association, against the County of Tompkins and Rodney G. Robinson, as County Treasurer, etc., to vacate and set aside an assessment on the property of the association in the city of Ithaca for the year 1910; and certiorari by the People of the State of New York, on the rela-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of Sidney S. Walcott, as president of the association, against William H. Parker and others as assessors of the City of Ithaca, to review an assessment on the property of the association in the City of Ithaca for the year 1912—tried together. Referee's report confirmed on motion, and final judgment ordered for the association.

The following is the opinion of the referee (Irving G. Vann) mentioned in the opinion of Sewell, P. J.:

These cases present the question whether certain property of a voluntary association, composed of more than seven members and organized under the name of the Telluride Association, is exempt from taxation under the provisions of the Tax Law relating to exemption. That statute provides that "all real property within this state, and all personal property situated or owned within this state, is taxable unless exempt from taxation by law." Tax Law, § 3. The next section provides that certain property shall be exempt from taxation, and by its seventh subdivision that "the real property of a corporation or association organized exclusively for the moral or mental improvement of men or women, or for * * * charitable, benevolent, * * * educational, scientific, literary, library, etc. purposes * * * or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes, and the personal property of any such corporation shall be exempt from taxation. But no such corporation or association shall be entitled to any such exemption if any officer, member or employé thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purposes be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association, or for any of its members or employés, or if it be not in good faith organized or conducted exclusively for one or more of such purposes. * * * The real property of any such corporation not so used exclusively for carrying out thereupon one or more of such purposes but leased or otherwise used for other purposes, shall not be exempt, but if a portion only of any lot or building of any such corporation or association is used exclusively for carrying out thereupon one or more of such purposes of any such corporation or association, then such lot or building shall be so exempt only to the extent of the value of the portion so used, and the remaining or other portion, to the extent of the value of such remaining or other portion, shall be subject to taxation; * * * provided that the real property of any fraternal corporation, association or body created to build and maintain a building or buildings for its meeting or meetings of the general assembly of its members, or subordinate bodies of such fraternity and for the accommodation of other fraternal bodies or associations, the entire net income of which real property is exclusively applied or to be used to build, furnish and maintain an asylum or asylums, a home or homes, a school or schools, for the free education or relief of the members of such fraternity, or for the relief, support and care of worthy and indigent members of the fraternity, their wives, widows or orphans, shall be exempt from taxation. * * *"

The constitution of the Telluride Association was adopted in July, 1911, and the association has since worked under it, but prior to that date the Telluride Institute, its predecessor, carried on the same work, for the same purpose, along the same lines, and within the same limits as are provided by the instrument now in force. Indeed, the constitution was formulated a long time before it was formally adopted and had furnished in substance the rule of action for all practical purposes. It is quite long, and an analysis of its provisions is unnecessary, as it is sufficient to say that the association was organized to give a thorough education, free of cost, to young men of promise, capable of self-support as shown by actual experience; each being carefully selected by examination and vote after his application has been on file and he has been under observation for at least one year while pursuing a course

of study. When he thus becomes a member, all his ordinary expenses in getting an education, including board, lodging, tuition, etc., are defrayed by the association; but as soon as his education is completed he ceases automatically to be a member. The association is managed by an annual convention of the members and by officers and committees elected thereby. There are now about 125 members, some of whom are students at Cornell University and others in various institutions in five states in the West, and others still are not students but members through election by the convention that organized the association. No student pays the association in work, money, or otherwise for what he receives in the way of board, lodging, tuition, instruments, material, etc., needed in pursuing his studies in the university and in a building owned by the association known as Telluride House. The work of the association, both in Ithaca and elsewhere, is charitable and educational in character. It has no other work or duty in theory or practice. All members, except those who organized the association, are students; but a few students are not "members," although in practice the words "member" and "student" are used interchangeably. No student, member, or officer is paid anything or pays for anything, but certain persons employed as chancellor, dean, treasurer, and business manager, who are neither members nor students, and others employed as servants to care for rooms, provide meals, etc., are paid reasonable compensation for services actually rendered in furthering the educational work or taking care of the students, but for no other purpose. All the expenses of the building and of the students while occupying it are paid from the income derived from an endowment fund set up by charitable persons, now amounting to about \$800,000, which is invested in corporate stocks and bonds and cared for by the officers, consisting of a president, vice president, and secretary, and by a committee of four elected for the purpose. The entire income is devoted exclusively to the education of the students and their maintenance while being educated, except a small percentage added each year to the endowment fund.

Telluride House was erected and paid for by the association between June, 1909, and September, 1911, and it is the taxation of that building, not as real estate, but as personal property in one case and a leasehold interest in the other, that gave rise to the present controversy. It is a substantial brick structure which cost about \$95,000 and the furniture and equipment about \$20,000 more. It has a dining room and kitchen on the first floor, living rooms on the second, sleeping rooms, and studies on the third and fourth. It has no laboratory or recitation rooms. The students live there, study there, eat and sleep there, and sometimes have social gatherings there with music and dancing. The association has no property in the city of Ithaca or the county of Tompkins except Telluride House and its equipment as above set forth. No part of said building is leased, or the source of any income. It is occupied exclusively by the members, students, and employes. No one receives any profit whatever, directly or indirectly, from the association, nor does any member, officer, employe, or outsider receive any pecuniary benefit except the amounts appropriated for scholarships to students and the compensation of employes for services actually rendered, reasonable in amount and fixed by the annual convention of the members.

Each student when admitted is given a scholarship which entitles him to maintenance, tuition, etc., but not to clothing or pocket money, although a small sum is allowed for general expenses. The students sometimes go out to work temporarily to supply themselves with such conveniences as are not furnished by the association and then return to their studies. The cost to the association every year for each scholarship is the sum of \$1,000. Fifty per cent. of the students could not get a university education if the opportunity was not afforded by the association. There was at one time a working arrangement between the association and a corporation known as the Telluride Power Company of Colorado, under which certain applicants for membership were employed by that company upon the recommendation of the association for a limited number of hours daily, with compensation for work and opportunity for study. During the first year they worked more and studied less. The second, they worked eight hours a day, and the third six hours, and in both of those years had the rest of their time for study, under an in-

structor employed by the company. The wages were precisely the same each year, and, though moderate in amount, were sufficient for support. In order to give the young men greater scope for improvement, the Telluride Association maintained a library and laboratories for their use. The object was to give them experience, to bring them into actual contact with business conducted along scientific lines, to test the men, weed out the less promising, and enable the association to make a safe choice of such as were regarded as worthy of scholarships. There was no arrangement or understanding, express or implied, that the students after graduation were to return to the company or work for it, although some of them did of their own volition. The association received nothing for the services rendered by them to the company and paid nothing for the opportunities for study afforded them by the company. There is the same working arrangement with a corporation known as the Beaver River Power Company, operating in Utah and Idaho, and efforts have been made to effect a similar connection with other companies. None of these companies has ever given anything to the endowment fund or to the association. Scholarships are not confined to those thus working for these companies, but are granted to others as well, but to none except those who are considered after careful test and observation to have the character, stamina, and fitness, as well as the preliminary attainments, to qualify them for admission as members or students in an institution having for its object the education of the most promising young men who can be found in the country. Some are selected from the body of students in Cornell University. Many have been rejected because they did not meet the exacting requirements, and the success, after graduation, of those thus chosen and educated has been gratifying. Graduates are now acting as professors and as managers, superintendents, and engineers of important enterprises. Scholarships are granted to the limit of the income, which has fallen off lately owing to current conditions, the average during the past few years being about 20 at the Cornell branch and 40 in all. About \$20,000 a year is devoted to carrying on Telluride House and the maintenance of the students therein, and the rest of the income is expended for students in other institutions.

The education of the young men is not confined to the curriculum of the college they attend, and all the colleges accept the standards of the association for entrance to their courses without further examination on their part. The usual courses are mechanical, civil, and electric engineering, agriculture, science, art, and architecture. Music, law, and medicine are included, but there are few who take these courses. A scholarship in Telluride House involves residence in the building, so that the students can come in contact with noted educators and with men of distinction in literature, science, and art, who are systematically entertained there and occasionally lecture there. To illustrate, a director of the Smithsonian Institution visits the house frequently, talks to the students collectively, meets them in their rooms, takes great interest, and devotes much time to them. Other instances of like character were proved on the trial. This contact with broad and mature minds is regarded by the management as an important part of the education furnished. The association requires that all work taken at the university shall be kept up to a high standard, higher than the university itself requires. If a student fails to meet this requirement, he may forfeit his scholarship, even if in no danger of being dropped by the university, and there have been cases of forfeiture for this reason. The chancellor and dean, refined and cultivated men of high character and attainments, are in residence much of the time with the students in Telluride House, to watch them, advise and guide them, to teach them by precept and example, and to add to their education that which cannot be provided by the university itself. The dean is primarily in charge of the educational work and has a system of marking of his own, aside from the marks given by the university, which are furnished to him every month so that he can keep track of the students' progress. Public speaking is required once or twice a week, all the students take part, and a prize is given for excellence. To a moderate extent research work is entered upon, such, for instance, as the investigation of heat and the chemical composition of various oils. Each student in Telluride House is a student in the university also, taking one or more of its courses and sharing in its various privileges the same as

other students. Some of them belong to the college fraternities. The association awards its own diploma to each student who graduates from Telluride House, but not until a year has elapsed after his graduation from the university.

In 1910 an assessment was spread upon the assessment roll of the city of Ithaca for state and county taxes in the following form: Under the printed head of "Name," was written "Nunn, L. L., and Telluride Company"; under the printed head of "Personal," was written "\$30,000"; under the head of "Total," was written "\$30,000"; and under the head of "Taxes," was written "\$75."

In 1912 an assessment was spread upon the assessment roll of the city of Ithaca in the following form: Under the printed head of "Personal Property. Name of person or corporation in tax district taxable on personal property," there was written "Telluride Association"; under the head of "Leasehold Interest," was written "\$30,000"; and under the head of "Remarks," was written "Campus." No entry was made under any other head, nor was there any other writing on the roll for either of said years. The taxes amount to about \$750 a year, except that in one year, when a large school building was erected in Ithaca, they were \$1,500. L. L. Nunn, whose name appeared in the earlier assessment, had never been a resident of Tompkins county or of the state of New York, but he had been connected with the Telluride Association as a charter member. There never was a corporation in this state known as "Telluride Company," but there was one known as the "Telluride Power Company" in the state of Colorado, which carried on the business of constructing and operating hydro-electric plants in Colorado, Utah, and Idaho, but never in the state of New York. Since August, 1912, it has been in process of dissolution, and it never had any interest in Telluride House, the Telluride Association, or any of its property.

[1] The land upon which Telluride House stands is part of the campus of Cornell University in the city of Ithaca and for years has been and still is exempt from taxation under the statute. There is no written agreement between the university and the association, and no complete verbal agreement, specifying the terms and conditions of occupancy. The university consented that the building should be erected on the spot where it stands and knew that it was so erected under the reasonable expectation on the part of the association that it should have a lease at a nominal rent for a reasonably long term of years. During the interviews upon the subject of a lease held between the representatives of the two institutions, both before and since the erection of Telluride House, the association asked for a lease resembling those given by the university to fraternal societies building upon its campus, for a term of 50 years at a nominal rent with the privilege of 50 years more on the same terms, subject to forfeiture for violation of any condition specified; the building to belong to the university upon the expiration of the second period. The university, however, objected to the length of term, both original and renewal, and insisted upon a period of 20 years for each and upon final expiration the building to become its own property. At no time has there been a refusal to lease for a reasonably long period at a nominal rent.

Under these circumstances, equity will prohibit the university from disappointing the reasonable expectation of the association, based on its own action, by expelling the latter from its ground and using the building for its own purposes. Since equity treats as done that which ought to be done, the nature of the tenure or occupancy of the association is that of a tenant at a nominal rent for a reasonably long term to be agreed upon by the parties or fixed by the courts. This, I think, is the status of the property so far as the question of taxation is concerned, independent of the question of exemption. No disturbing question has yet arisen between the university and the association. Their relations are most cordial and harmonious and there is no reason to apprehend that they will ever be disturbed.

Whether either of the assessments as laid is sufficient in substance and form to satisfy the law, I do not decide, but, finding the facts as they exist, leave the conclusion of law in that respect to be found by the courts of review, in case they do not agree with me on the question of exemption.

[2-4] While taxation is the rule, and exemption the exception, and the burden of showing exemption rests on the one claiming it, the statute regulating the subject should be read in the light of the policy of the state of New York, established early in its history and increasing in liberality as time has passed, to encourage education. The state expends much money each year for this purpose, and, in further promotion of its broad policy, exempts from taxation the property of such associations, corporate or voluntary, as are organized exclusively for, among others, educational or charitable purposes, and used exclusively for one or more of those purposes. Tax Law, § 4, subd. 7. This provision applies primarily to real estate, but the same sentence provides that the personal property shall also be exempt, and the context and connection indicate that the object and use in the case of personal property must be the same as in the case of real estate. Otherwise the latitude of exemption would run far beyond the obvious intention of the Legislature.

[5] The question is raised whether the purposes for which Telluride Association was organized are educational or charitable to the exclusion of all others. The defendants read from the constitution, under the head of "Administration of Property," the following section: "It shall be the endeavor of the association not only to preserve the value of its property but to increase the same. To this end, and for the purpose of providing its members employment and experience, it shall be the aim of the association to establish, invest in and conduct commercial enterprises." Founded on the last three words of the provision quoted, the argument is made that carrying on a commercial enterprise cannot fall within the language of the statute, and hence that the object of the organization is not exclusively educational, or charitable.

As the association had an endowment fund and depended on the income therefrom to carry on all its work, it had a right to invest the fund, as it did in fact, in the stocks and bonds of various corporations, such as banking, transportation, and manufacturing companies. Investment in the stock of such a corporation is to a certain extent conducting the business thereof through the right of the stockholder to vote for directors. In this sense, clearly, the power to conduct commercial enterprises does not deprive the Telluride Association of the right to exemption so far as Telluride House and its contents are concerned. The association has never conducted a commercial enterprise in any way except by mere investment in its stock. It has never organized or originated any commercial enterprise. No such project has ever been proposed or contemplated.

It is true that the association owns a little less than one-half the stock of the Beaver River Power Company, and its friends own enough more to give control of the management through the combined voting power. This, however, is simply a result of the power to invest in corporate stocks, which cannot be questioned or held to carry the purpose of the organization outside of the statute. Is a university deprived of its right to exemption because it invests part of its educational funds in the stock of railroad, electrical, or manufacturing corporations and to this extent conducts commercial enterprises? Educational work cannot be carried on without money, and, unless an educational institution uses up its principal or lets it lie idle, it must invest in something and may, as most of them do, invest in corporate stocks. This does not deprive them of their right to exemption.

According to the uncontradicted testimony of a prominent member of the convention which adopted the constitution, the discussion indicated that the words "invest in and conduct commercial enterprises" were understood to mean simply the power to invest in stocks and bonds. Whether the association, for the declared purpose "of providing its members employment and experience," could originate, own, and carry on a commercial enterprise, it is unnecessary to decide, for no such thing has been done and none such has ever been contemplated, and the practical construction by the association of its own powers under its constitution is of value in ascertaining its meaning. It may be added that the statute itself contemplates a diverse use of a lot or building. There is exemption to the extent of the value of the portion used according to the statute, while the remainder is not exempt. This seems to indicate an intention to cut down the command that the association must be organized ex-

clusively for a statutory purpose, as otherwise the statute would indirectly sanction a use *ultra vires*. Moreover, the provision relating to exemption speaks in one place of a corporation or association "organized or conducted for one or more" of the purposes named. This also seems to indicate an intention to relax said command by extending exemption to such associations as are conducted exclusively for one or more of the statutory purposes, regardless of whether they were organized exclusively for such purposes.

[6] The constitution which constitutes the articles of association was adopted at a convention held in Utah, but each annual convention fixes the place of meeting for the next, and the conventions are held in different states. The association has no headquarters, principal place of business, or office. Its principal business is transacted at the annual convention. The associates reside in many different states, its president and more of its members in New York than in any other. Telluride House is necessarily from its situation subject to visitation and control by the state of New York. I am of the opinion that the association has a residence for the purpose of taxation and exemption in every state where its charitable and educational work is carried on.

The association is so peculiar in purpose and practice as to be difficult of classification, and for this reason probably there is no decision by the courts that is strictly analogous. The chief reliance of the respondents is *People ex rel. Delta Kappa Epsilon Society of Hamilton College v. Lawler*, 74 App. Div. 553, 97 N. Y. Supp. 840, affirmed without opinion, two of the judges not acting, in 179 N. Y. 535, 71 N. E. 1136. In that case a building and the land upon which it stood were owned by a college Greek letter fraternity, organized, according to its constitution, for literary purposes and the promotion of the fine arts. The building was used primarily as a boarding house for the active members of the chapter, where they enjoyed the privileges of home life and met for social recreation and fellowship, but it was used incidentally for literary, educational and scientific purposes. In holding that it was not exempt from taxation, the court said: "The important and controlling question for our determination relates to the use to which the relator's property was put.

* * * It is apparent that the partial or occasional use of the relator's chapter house for literary, educational, or scientific purposes is not sufficient to sustain its claim to exemption, unless it can be said that such purposes are primary and inherent, while all others are secondary and incidental; for although we ought not, perhaps, to give to the word 'exclusively' an interpretation so literal as to prevent an occasional use of the relator's property for some purpose other than one or more of those specified, yet the policy of the law is to construe statutes exempting property from taxation somewhat rigidly, and not to promote such exemption to be established by doubtful implication.

* * * While it may be said that the relator is connected with Hamilton College, and that its chapter house is in a certain sense an adjunct thereto, yet so far as ownership, occupation and control are concerned it is entirely independent of the college. Its primary purpose is to afford the members of the fraternity owning it with an abiding place while attending college. It is there that they eat and sleep; it is there that they mingle with each other in social intercourse; it is there that they entertain their friends, and to that end indulge in dancing and other similar amusements. In short, it is to all intents and purposes a club house, a place for rest, recreation, and fraternal intercourse, rather than for the purposes for which it is claimed to have been organized, which purposes are plainly secondary and incidental; and, such being the case, we do not see how, within the settled policy of the law, * * * it is entitled to exemption from taxation."

It is to be observed that in the case cited the educational element was not prominent and the charitable feature was wanting. The young men paid the expenses of carrying on the building and for their own maintenance, such as board, lodging, etc., while they occupied it. They paid their own tuition and their own way in every respect. They paid for every benefit received and for every privilege enjoyed. A use is not charitable when it is paid for wholly by one's self. On the other hand, in the case of the Telluride Association the young men paid for nothing connected with their education, which was free in every respect. They paid nothing for tuition, board, lodging, maintenance, or

anything connected with their education. The use and purpose of the association and of Telluride House is charitable and educational combined; charitable because all the expenses of the students are paid by the association, and educational because a thorough education is furnished, broader and more complete than that provided by the university. Charity and education together cover every purpose and every activity.

In the case of *People ex rel. Young Men's Association for Mutual Improvement v. Sayles*, 82 App. Div. 197, 53 N. Y. Supp. 67, it was held that a corporation organized exclusively for the purpose of promoting benevolent and charitable purposes, which owned Harmanus Bleecker Hall in the city of Albany, was not exempt from taxation as to the part of said hall that was leased for theatrical performances and public entertainments, because it was not used, in the language of the statute, "exclusively for carrying out thereupon one or more of such purposes, but leased or otherwise used for other purposes." It was held, however, that it was exempt as to the portion not so used. The same was held in the next case in the same volume, where a benevolent corporation owned a large public hall and leased it for hire to others for exhibitions, etc. *People ex rel. Catholic Union of the City of Albany v. Sayles*, 82 App. Div. 203, 53 N. Y. Supp. 65. The distinction between those cases and that under consideration is obvious without comment.

On the other hand, the plaintiff and relator relies on *People ex rel. Board of Trustees of Mt. Pleasant Academy v. Mezger*, 98 App. Div. 237, 90 N. Y. Supp. 488, affirmed without opinion in 181 N. Y. 511, 73 N. E. 1130. In that case the trustees of an incorporated academy with many buildings, including a stable, an armory with drill rooms, a library, and a building occupied by the principal as a residence, leased them all to the principal for \$3,000 a year in excess of the cost of maintenance, but the excess was used by the trustees in improving the buildings and grounds. It was held that all the property was used exclusively for educational purposes and was exempt from taxation. The court said: "The assessors contend that all of the real and personal property of the relator is not used exclusively for educational purposes within the purview of this statute. It is insisted that 'sleeping rooms and drill rooms, armories and stables, library buildings and buildings occupied by the lessee as a residence, recreation grounds and dining halls,' although a part of the academy foundation and used in the administration thereof, are not within the exemption contemplated by the statute. The academy is both a day and a boarding school; consequently dormitories are necessary for the boarding pupils. The pupils are required to wear military uniform and are under military discipline. It is appropriate, then, that there should be an armory and a drill room. No particulars are given touching the stable. But it seems natural that a horse or horses should be required, and therefore must be kept, in the maintenance of a large boarding school. A library building is germane, if not essential, to the equipment of an academy. 'The lessee' is the head of the school, who lives in four rooms in one of the academy buildings; in other words, the principal is in residence. If the boarding pupils must dine, a dining hall is the proper place to serve them with victuals. * * * The statute should be applied so as to exempt the entire articulated system of an institution, and not merely the rooms or parts of buildings where tasks are conned or lessons are recited. The criterion is whether the property is exclusively devoted to the use of the academy in the education which the institution offers to those attendant upon it in the sense that education contemplates their mental, moral, and physical training, and their proper maintenance while upon the rolls."

While this case is not analogous, it is useful as tending to show the view of the court as to what is meant by an exclusively educational use of property. Many other authorities are cited, some from outside of the state, but they are not now of value, owing to the lack of analogy in their facts and in some cases to difference in the language of the statutes involved.

The novelty of the facts makes the case under consideration interesting, but so difficult as to invite divergent views, and the decision must rest on original impressions and reasoning rather than authority. My conclusion is that the facts stated, about which there is no dispute, and the reasons already given, show that Telluride Association was organized exclusively, and that

Telluride House is used exclusively, for charitable and educational purposes. The statute is complied with when all of purpose or use that is not educational is charitable.

There should be judgment for the plaintiff in the action and for the relator in the special proceeding.

Simon Fleischmann and William R. Pooley, both of Buffalo, for relator.

Peter F. McAllister, of Ithaca, for respondents.

SEWELL, P. J. This is a motion to confirm the report of the Hon. Irving G. Vann, former judge of the Court of Appeals of this state who was appointed referee in the above-entitled certiorari proceedings instituted to review an assessment levied on the property of the relator, the Telluride Association, located in the city of Ithaca. The principal question presented for determination in this proceeding is of general interest and far-reaching importance. The assessors of Ithaca in the assessment roll before the court assessed the property of the Telluride Association, which a few years ago erected a fine building on the campus of Cornell University with the consent of the university authorities, and the association claims that it is organized exclusively for educational and philanthropic purposes and that the property in question is used solely for such purposes, which contention was sharply litigated before Judge Vann, who was appointed referee to report to the court his findings of fact, conclusions of law, and opinion upon the question presented. Judge Vann, in addition to formulating findings of fact and conclusions of law, also wrote a highly instructive and illuminating opinion on the question before him, all of which are now submitted to the court for its final action. I have examined these findings and the opinion in which Judge Vann recommends that a final order be made in favor of the Telluride Association, and there is nothing to add to what Judge Vann has so clearly and forcibly expressed in his opinion, which is adopted as that of this court and, in accordance with the recommendations of which, a final order in favor of the relator is directed to be entered. A copy of Judge Vann's opinion so approved by the court and made that of the court is hereto attached and made part of this memorandum.

(161 App. Div. 387)

ROTHENBERG v. COLLINS.

(Supreme Court, Appellate Division, Third Department. March 13, 1914.)

1. APPEAL AND ERROR (§ 925*)—JUDGMENT—PRESUMPTION.

On appeal from a judgment, it will be presumed that the case was properly tried, and that all the rights of both parties have been disposed of in harmony with the rules of justice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3729-3734; Dec. Dig. § 925.*]

2. APPEAL AND ERROR (§ 1006*)—REVERSAL OF JUDGMENT—VERDICTS.

That the same verdict has been rendered on two different trials of the same case will not preclude reversal of the judgment on the second verdict, where the record shows that a fair trial was not had.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3951-3954; Dec. Dig. § 1006.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. TRIAL (§ 108½*)—MALPRACTICE—EXAMINATION OF JURY—SUGGESTION OF INSURANCE.

Where, in an action against the visiting senior surgeon of a hospital, who was serving without pay, for damages from his negligent failure to care for plaintiff's dislocated knee, the evidence made a close case as to whether the surgeon had neglected to care for plaintiff to his injury and whether the want of treatment was not according to plaintiff's expressed wishes, and plaintiff's counsel sought to appeal to the prejudice of the jury by placing defendant, contrary to the facts, in the position of one owing a special duty to plaintiff out of the many patients at the hospital, the action of plaintiff's counsel in asking the jury whether they were interested in any insurance company issuing policies for protection against liability for injuries, and in stating that he knew of companies which insured against liability for injuries from malpractice, was ground for reversal.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 108½.*]

Howard, J., dissenting.

Appeal from Trial Term, Monroe County.

Action by August W. L. Rothenberg against Newton M. Collins. From judgment for plaintiff and denial of a new trial, defendant appeals. Reversed, and new trial granted.

See, also, 145 N. Y. Supp. 1143.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Reed & Shutt, of Rochester (George D. Reed, of Rochester, of counsel), for appellant.

George B. Draper and Stephen J. Warren, both of Rochester, for respondent.

WOODWARD, J. This action is brought to recover damages alleged to have been sustained by the plaintiff through the negligence of the defendant, a physician and surgeon, in attending the plaintiff, who suffered an injury to his leg in an accident while in the employ of the state upon the Barge canal. Upon a previous trial the jury found a verdict of \$4,000 in favor of the plaintiff, the judgment being reversed on appeal to the Fourth Department on the ground that the verdict was against the weight of the evidence, though the learned court did not enter into a discussion of the merits of the case. 143 App. Div. 957, 128 N. Y. Supp. 1144. A second trial resulted in a like verdict of the same amount as that found upon the original trial, and the case has been certified to this department on an appeal from the judgment entered upon the verdict, and from an order denying defendant's motion for a new trial.

[1] The learned trial court, in denying a motion for a new trial, after citing the rule laid down by the court for this character of actions in *Pike v. Honsinger*, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655, says: "Within these rules, had it been my province to decide the questions of fact, I should have had no difficulty in reaching a conclusion adverse to plaintiff's right of recovery," and that, "While there is grave doubt as to whether the present verdict should be permitted to stand, still it should not be set aside except upon a careful

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

review of the testimony and a statement of reasons to justify it and to serve as a guide upon another trial," and so the case is passed on to this court for that "careful review of the testimony" which it is peculiarly the province of the trial court to make, with all of the details of the trial fresh in mind. A judgment of the trial court comes to an appellate court with the presumption that it has been properly tried; that all of the rights of both parties have been disposed of in harmony with the rules of justice, and a mere suggestion of doubt, out of harmony with the ruling, is of but little aid in the discharge of the duty which devolves upon the Appellate Court.

[2] While an examination of this case convinces us that there are questions of fact which belong to the jury to determine, and while, under ordinary circumstances, the fact that two juries have reached the same conclusion would be practically conclusive here, there is running through the entire record such a suggestion of unfairness in presentation, and the questions of fact are so lacking in conclusiveness, that we feel that the ends of justice require a new trial. If the same insidious effort to mislead characterized the trial which is apparent in the respondent's brief, it is easy to understand how a jury, with sympathies aroused for the misfortunes of the plaintiff, could be induced to overlook the weight of evidence, and to reach a conclusion which induced grave doubts in the mind of the trial justice. For instance, we are told that:

"Justice Foote denied the defendant's motion for a new trial, and wrote an opinion in which he carefully reviewed the rules of law applicable to the case, and held that under the evidence it was a case not within the province of the court, but within the province of the jury, to decide."

While this may be true in a sense, it very clearly does not express the real attitude of the learned trial justice, who distinctly suggests the propriety of setting aside the verdict "upon a careful review of the testimony and a statement of reasons to justify it, and to serve as a guide upon another trial." Again, we are told that the plaintiff was a strong, healthy man, who had never been sick or under a physician's care "until he was taken to the hospital and engaged the defendant to care for his dislocated knee, upon December 5, 1904"; that "plaintiff arrived at the hospital about 4 o'clock in the afternoon of December 5, 1904, was received in the emergency room, and soon thereafter engaged the defendant to treat his leg, and agreed to pay for such treatment." This, with much other matter, is asserted in the brief to convey the impression that the defendant was specially engaged to look after the plaintiff, while as a matter of fact the defendant was the visiting senior surgeon of the hospital, serving without pay, and the only evidence as to the engaging of the defendant is to be found at folio 129 of the record (cited by plaintiff's counsel), where the plaintiff testifies that on being brought into the hospital he found the nurse, Miss Myers, who asked him if he wanted a doctor to come there and take care of him, and he answered, "No." He then says:

"Collins [the defendant] came in, and he says: 'What's the matter mit you?' I say: 'I got a thing what you ought to find out. I think I got a broken leg.' 'Where you got it?' he says. I says, 'I got it in Brighton Lock, working for the state of New York there, and got hurt in the lock.' Then he

asked me was there a doctor coming here for you, and I says, 'No, sir, I got no doctor, I want the best doctor on this hospital to take care of my leg; if the state don't pay your bill, I pay the bill myself.' 'All right,' Dr. Collins said. I told him to take care of me then."

Clearly this was not a special employment of the defendant; it was merely an arrangement with the hospital, with an agreement to pay if the state of New York did not, and there is no evidence in the case to show that Dr. Collins ever considered the plaintiff as a private patient, or that he has ever made any charge for his services, or that the plaintiff has ever paid him anything. On the contrary the plaintiff was concededly a ward patient, and Dr. Collins testified that he did not receive any compensation from any one among the ward patients. Speaking of his position as senior surgeon, in charge of the ward service of the hospital, he says:

"It is an honorary position, and a position that there is never any price allowed to be charged to or paid by any ward patient in any hospital I ever heard of; they are supposed to be patients that are not able to pay a surgeon." Fol. 571.

[3] This is entirely uncontradicted; and, while it would not relieve the defendant of his obligation to use due care in the treatment of the patient, it is important as showing the "atmosphere" in which this action was tried, and the effort of plaintiff's counsel to appeal to the prejudices of the jury, by placing the defendant in the position of one owing a special duty to this one patient out of the many whom he was called upon to serve in the discharge of his honorary duties at the hospital in question. It is likewise important in connection with an exception saved by the defendant at the very opening of the case, and which, under other circumstances, might not be of controlling importance. In examining the jury counsel for the plaintiff said:

"I ask the jury to tell us if any of them are shareholders, stockholders, directors, officers, employes, or in any way interested in any insurance company issuing policies for protection against liability for damages for injury to person or property?"

This was objected to. The court asked if this was a negligence action, and, on being assured that it was a quasi negligence action, malpractice, the court said:

"If it is a malpractice action, you ought to ask them if they were stockholders or interested in any company insuring against malpractice."

Plaintiff's counsel replied:

"I tried to ask them in accordance with the statute."

Defendant's counsel objected to "all this proceeding before this jury," and the court responded:

"Of course that section is intended to apply to cases where there is a practice of insuring against liability for negligence. I have never heard of any practice that any company exists anywhere that insures a doctor against the results of his malpractice."

To this plaintiff's counsel replied "I have." Defendant's counsel excepted to the statement as—

"improper and incompetent, and as having a tendency to mislead the jury, and lead them off from the issue that will be tried."

The court permitted the question to be asked, and defendant's counsel excepted. The court then said:

"Anybody that is a stockholder in an indemnity company raise your right hand."

Counsel for plaintiff interposed, "Or otherwise interested." The court then announced that there was no such person, and defendant's counsel asked to withdraw a juror, which motion was denied, and the defendant took an exception. The court instructed the jury that:

"You are not to infer, gentlemen, from anything you have heard here this afternoon in reference to indemnity companies, that there is any indemnity company at all interested in this case. The law permits that kind of questions to be put to jurors because it is thought that sometimes jurors who have financial interests in companies insuring against accidents or injuries have a bias in their minds in that class of cases, and so it is thought proper that the parties should know whether jurors are of that type of mind, or their business is such that they might have a prejudice in that class of cases."

But the prejudice to the defendant is to be found, not so much in the question of whether any of the jurors were interested in indemnity insurance companies, but in the suggestion conveyed to the jurors by the assertion of counsel for plaintiff that he knew of corporations insuring doctors against malpractice; that the defendant was thus protected—that the burden of a verdict would fall upon a corporation rather than upon the individual who was before them—and this point was not cleared up before the jury by the remarks of the court. Moreover, it has been held that evidence that the defendant, in an action for negligence, was insured in a casualty company, or that the defense was conducted by an insurance company, is incompetent, and so dangerous as to require a reversal even when the court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it could not have influenced the verdict. *Simpson v. Foundation Co.*, 201 N. Y. 479, 490, 95 N. E. 10, 15 (Ann. Cas. 1912B, 321), and authorities there cited. In the case last above cited the court say:

"In *Horden v. Salvation Army*, supra [124 App. Div. 674, 109 N. Y. Supp. 131], Mr. Justice Ingraham said: 'The question as to whether or not under any circumstances evidence of this kind is competent has been so often before the court and so uniformly decided that there can be now no question that under no circumstances is it proper to ask such a question. The only possible ground of asking the question is to suggest to the jury that, as the defendant would sustain no damage by a verdict against it, they should give to the injured plaintiff compensation to which under other circumstances he would not be entitled. * * * As counsel in cases of this kind have been so often admonished as to the impropriety of suggesting, either by way of argument or by way of questions to the jury, or in any other way, that the defendant was protected by insurance, it seems to be unnecessary to say more than that such a suggestion in the presence of the jury will render any verdict that has been obtained by the plaintiff valueless, as a violation of the rule will require a reversal of the judgment.'"

In the *Simpson v. Foundation Co.* Case, supra, the court say:

"While there was no proof in this case that the defendant was insured, by suggestion and indirection the jury were given to understand that such was the fact, and the result, apparently, is reflected in the verdict"

—and the same might be said of the case now before us. The counsel for plaintiff had asked a general question whether any of the jurors

were interested as stockholders or otherwise in an insurance company issuing policies "for protection against liability for damages for injury to person or property," and the court had remarked, in passing upon an objection to the question as being incompetent, improper, and immaterial, that "if it is a malpractice action, you ought to ask them if they are stockholders or interested in any company insuring against malpractice." Later the court suggested, after further objection to the matter being brought out before the jury, that: "Of course that section is intended to apply to cases where there is a practice of insuring against liability arising from negligence. I have never heard of any practice that any company exists anywhere that insures a doctor against the results of his malpractice"—and plaintiff's counsel replied, "I have," thus clearly suggesting to the jury that there was such insurance in the case at bar, and forcing defendant's counsel to make objections where he was not in a position to make a denial. This was getting before the jury, "by suggestion and indirection," that which plaintiff's counsel had no right to do, and in a close case of this character it cannot be presumed that it did not have its influence upon the jury, and the instructions of the court did not operate to relieve the plaintiff from the error. See *Stein v. Brooklyn, Q. Co. & Suburban R. R. Co.*, 62 Misc. Rep. 309, 114 N. Y. Supp. 791; *Tincknell v. Ketchman*, 78 Misc. Rep. 419, 139 N. Y. Supp. 620; *Manigold v. Black River Traction Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861. In the latter case the court say:

"The law is well settled that it is improper to show, in an action of negligence, that the defendant is insured against loss in case of a recovery against it on account of its negligence. This was expressly held in the case of *Widrick v. Moore*, 68 Hun, 680 [22 N. Y. Supp. 1119]. It is not proper to inform the jury of such fact in any manner."

In the case now before us the plaintiff was taken to the Homeopathic Hospital, in the city of Rochester, on the 5th day of December, 1911, and it is conceded that there was a preliminary examination of the injury, and that certain X-ray pictures were immediately taken. The defendant testifies that on the following day he placed the plaintiff under an anæsthetic, and attempted to reduce the injury to the plaintiff's kneecap, and that he subsequently made a further attempt, but that, none of these proving entirely successful, he informed the plaintiff of the difficulty he had found, and told him that nothing short of an operation with the knife could promise a successful replacement, and that this involved certain dangers, and that the plaintiff refused to permit such an operation. The plaintiff, on the other hand, testifies that the defendant did nothing for him from the 5th day of December to the 13th and 14th, and that this was followed by a further attempt on the 28th; this later attempt being denied by the defendant. Right here is the most important conflict of evidence, and it is upon the proposition that the defendant, by failing to operate immediately, caused the leg to become stiff and incapacitated, afterward requiring a major operation in which the upper and lower bones of the leg were united, after removing the knee joint, that the plaintiff suffered injury. It is, however, possible to reconcile the testimony of both parties so far

as the good faith is concerned without necessarily finding that the defendant was guilty of neglect of any duty which he owed to the plaintiff. The defendant was the visiting surgeon at the time. He had several assistants, and it is well known that an operating physician does not attend to getting the patient ready for the operation, under ordinary circumstances, and if it happened to be the case that the plaintiff was prepared for the operation on the day following his coming to the hospital, and was placed under complete dominion of the anæsthetic, as the defendant says he was, he might not have any clear recollection of the presence of the defendant, or any recollection of the day. If this was true, the plaintiff might, in entire good faith, testify as he did that he had no treatment from the defendant between the day of his arrival and the 13th day of the month. If it was true that the defendant operated upon the plaintiff on the 6th day of December, the patient being completely under the influence of the anæsthetic, there is no evidence in the case from which the jury would have right to infer that it was negligent not to make a further attempt until the 13th, for there may have been a condition of the patient which made it imprudent to again subject him to the control of the anæsthetic without a complete rest, and a week would not be an unreasonable period.

But, assuming that there was such a conflict of evidence upon this question as to warrant the jury in finding that the defendant did not proceed as rapidly as he might have done, or as he ought to have done, the testimony of Frederick W. Zimmer, a surgeon of a different school of medicine, who afterward performed the major operation referred to above, shows conclusively that this failure was not the cause of the ultimate shortening of the leg and the removal of the joint, for his evidence is direct and positive that the plaintiff had sustained a fracture of the patella which had left pieces of bone in such a position that it was impossible to reduce the fracture and get the bones in a position to reunite without an operation with the knife, such as the defendant testifies he advised the plaintiff would be necessary. Plaintiff's witnesses never saw the leg while it was in its original condition; they merely testified from the X-ray pictures what they thought ought to have been done, and there was a decided conflict in the evidence, both as to the opinion of the witnesses and as to what was the correct version of the X-ray pictures, while Dr. Zimmer, who actually opened up the leg and took out the knee joint, testifies positively as to what he found, and says that no operation less than that involved in the use of the knife could have resulted in getting the pieces into position, and he does not believe that the plaintiff could have been given anything other than a stiff leg, though apparently having some confidence that it might not have been necessary to remove the kneejoint if the plaintiff had permitted an operation with the knife at the proper time. But the defendant had no right to perform a major operation, involving great danger to the plaintiff, without the latter's consent, and while the plaintiff denies that he refused such consent, the evidence can hardly be said to preponderate on the side of the plaintiff, for the defendant swears positively that he so advised the plaintiff, and that

the latter refused his consent, and the witness Helen Robinson, who was in training for nursing at the time, testifies that the plaintiff was in the operating room several times soon after his coming to the hospital, and that after one of these visits to the operating room Dr. Collins told him in her presence that he couldn't reduce the dislocation without opening the knee, and that the plaintiff—

"didn't seem to want to have it done. He said he would just let it go as it was, he didn't want to have it done; he was a little afraid of cutting."

Several other witnesses testify in reference to the operations of Dr. Collins, though they are not able to fix the exact dates, and it is difficult to understand how the jury could have reached the conclusion that the defendant neglected any duty which he owed to the plaintiff.

It does not, in view of the prejudicial error occurring at the opening of the trial, appear to be necessary to determine the question of the weight of evidence, or what is the effect to be given to a second verdict of the jury. The trial now under review did not preserve to the defendant his rights; his case was prejudiced by the interjection of matter having no relation to the issues, and which plaintiff's counsel must have known was highly improper, and the defendant ought not to be adjudged to pay this plaintiff \$4,000, unless he has, by due process of law, established his superior right to the same, and this he has failed to do.

The judgment and order appealed from should be reversed, and a new trial granted, with costs to the appellant to abide the final result.

LYON, J., concurs. SMITH, P. J., and KELLOGG, J., concur upon the ground that the verdict is against the weight of evidence. HOWARD, J., dissents.

(161 App. Div. 304)

NEW YORK STATE NAT. BANK OF ALBANY v. WHITEHALL WATER POWER CO., Limited.

(Supreme Court, Appellate Division, Third Department. March 13, 1914.)

1. **CONTRACTS (§ 213*)—CONSTRUCTION CONTRACT—TIME OF COMPLETION.**

Where when a contract was made for constructing an addition to a mill it was understood that the wheel pit was also to be lowered the depth specified in the contract, the time it would take competent engineers, with knowledge of the actual physical conditions and with adequate equipment, to do such additional work should be added to the contract time for completing the work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 957-977; Dec. Dig. § 213.*]

2. **CONTRACTS (§ 800*)—CONSTRUCTION CONTRACT—TIME OF COMPLETION.**

Where a supplemental construction contract provides for the doing of additional work which lies at the foundation of the work originally contracted for, the law implies that the time stipulated in the original contract for completing the work is thereby extended by the time necessary for doing the extra work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1872-1881; Dec. Dig. § 800.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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3. **CONTRACTS (§ 322*)—CONSTRUCTION CONTRACTS—ACTION—SUFFICIENCY OF EVIDENCE.**

In an action involving liquidated damages for failure to construct an addition to a mill within the time contracted for, evidence *held* not to show that the first cofferdam was constructed upon the theory that the wheel pit was not to be changed, but to show that the wheel was to be at a greater depth.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1306, 1307, 1339, 1347, 1348, 1465, 1492, 1534-1542, 1754, 1768, 1772, 1801, 1802, 1804-1808, 1815, 1816; Dec. Dig. § 322.*]

4. **CONTRACTS (§ 213*)—CONSTRUCTION CONTRACTS—TIME OF COMPLETION—EXTRA WORK.**

Where the parties to a construction contract contemplated that the time required for the deepening of the wheel pit should be added to the time provided for completing the contract, the time required for deepening the wheel pit must be determined in view of the physical conditions of the ground as they actually were, and not as they were believed to be.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 957-977; Dec. Dig. § 213.*]

5. **CONTRACTS (§ 285*)—CONSTRUCTION CONTRACTS—DECISION OF ARCHITECT.**

Where a construction contract expressly provided that, should there be any discrepancy between the specifications and plans, the architect's explanation thereof should be final and binding upon the contractor, a decision of the architect that certain work was not extra work, but was required by the contract under the plans and specifications, was binding.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1290, 1291, 1303, 1304; Dec. Dig. § 285.*]

Appeal from Special Term, Washington County.

Action by the New York State National Bank of Albany against the Whitehall Water Power Company, Limited. From a judgment for plaintiff, defendant appeals. Affirmed as modified.

See, also, 140 App. Div. 739, 125 N. Y. Supp. 861.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Edgar T. Brackett, of Saratoga Springs, for appellant.

Hun & Parker, of Albany (Marcus T. Hun, of Albany, of counsel), for respondent.

JOHN M. KELLOGG, J. The plaintiff's assignor constructed an addition to the defendant's mill, and there is unpaid on the contract price \$11,678.96, for which, and for certain alleged extra work, the plaintiff seeks recovery. By the contract, dated May 3, 1905, the work was to be completed September 1, 1905, within 3 months and 28 days. It was in fact completed July 1, 1906, 13 months and 28 days after the date of the contract, and 10 months after the agreed time. The contract provided \$50 per day as liquidated damages to the defendant for each day's delay in the completion of the work, and that the delays should be apportioned. The defendant, by its counterclaim, seeks to recover such liquidated damages for 303 days. The judgment appealed from determines that the deepening of the wheel pit 3½ feet, which was provided for by a supplemental agreement, extended the contract so that the time did not begin to run until Jan-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

uary 1, 1906, thus driving the work into cold weather, which made great delay in laying the brick and placing the floor beams, and such work, which should have been completed in one month in seasonable weather, required three months, thus extending the contract time two months more, with the result that 47 days of the delay were chargeable to the contractor, the balance to the defendant.

[1] This case was before us in 140 App. Div. 740, 125 N. Y. Supp. 861, and it is unnecessary to repeat the facts there stated. When the contract was made it was understood that the wheel pit, which lay at the very foundation of the work, was to be lowered one foot or more below the depth specified in the contract, for which the contractor was to receive \$2.50 per cubic foot, and that the contractor was to be notified of the depth required as soon as a determination was made. We held that until the contractor was so notified the original contract practically remained in suspense, and that the time intervening was not a part of the contract time. This was not upon the theory that the owner or the architect had delayed the work, but that the parties had, in substance, agreed that the work need not be entered upon until the nature of this foundation work was agreed upon. We also held that if this extra work necessarily required extra time for its completion, with reference to the work itself or the extra cofferdam made necessary for it, such extra time was to be added to the contract time. This did not mean that the time which the contractor might spend upon the work, or in experimenting upon the cofferdam, was to be added to the contract time, but that the situation as it actually existed was to be considered, and if engineers competent for such work, who had full knowledge of the condition of the bed of the lake and the other conditions, with adequate machinery and appliances, proper supervision and working to capacity, would be engaged a certain time in the necessary performance of such work, that such time should be added to the contract time.

[2] The law implies that where, by a supplemental agreement, additional work, which lies at the very foundation of the contract work, is agreed upon, the term of the original contract is extended by the time which is necessary for the performance of such extra work. It is evident that the wheel pit could not be lowered $3\frac{1}{2}$ feet without taking some time. It is also apparent that in agreeing to deliver the building in 3 months and 28 days the contractor had undertaken to do a great deal of work in a very short time. It must have been within the understanding that the deepening of the wheel pit would necessarily cause some extension of the contract time. The parties not having agreed upon the extended time, it follows that the extension was for such time as the extra work at the place where it is to be performed reasonably requires under favorable conditions.

The important questions for consideration are when the contractor was notified that the wheel pit was to be lowered $3\frac{1}{2}$ feet, and how much time was added to the contract on that account. It was assumed upon the former appeal that such notice was given July 7th when the blueprints for the work were furnished. Upon a careful consideration of the present record it is clear that the contractor had due notice on

June 8th, and should then have entered upon the work. According to the plaintiff's theory the contractor had substantially built the cofferdam in which the wheel pit mentioned in the original contract was to be placed, that such work was done in reliance upon the original contract, and without expectation that the wheel pit was to be deepened, and that the change of plan made necessary a new cofferdam. It is evident that the contractor cannot have an extension of the contract upon the theory that it remained in suspense awaiting the determination as to the deepened wheel pit, and at the same time be credited with the construction of the first cofferdam which he claims was built upon the theory that there was to be no deepening of the wheel pit.

[3] The facts do not justify the claim that the first cofferdam was constructed upon the theory that there was to be no change in the wheel pit. Upon May 24th, 21 days after the date of the contract, the architect wrote the contractor that nothing was being done with reference to the cofferdam, and he urged him to begin work upon it, saying, "as the change which is contemplated in this work will not affect the size of cofferdam required and the extent to which it will be carried." The contractor replied upon the 25th of May that he would take immediate steps in progressing the work. He began the work June 1st. He gave the order for the iron June 1st; June 3d some of the order was canceled "to the extent of the wheel pit and the top of the turbine pit iron. Daggett [the contractor's superintendent] informed us that there would be a change in that iron." The work upon the cofferdam was done by the carpenters and masons and the ordinary workmen employed upon the job. No man familiar with such work laid it out or determined as to its condition or supervised it. After it was built the contractor was unable to free it from water. In the contract it was specified that the contractor should satisfy himself as to the nature and location of the work bid for, "of the quality of the materials required and of all other matters which can any way influence their contract, and no misunderstanding on these matters will in any way relieve the contractor from any risks or from filling the terms of the contract." On June 6th the contractor wrote the architect that he had not received information "as to the depth of the wheel pit or the arrangement of the wheels in the wheel pit chamber so it is impossible to order the beams." The architect replied the next day that he would be at Whitehall Thursday morning, and if the contractor and the superintendent would be there, the matter of the wheel pit would be settled; that the style of wheel to be used had delayed the determination, but that matter would be settled Thursday. The evidence shows that on June 8th, at Whitehall, the depth of the wheel pit was determined and the contractor's superintendent duly notified. Closson, the engineer of the firm which was to furnish the iron, swears that upon the 9th Gilroy, the architect's representative, came to Albany "and told us to order the beam for the wheel pit according to certain sizes and dimensions which we worked out. * * * They were ordered under his instructions June 12th." There is no substantial denial of the fact that on June 8th the contractor was notified that the wheel pit was to be deepened 3½ feet. We quote from the respondent's brief:

"The plans for the revised wheel pit were not received by McKinney & Sons from Gilroy until June 9, 1905."

July 3d the architect wrote the contractor, complaining that the cofferdam had not been pumped out and no brick or stone work started, and continues:

"It seems impossible for you to finish your contract in time at the rate at which you are going and I wish to impress upon you the necessity of putting more men or taking other steps to expedite the work, as I do not wish to be compelled to take action as outlined in article 5 of the contract, but will be compelled to do so if work does not proceed faster."

To which the contractor replied July 6th, the day before he received the blueprints, that there were unexpected difficulties in getting the water out of the cofferdam, which are liable to occur, and that he expects a diver at the earliest possible date, and that the water in the lake has been two or three feet higher than usual. There was no suggestion that the defendant did not know the depth of the wheel pit. On June 20th the contractor wrote the architect that when he and Daggett met at Whitehall June 8th, it was arranged that Gilroy was to go to Albany and assist the contractors there in arranging the steel for the revised wheel pit, and stated that Daggett reported that the owner would bear the extra cost of the iron caused by purchasing it from stock, and asked him to confirm that statement to the iron men. The architect replied June 21st, referring to the change in the wheel pit:

"Two weeks have now elapsed since you were notified of the final decision in the matter."

On July 11th the architect writes the contractor that the work on the cofferdam is not progressing satisfactorily, and that he doubts their ability to finish the contract on time; that he is desirous of avoiding trouble in the settlement, and hopes they will put on all the help possible and push the work to completion, and offers any assistance which may be asked of him. On August 14th a similar letter is written, urging that he hurry up work upon the cofferdam, and on August 23d he writes, inclosing a letter from the owners which complains that the men working upon the cofferdam have shown themselves thoroughly incapable regarding submarine work, and declares that the matter cannot be continued, and the architect writes that more men must be put on, more men with skill in the line of cofferdam work, or they will be compelled to take the action outlined by article 5 of the contract. Article 5 permits the owner to discharge the contractor and finish the work on his account. The contractor replied August 23d that he would like to confer with the architect in Philadelphia or Whitehall. The contractor went to Philadelphia. Apparently there was no complaint of the criticisms made as to the conduct of the work on the cofferdam. No claim was made after June 8th that the work was being held back for want of notice that the wheel pit was to be lowered.

We have seen that the contractor was to take all the chances as to the conditions at the place where the work was to be performed. In fact he made no adequate examination of the place where the cofferdam was to be, either at the time the contract was made or at the time when the first cofferdam was constructed. Neither the contractor nor

the defendant or architect in fact had any real knowledge of the actual conditions existing under the water at the place where the cofferdam was to be built. And if they had known, none of them had sufficient experience to enable him to appreciate the difficulties. The contractor began the cofferdam with the knowledge that the wheel pit was to be lowered, but he assumed, as did the architect, that the lowering of the wheel pit would not make any difference in the size of the cofferdam or its exact location. This evidently would have been a correct supposition if the lake bottom had been a rock surface, such as they evidently supposed it to be. As matter of fact it was a rock surface, with a gradual slope into the lake, and in a short distance the rock disappeared and broken stone only was found, which furnished no satisfactory anchorage for a cofferdam, with the result that the water came through the bottom and the cofferdam could not be made dry. The contractor, up to July 7th, in a way was trying to perfect the first cofferdam and prevent its leaking. Up to that time the building of the cofferdam had been in inexperienced hands, and the principal trouble came from the fact that the condition of the bottom of the lake at this point was not definitely known, and that the parties building the cofferdam did not have the experience or ability to construct a proper cofferdam on such a bottom. The diver was not an engineer, but had had practical experience in diving, and some experience in building cofferdams, although he evidently did not appreciate the situation, or know how to meet it, and the work of completing the first, second, and third cofferdams was evidently experimentally conducted at great disadvantage, delayed at times by the absence of the diver or the want of proper machinery. The diver, in showing his qualifications, says:

"I am a diver; have been engaged in that work 12 years; I have searched for bodles, raised boats, built intakes for waterworks, and have built several cofferdams."

The lake at this point did not have a treacherous or shifting bottom. From the fact that a part of the cofferdam would rest upon a sloping rock and the balance upon a sloping bed of loose stone, it presented unusual difficulties, evidently beyond the ability of the diver to cope with. The witnesses of the plaintiff are quite indefinite as to the actual work done from time to time upon the cofferdam. The diver worked 57 days. Gilroy, a representative of the architect, kept a diary, showing what men were engaged upon the entire work from day to day and where employed. His evidence indicates that during many working days no work was done upon the cofferdam, and indicates quite clearly that the work was not progressing with the intelligence, force, and attention which the circumstances required.

It is evident that the first cofferdam was built with the understanding that there was to be a greater depth to the wheel pit than contemplated in the original contract, for after the actual depth was known the work upon it continued to July 10th. Here is a month and two days lost time clearly chargeable to the contractor. At the trial those in the employ of the contractor seemed to understand that the first cofferdam was entirely useless in making the deeper wheel pit, and unfitted and unsuited for the deeper wheel pit. This knowledge had been

gained long after it was arranged to lower the pit. Undoubtedly such work was caused by the lowering of the wheel pit, and great difficulties were found in building the cofferdam. It is nevertheless clear that if the contractor had obtained full knowledge of the condition of the lake at this point, and had put the work in the hands of a competent engineer, with competent assistants, much less time would have been expended upon it. A great part of the delay is attributable solely to the inexperience of those who were conducting the work, and from unsuccessful experiments which would have been unnecessary if the condition of the lake bottom had been thoroughly known, and if the parties doing the work had been capable of understanding what those conditions meant. The cofferdam was not a part of the work under the supervision of the architect; it was a structure which the contractor was to build in his own way, to furnish him a place in which to do the contract work. The mistakes of the contractor are in no way chargeable to the architect. No delay was suffered in obtaining the ironwork for the cofferdam. It was upon the ground September 3d, long before the contractor had any occasion to use it. The time from May 3d, the date of the contract, to June 8th, being 1 month and 5 days, during which the contractor was not informed of the proposed depth of the wheel pit, should be added to the term of the contract, making the time when the work was to be finished October 6th. It is somewhat difficult to determine just how much time was wasted in useless experiment, or in not giving proper attention to this work. When the new cofferdam was begun about July 10th, it took some time to remove the old one and the gravel which had been placed around it. This time was not chargeable to the defendant, as the entire work with reference to the first cofferdam was a mistake.

[4] We must assume it was the intention of the parties that by the agreement for the deepening of the wheel pit there was added to the contract all the time which that work necessarily required. Such time is not to be based upon what the parties then understood was the condition of the river bottom, as they all were in error with reference to it, and none of them, if they had actually known the condition, would have comprehended the difficulties presented. But the situation must be taken just as it was, and not as it seemed to be. The parties did not understand the actual situation, and had no accurate appreciation of what would be a reasonable time for the work as the situation actually was. It is therefore for the court to determine what was a reasonable time for doing the work at the place where the contract required it to be done, and we are not controlled by the mistake under which the parties were acting at the time. Competent men, familiar with such work under water, who actually comprehended the exact situation and had the proper machinery and appliances, undoubtedly could have done this extra work in three months. A considerable part of the time used up must be considered as chargeable to inexperience and ignorance of the actual condition of the lake and of what those conditions meant, and to the want of a proper working force and competent supervision. We, therefore, add three months to the term ending Oc-

tober 5th, with the result that the contract should have been fully performed on or before January 5th.

Before the cofferdam was finished much of the brickwork had been done. It is found that the remaining brickwork and the laying of the beams could have been done in a month of favorable weather. If the wheel pit had been finished October 5th, there was ample time for doing this work before the winter closed in. There is therefore no extension on account of the winter weather. The contractor is responsible for the delays from January 5th to July 1st, 1906, 151 days, exclusive of Sundays, and the defendant is entitled to receive \$50 per day, the liquidated damages therefor.

In the letter of July 6, 1905, in furnishing the revised plans for the wheel pit, the architect stated that there would be a saving of \$480.90 in the structural steel and cast iron, and in other items, making a total of \$751.10, a rebate which will be due the owner. And it is urged by the defendant that the trial court erred in not allowing that sum. On August 5th the defendant's superintendent acknowledged the receipt of the letter, and stated they had not received the statements from the iron men, and could not check the matter up, but that it would have attention. The amount was certified by the architect in his final certificate. The court has found that the architect's certificate was unfair and not binding upon the contractor. All the parties interested were apprehensive that the delay in determining the depth of the wheel pit might cause a delay in getting the iron therefor, and thus delay the job. Daggett claims that the architect directed that the iron and steel be obtained at the earliest moment, and if bought from stock, the extra costs would apply on the saving in weight. There seems to have been reason for the suggestion. The evidence shows that, while there was a saving in the weight of the iron, there was no saving in the cost, for in order to get a prompt delivery it was necessary to buy from the stock of dealers in New York and not from the manufacturers. The court has evidently accepted Daggett's view of the situation, and was fairly warranted in so doing. The certificate was unfair with reference to the steel and iron, and not within the terms of the contract. No allowance should be made by the contractor on account of the steel and iron. The remainder of this credit certified by the architect has not been met, and it is not shown that there was error in this certificate as to the other items certified. The contractor was therefore chargeable with \$270.20 on account of the saving in material, and the judgment should be modified by allowing the defendant that amount.

[5] At an early date it was discovered that, according to the specifications, the roof of the addition did not meet the roof of the main building, and it was necessary to make a slight elevation in the new roof to conform to the old at the place where they join, for which the court has allowed the plaintiff \$200 as extra work. The drawings indicated that the roofs joined. The construction of the plans under the contract was left with the architect. It was provided in the specifications that:

"Should there appear any discrepancy between them and the plans the architect shall explain them and such explanation shall be final and binding upon the contractor, who will make no charge or claim for extra work in con-

sequence of such explanation, and he shall execute the work in accordance therewith."

It was also provided that no extras shall be allowed without a written order from the architect, and that if any other work than shown is required, the architect must fix the price of it, and the contractor shall abide by it. These conditions were binding, and were not waived. This work was not directed as extra work. The architect claimed it was required by the original contract, and his decision as to the meaning of the plans and specifications is binding. The judgment should be modified by striking therefrom this allowance.

The court reverses the finding that the defendant is only entitled to \$2,350 as liquidated damages, and that there was due, and the architect should have certified to, \$11,678.96 to the plaintiff; that the plaintiff performed extra work with reference to the roof of the value of \$200; that the plaintiff is entitled to recover \$10,899.61, with interest; the ninth finding of fact; the tenth finding of fact; the eleventh finding of fact; the thirteenth finding of fact except the first two sentences thereof. And, in lieu thereof, the court finds that the plaintiff had notice as to the depth of the wheel pit June 8, and should have then commenced work thereon; that by delay in giving notice as to the change in the wheel pit the contract time was extended 1 month and 5 days; that building of the cofferdam was in the hands of inexperienced, incompetent men, with an inadequate force, who did not know the situation at the place where the cofferdam was to be built, and that a great part of the delay in building the cofferdam and the wheel pit arose from those facts; that by the contract the plaintiff was chargeable with knowledge of the situation at the place where cofferdam was to be built, and competent men, with proper appliances and a sufficient force, should have constructed it in three months' time, or by September 8th; the deepening of the wheel pit extended the time for the completion of the contract until January 5, 1906, and for all delays after that the plaintiff is responsible, and should be charged with \$50 per day liquidated damage for each working day; the change in the wheel pit made a saving to the plaintiff in material, other than steel and iron, of \$270.20, which should be allowed to the defendant. The computations may be made pursuant to these findings and the opinion, and incorporated in the order.

The judgment should therefore be modified as stated in this opinion, and, as modified, affirmed, with costs to the appellant. All concur.

(161 App. Div. 489)

HERRMANN et al. v. CABINET LAND CO.

(Supreme Court, Appellate Division, Second Department. March 13, 1914.)

MORTGAGES (§ 584*)—FORECLOSURE SALE—DEFECTS.

The purchaser at a foreclosure sale, which is void as against the owner of the equity of redemption because he was not made a party, becomes the assignee of the mortgage; and if he enters lawfully into possession, as by entering under the judgment of foreclosure and sale and the deed there-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

upon, he becomes the mortgagee in possession, and the owner of the equity cannot regain possession by ejectment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1555; Dec. Dig. § 534.*]

Appeal from Special Term, Queens County.

Action by Anna M. Herrmann and others against the Cabinet Land Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Argued before JENKS, P. J., and THOMAS, RICH, STAPLETON, and PUTNAM, JJ.

Merle I. St. John, of New York City, for appellants.

Lynn C. Norris, of Brooklyn, for respondent.

JENKS, P. J. The action is ejectment, and the question is whether the defendant Cabinet Land Company is entitled to the judgment that dismisses the plaintiffs upon the merits. The plaintiffs' demurrer to the said defendant's second defense was overruled, and thereupon a motion was made for judgment. In 1874, the land was conveyed to plaintiffs' intestate, subject to a purchase-money mortgage. In the foreclosure of that mortgage in 1897, an affidavit attached to the judgment roll purported to show personal service of the summons and complaint upon the said intestate in 1899, but the pleadings allege that he died in 1890. The purchaser at the foreclosure sale made in 1903 assigned his bid to the Anonymous Company, which completed the purchase, received the referee's deed in 1909, and thereupon conveyed to this defendant. The said defendant for its second defense, after recital of these matters, pleads:

"That thereafter and in or about March, 1909, this defendant entered peaceably into the actual possession of said lot No. 355, and it has continued and now is in possession thereof. That said entry was made under and by virtue of said judgment of foreclosure and sale and in reliance upon the fact that said Charles H. Schorr purported to have been actually served with the summons and complaint in said action and without any notice or knowledge whatsoever of the claim set forth in the complaint herein that the said Charles H. Schorr died before the date of said service and that he was not served in said action."

Even though the sale was void as against the owner of the equity of redemption, in that he was not made a party to the foreclosure suit, the purchaser at the foreclosure sale became the assignee of the mortgage, and, if he entered lawfully into possession, becomes a mortgagee in possession. *Townshend v. Thomson*, 139 N. Y. 152, 34 N. E. 891; *Croner v. Cowdrey*, 139 N. Y. 471, 476, 34 N. E. 1061, 36 Am. St. Rep. 716; *Barson v. Mulligan*, 191 N. Y. at page 320, 84 N. E. 75, 16 L. R. A. (N. S.) 151; *Brobst v. Brock*, 10 Wall. 519, 19 L. Ed. 1002; *Bryan v. Brasius*, 162 U. S. at page 419, 16 Sup. Ct. 803, 40 L. Ed. 1022; *Romig v. Gillett*, 187 U. S. 111, 23 Sup. Ct. 40, 47 L. Ed. 97; *Phyfe v. Riley*, 15 Wend. 248, 30 Am. Dec. 55; *Lowenfeld v. Ditchett*, 114 App. Div. 56, 99 N. Y. Supp. 724. The entry made pursuant to the judgment of foreclosure and sale and the referee's deed thereupon was "lawful" within the purview of the rule. A similar

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

entry was said to be lawful and under color of right in *Townshend v. Thomson*, *supra*. See, too, *Romig v. Gillett*, *supra*, 187 U. S. at page 117, 23 Sup. Ct. 40, 47 L. Ed. 97. The cases cited by the learned counsel for the appellant can be discriminated. In *Howell v. Leavitt*, 95 N. Y. 617, the possession was obtained by what the court described as a "trespass" and by force. In *Deutsch v. Haab*, 135 App. Div. 756, 119 N. Y. Supp. 911, the court animadverts to the fact that there had been no sale under the attempted foreclosure, and the question now up was not before the court. In *Barson v. Mulligan*, 191 N. Y. 306, at page 313, 84 N. E. 75, at page 78 (16 L. R. A. [N. S.] 151), the question was whether "a mortgagee who takes possession of the mortgaged premises as tenant under a lease from a life tenant can become a mortgagee in possession without the consent of the mortgagor," and the point of the decision is that one who enters as a lessee could thereby not hold over as a mortgagee any more than he could acquire lawful possession by force or fraud. 191 N. Y. 322, 84 N. E. 75, 16 L. R. A. (N. S.) 151. *Constant v. Barrett*, 13 Misc. Rep. 249, 34 N. Y. Supp. 163, presented a somewhat similar question. In *Becker v. McCrea*, 193 N. Y. 423, 86 N. E. 463, 23 L. R. A. 754, the question was whether a mortgagee in possession could set up title of "adverse" possession against the right of redemption. There had been a foreclosure suit which went to judgment, but there was no sale thereunder. *Hoye v. Bridgewater*, 134 App. Div. 255, 118 N. Y. Supp. 951, but recognizes a general principle that consent of the mortgagor is necessary to constitute a mortgagee in possession, which is not applicable when the possession is acquired as it was in the case at bar.

The rule of *Townshend's Case*, *supra*, is not confined to the mortgagee as a purchaser at the sale, or to his assignee, but applies to any purchaser. Section 1632, Code of Civil Procedure; *Continental Insurance Co. v. Reeve*, 135 App. Div. 737, 119 N. Y. Supp. 901. *Shriver v. Shriver*, 86 N. Y. 575, *contra*, relies wholly upon *Watson v. Spence*, 20 Wend. 260, which was decided in 1810, prior to the enactment of the said section of the Code or of its parent statute (2 R. S. [1st Ed.] 192, pt. 3, c. 1, § 158).

The judgment is affirmed, with costs. All concur.

LATINER v. WONDERLAND AMUSEMENT CO.

(Supreme Court, Appellate Division, First Department. March 13, 1914.)

CORPORATIONS (§ 432*)—ACTIONS FOR WRONGFUL DISCHARGE—AUTHORITY OF TREASURER.

In an action for wrongful breach of a contract of employment entered into between plaintiff and defendant's treasurer, evidence that defendant corporation accepted and paid for plaintiff's services for one week is sufficient *prima facie* evidence of the treasurer's authority to bind defendant.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, New York County.

Action by Bernard Latiner against the Wonderland Amusement Company. From a judgment on dismissal of complaint, plaintiff appeals. Reversed and remanded.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

Eugene I. Yuells, of New York City, for appellant.

Jerome Wilzin, of New York City, for respondent.

PER CURIAM. Plaintiff sued for damages for breach of a contract of employment. The alleged contract was oral, and was made, on defendant's behalf, by Burlinghoff, its treasurer. After one week's service, for which he was paid, plaintiff was discharged. The complaint was dismissed for lack of proof that Burlinghoff had authority to bind defendant by a contract running for so long a period as the one sought to be established. We think the facts proved made out a prima facie case. Whether or no the treasurer has or has not power to enter into ordinary contracts affecting the usual business of the corporation, but not necessarily pertaining to its finances, it is not now necessary to determine. In *Farmelee v. Associated P. & S.*, 9 Misc. Rep. 458, 30 N. Y. Supp. 250, the report fails to show whether the action was for wages or for damages for unlawful discharge, but the opinion seems to have been based on the assumption that prima facie a treasurer has power to enter into ordinary contracts of employment. Here the evidence showed that the defendant accepted and paid for plaintiff's services for one week, and this, we think, was sufficient prima facie evidence of Burlinghoff's authority to bind defendant by the contract alleged. *Phillips v. Campbell*, 43 N. Y. 271, 272; *Traitel Marble Co. v. Brown Bros., Inc.*, 159 App. Div. 485, 144 N. Y. Supp. 562.

The judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event.

HANOVER NAT. BANK OF CITY OF NEW YORK v. ORIENTAL BANK OF NEW YORK.

(Supreme Court, Appellate Division, First Department. March 13, 1914.)

LIMITATION OF ACTIONS (§ 180*)—DEFENSE—MODE OF TAKING ADVANTAGE.

The defense of limitations can be raised only by answer and not by motion to strike.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 670-675, 681; Dec. Dig. § 180.*]

Appeal from Special Term, New York County.

Action by the Hanover National Bank of the City of New York against the Oriental Bank of New York. From an order denying a motion to strike out allegations in the complaint, defendant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

William C. Armstrong, of New York City, for appellant.
P. S. Dudley, of New York City, for respondent.

PER CURIAM. If the defendant desires to raise the question as to whether or not the claim is barred by the statute of limitations, it cannot be done by a motion to strike out, but must be taken by answer. The order is affirmed, with \$10 costs and disbursements.

(83 Misc. Rep. 648)

PEOPLE ex rel. FUCHS v. POLICE COM'R OF CITY OF NEW YORK.

(Supreme Court, Special Term, New York County. January, 1914.)

HABEAS CORPUS (§ 85*)—PERSON SEIZED UNDER EXTRADITION WARRANT—RIGHT TO DISCHARGE—EVIDENCE.

Where the return of a writ of habeas corpus sued out by a person held under a warrant of extradition is traversed by a denial of the identity of the relator with the person named in the indictment, on the ground that relator was not in the demanding state when the crime was committed, and therefore not a fugitive from justice, and this contention is sustained by a preponderance of the evidence, the writ will be sustained and relator released.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.*]

Habeas corpus by the People, on the relation of Louis Fuchs, against the Police Commissioner of the City of New York. Writ sustained, and prisoner discharged.

Chas. G. F. Wahle, of New York City, for relator.
Stanley Richter, Asst. Dist. Atty., of New York City, for defendant.

FORD, J. Here a prisoner is held under a warrant of the governor for extradition, and brought before the court on a writ of habeas corpus. The return is traversed by denial of the identity of the relator with the person named in the indictment, on the ground that he was not in the demanding state at the time of the commission of the crime, and therefore not a fugitive from justice. Upon the issue so raised, oral testimony was taken which shows a direct and material conflict. The question before me resolves itself into this: Can this court find in favor of the relator and sustain the writ on such conflicting testimony? Mr. Justice Carr's masterly review of the authorities in *People ex rel. Genna v. McLaughlin*, 145 App. Div. 513, 130 N. Y. Supp. 458, is decisive, and the question there decided is so strikingly similar to the one here as to make a lengthy opinion on my part a presumptuous work of supererogation. In that case the rule is flatly laid down that:

"This question of jurisdictional fact must be determined by the court as is any other question of fact which it has the power and duty to determine, according to the rule of the common law as to the preponderance of evidence."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The preponderance of evidence I find to be heavily on the side of the relator, and the writ will therefore be sustained and the prisoner discharged. The case mainly relied upon by the district attorney in opposition is *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. 282, 49 L. Ed. 515, decided in 1905. That case is discussed in the *Genna Case*, supra, decided in 1910, and the extract quoted from the former case in the brief of the district attorney to the effect that "the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused," is held to be "entirely apart from the question then up for decision." The case of *McNichols v. Pease*, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121, is cited as the later and controlling adjudication by the federal Supreme Court which, by implication at least, supports the view taken by the Appellate Division.

Writ sustained, and prisoner discharged.

(161 App. Div. 492)

DEITCH v. DEITCH.

(Supreme Court, Appellate Division, Second Department. March 13, 1914.)

1. MARRIAGE (§ 60*)—ANNULMENT—IMPOTENCY—LIMITATIONS.

The limitation of five years from marriage prescribed by Code Civ. Proc. § 1752, for bringing an action to annul a marriage for physical incapacity rests on public policy, different from that in ordinary actions.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 125-128, 130-135; Dec. Dig. § 60.*]

2. MARRIAGE (§ 60*)—ANNULMENT—EXPLAINING DELAY.

Plaintiff, in an action to annul a marriage, subjoining a cause of action for misrepresentation, might, though there be no formal defense of limitations, have to account for her eight years of continued cohabitation.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 125-128, 130-135; Dec. Dig. § 60.*]

3. APPEAL AND ERROR (§ 959*)—REVIEW—DISCRETION AS TO AMENDMENT.

The discretion of the Special Term to amend, in furtherance of justice, in matrimonial actions, especially as to costs for allowing amendment, will not ordinarily be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3831; Dec. Dig. § 959.*]

Appeal from Special Term, Kings County.

Action by Ida Deitch against Philip Deitch. From an order allowing to defendant to amend and set up as a defense the statute of limitation, Code Civ. Proc. § 1752, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Abraham P. Wilkes, of New York City, for appellant.

Simon Berg, of Brooklyn, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. [1] The limitation to sue within five years for annulment of marriage on the ground of physical incapacity (Code Civ. Proc. § 1752) extends the original two-year limitation for such proceedings (R. S. pt. 2, c. 8, tit. 1, § 33). This statutory limitation is part of our public policy. It declares a rule of the Ecclesiastical courts that the injured party cannot unreasonably delay proceedings for relief without being open to the charge of want of sincerity and promptitude. *M. called C. v. C.*, L. R., 2 P. D. 414, 419; 29 Law Times, N. S. 316.

Divorces for alleged impotency early led to abuse and fraud. *Amram*, Jewish Law of Divorce, p. 65; Bishop, Mar. Sep. & Div., §§ 436, 1272, 1273. Hence the limit on the time to avoid a marriage rests upon a basis quite different from the periods to begin other civil suits. *McNair v. McNair*, 140 App. Div. 226, 125 N. Y. Supp. 1, and *Kaiser v. Kaiser*, 16 Hun, 602, were hearings on the husband's default. Both were simple suits for annulment.

[2] Where plaintiff subjoins a cause of action for misrepresentation, as here, the plaintiff, even without the formal defense of the statute of limitations, might have to account for her eight years of continued cohabitation.

[3] The discretion of the Special Term to amend, in furtherance of justice, in matrimonial actions, especially in imposing or withholding costs as terms for allowing such amendments, will not ordinarily be reviewed on appeal.

The order appealed from is affirmed, without costs.

(83 Misc. Rep. 645)

FAERBER v. 969 PARK AVE. CO.

(City Court of New York, Trial Term. January 15, 1914.)

1. NEGLIGENCE (§ 31*)—STATUTORY DUTY—FAILURE TO LIGHT HALLS.

Under Tenement House Law (Consol. Laws, c. 61) § 76, requiring the owner of every tenement house to keep a light at night in the public halls and near the stairs thereof, and Laws 1912, c. 13, defining a tenement house as including apartment houses, the owner of an apartment house is negligent in failing to maintain the required light.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 50; Dec. Dig. § 31.*]

2. NEGLIGENCE (§ 68*)—CONTRIBUTORY NEGLIGENCE.

Where a person goes into an unlighted apartment house with an employé of the owner, and, without requesting such employé to lead him out with the lantern used in entering the building, attempts to find his own way through a darkened hallway without the assistance of any light to enable him to reach his destination, he is negligent, precluding his recovery for injuries.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 92, 94, 95; Dec. Dig. § 68.*]

Action by George J. Faerber against 969 Park Avenue Company. Judgment for plaintiff, and defendant moves for a new trial. Motion granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Blumenthal & Levy, of New York City, for plaintiff.

Robert M. McCormick, of New York City, for defendant.

FINELITE, J. This is a motion made by the defendant to set aside the verdict as rendered by the jury upon all the grounds stated in section 999 of the Code of Civil Procedure, and for a new trial. The action was brought to recover damages for injuries received through the negligence and carelessness of the defendant and its agents, arising out of the following facts, which are stated in substance: It appears that the defendant was the owner of the premises known as 969 Park avenue, New York City, which was a new building erected by the defendant, and which was almost in completion and ready for occupancy by tenants, that it had therein electric light and gas fixtures, and that a tenant was about to move into said premises, but which light was not in use at the time the injuries to the plaintiff were received. It appears further from the facts herein that the superintendent of said premises, who had sole charge thereof, on or about the 26th day of September, 1912, went to a furniture store and ordered an iron couch and mattress to be delivered and placed in his room in said house on said day. The plaintiff, with a helper, arrived at the premises shortly after 6 p. m., and they were met by the superintendent, who directed a man under his direction, one Degnon, to show the plaintiff and his helper where to deliver the couch and mattress. Degnon had a lighted lantern in his hand, and led the two men through the various halls and rooms until they finally reached the room where the couch and mattress were directed by the superintendent to be delivered. Degnon was requested by the plaintiff to sign the receipt book for the couch and mattress, but he told the plaintiff that he had no authority to do so, but that he could go out to the superintendent and get it signed. The plaintiff thereupon walked through said halls to reach the outer office where the superintendent was waiting, but before he reached the office, in walking slowly through said hall, fell down a flight of stairs into an opening located in said hall, within 5½ inches from the hall flooring, and received the injuries complained of. The plaintiff on direct examination further testified that he "walked right up to get the receipt book signed; that was all, and I fell down these stairs. I didn't know they were there. That is all I done. I tried to hug the wall a little, and all of a sudden I went down. As I walked along it was so dark that once in a while I would bump my elbow and then all of a sudden I thought I was right, and I went down the stairs. That is all I done. Before I left the room where I delivered the bed and mattress I asked this man for the receipt book to be signed. He told me I would have to take it out and see the superintendent. There was no light in the hall, and I, therefore, could not see the stairs," and that the injuries that plaintiff received were to his left side, where his body struck the stairs, also to his temple; that he suffers continuous headaches; that his eyes were black and blue and closed; that his wrists were strained a little; that his eyes remained closed for five or six days, and were black and blue during that time, and that he had consulted a doctor, who attended him about the injuries, and made several visits to the doctor; that the

plaintiff still complains of pains in the head, which pains continue to date, and was unable to go back to work for seven days after the accident, and was again obliged to cease working for a period of three days on account of severe pains in the head, and thereafter resumed his work. On cross-examination the plaintiff testified that he asked the person who had the lantern to sign the book; that he said he had no authority to sign; that the superintendent had to sign, and he asked him where the superintendent was, and he told him that he was outside—

"and I left the room; he did not tell me to wait till he would show me the way out. He told me the superintendent would sign the book. I went out of the room slowly, and went through the hallway the way you would go through any hallway. It was dark, and I went through it slow, and I had the receipt book in my hand, and I walked a number of paces, and the first thing I knew I fell. I went straight ahead along the hall. I took no turn. I did not hear this man say when we carried the bed and mattress into the superintendent's room to 'Look out, that there is a stairs there!' He did not say it. I did not hear him say anything of the kind to me, or to my man that was helping me carry the mattress."

This is the substance of the evidence in reference to the manner in which the plaintiff walked and fell into this open space and received his injuries.

[1] The defendant contends that the plaintiff has not only sustained the burden of proof of his freedom from contributory negligence, but, on the other hand, on his own testimony, he has shown himself to be guilty of the grossest kind of negligence, and argues from the following standpoint: That this was the first visit that the plaintiff made to these premises, and that on entering the building he was carrying a bed cot on his back, it being pitch dark in the building, except for the light cast from the lantern in the hands of the defendant's employé; that the plaintiff had no knowledge of this flight of stairs down which he subsequently fell before the actual moment of falling, although he passed very close to it on his way into the room where he was to put the cot. After he had placed the cot in the room where it was to go, he asked the defendant's employé if he would sign the receipt. His own words as to what transpired are in substance as hereinbefore stated. Thereupon he left his helper with the defendant's employé in the room, and started out alone to find the superintendent. The hall was pitch dark, and he did not know where he was to find the superintendent. He took it upon himself to go about searching in a building which was pitch dark, about which he knew nothing whatever, and in which he had only been once, at which time his attention was otherwise occupied than in seeing and determining the lay-out of the building. He walked through a passageway, bumping his elbows against the wall, it was so dark, and the next thing he knew he had fallen down this flight of stairs.

The defendant contends as a matter of law that a person may not come into an unfamiliar place and wander about, not knowing into what trap he may fall; that where a man enters a dark building he is called upon to use the highest degree of care, and to use any means within his power to insure his safety, and cites to support his conten-

tion Rohrbacher v. Gillig, 203 N. Y. 413, 96 N. E. 733; Brugher v. Buchtenkirch, 167 N. Y. 153, 60 N. E. 420; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580; Weller v. Consolidated Gas Co., 198 N. Y. 98, 91 N. E. 286, 139 Am. St. Rep. 798; Baumler v. Wilm, 136 App. Div. 857, 122 N. Y. Supp. 98; Donnelly v. Katz, 133 App. Div. 905, 117 N. Y. Supp. 644; Lather v. Bammann, 122 App. Div. 13, 106 N. Y. Supp. 790; Schindler v. Welz & Zerweck, 145 App. Div. 532, 130 N. Y. Supp. 344—which, he argues, hold to the effect that a person who visits an apartment house on business, in which the halls were not lighted, and tried to pass along a dark hallway, and falls down a flight of stairs, cannot maintain an action against the owner because the attempt of the visitor to pass along a strange hallway without being able to see where he is going, *unless under some special stress of circumstances*, constitutes contributory negligence. From an examination of these authorities the facts herein seem to be similar to the facts stated in the cases here above cited.

In Rohrbacher v. Gillig, *supra*, the facts were that the plaintiff entered a building for the purpose of going to an upper floor, but he passed the stairway and went on through a dark hallway, and eventually fell into an elevator shaft. In that case the Court of Appeals found that the plaintiff was guilty of contributory negligence, saying:

"If he was unable to perceive existing conditions, then inability imposed upon him the duty of exercising the greatest caution, or of refraining from proceeding further in the building without first finding out where he might safely go."

This observation was made in the case of Brugher v. Buchtenkirch, 167 N. Y. 153, 60 N. E. 420. In that case the plaintiff, also, continued past a flight of stairs leading to the upper stories and to a hall, which was unlighted, and fell down some steps. The judgment there recovered by the plaintiff was reversed by the court of last resort upon the authority in Hilsenbeck v. Guhring, *supra*, and in Piper v. N. Y. C. & H. R. R. R., 156 N. Y. 224, 50 N. E. 851, 41 L. R. A. 724, 66 Am. St. Rep. 560.

The principle which these decisions have established is that a person coming into such an unfamiliar situation, where a condition of darkness renders the use of his eyesight ineffective to define his surrounding, is not justified, in the absence of any special stress of circumstances, in proceeding further without first finding out where he is going and what may be the obstruction to his safe progress. In Kenney v. Rhineland, 28 App. Div. 246, 50 N. Y. Supp. 1088, affirmed 163 N. Y. 576, 57 N. E. 1114, and in Brown v. Wittner, 43 App. Div. 135, 59 N. Y. Supp. 385, the First Department held that it was not contributory negligence, as a matter of law, for a plaintiff to use the stairways and halls of a semipublic character in the absence of a light, even where they knew of defects in the carpets or matting; and a like doctrine was held by the Second Department in Lee v. Ingraham, 106 App. Div. 167, 94 N. Y. Supp. 284; Mr. Justice Bartlett writing:

"It was said in the Lather Case, *supra*, that the violation of the provision of section 82 of the Tenement House Act (Laws of 1901, ch. 334) afforded evidence sufficient to justify a recovery."

The case turned, as here, upon the question of contributory negligence, and a great stress was laid upon the fact that when—

"he walked out of the dining room he knew that the hall was dark, yet he deliberately shut the door and excluded what light there was from his apartment, knowing that the door of the bathroom and the stairway were immediately adjoining." "The darkness of the hallway," says the court, "which caused the accident was thus brought about by his own act in excluding the light from the dining room, which would have enabled him to see the door to the bathroom without exposing him to the risk of falling down the stairway. * * *"

In this case the learned Appellate Division was divided whether under the rule which requires *that where different inferences may be drawn from the facts*, it is for the jury to decide under proper instructions, and not a question of law for the trial judge to pass upon. This case is pointed out, not as bearing, entirely upon the issues involved herein, but being analogous to the question whether a person walking through a dark hallway, falling into an open space and being injured, should not, under the circumstances, be submitted to a jury as a question of fact to be decided by them, and not as a question of law by the court (*Piper v. N. Y. C. & H. R. R. R.*, 156 N. Y. 224, 50 N. E. 851, 41 L. R. A. 724, 66 Am. St. Rep. 560; *Parsons v. N. Y. C. & H. R. R. R.*, 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 450. The authorities upon this question seem to be somewhat conflicting, in some instances holding that it is contributory negligence for a person to walk along a dark hallway, and, irrespective of using his elbows, to feel his way in the darkness; it was his duty to hesitate then and there to avoid falling into an open pitfall and being injured, and if he attempts to proceed, no matter how cautiously he may act, and should come to an opening and fall therein and receive injuries, that he is, under such circumstances, guilty of contributory negligence as a matter of law. From the examination of all the authorities that I can find upon this subject it seems that the Court of Appeals has finally concluded that the principle which these decisions have established is that a person coming into such an unfamiliar situation, where a condition of darkness renders the use of his eyesight ineffective to define his surroundings, is not justified, in the absence of any special stress of circumstances, in proceeding further without first finding out where he is going and what may be the obstructions to his safe progress. *Rohrbacher v. Gillig*, 203 N. Y. 413, 96 N. E. 733; *Hilsenbeck v. Guhring*, 131 N. Y. 674, 30 N. E. 580; *Weller v. Consol. Gas Co.*, 198 N. Y. 98, 91 N. E. 286, 139 Am. St. Rep. 798; *Baumler v. Wilm*, 136 App. Div. 857, 122 N. Y. Supp. 98; *Donnelly v. Katz*, 133 App. Div. 905, 117 N. Y. Supp. 644; *Lather v. Bammann*, 122 App. Div. 13, 106 N. Y. Supp. 790; *Schindler v. Wellz & Zerboeck*, 145 App. Div. 532, 130 N. Y. Supp. 344.

As a question of fact arose from the evidence whether or not the superintendent of said premises directed the plaintiff to deliver the couch and mattress in his room, and that an employé of the defendant with a lantern led the plaintiff into and along said hall, which was in darkness, and after the delivery of said couch and mattress directed the plaintiff where he could have the receipt book signed, and the su-

perintendent, as well as the employé of the defendant, denying this fact, the case was thereupon submitted to the jury upon the conflicting question of fact to be decided by them under a charge of the law as laid down by the court, to which no exception was taken, and the court in its charge stating that if the plaintiff, under all the circumstances, acted carefully and prudently to avoid being injured, and that the defendant failed to supply the plaintiff with a light sufficient to enable him to see where to walk, as it was obliged to under the circumstances in compliance with the Tenement House Act, the jury awarded a verdict in favor of the plaintiff upon the facts involved herein.

[2] The defendant now contends that there was no statutory obligation upon it to provide lights in the hallway of this building, and that it was in no way negligent in failing to provide light, for the law is well settled that, in the absence of a statutory requirement, no duty devolves upon the landlord or the owner of a building to light the hallways, even though he retains control over the same, and cites *Robinson v. Crimmins*, 120 App. Div. 250, 104 N. Y. Supp. 1076, and *Brugher v. Buchtenkirch*, 167 N. Y. 153, 60 N. E. 420, and *Grimmer v. Tenement House Dep't*, 204 N. Y. 370, 97 N. E. 884, for the reason that, the building not being completed, and not being occupied by tenants, anyone entering the building would be presumed to have done so at his own risk, for which the defendant would not be liable. The cases cited by the defendant have been the law until the statute was amended by chapter 13 of the Laws of 1912, which went into effect on March 5, 1912, and which reads as follows:

"A 'tenement house' is any house or building, or portion thereof, which is either rented, leased, let or hired out, to be occupied, or is occupied, in whole or in part as the home or residence of three families or more living independently of each other, and doing their cooking upon the premises, and includes apartment houses, flat houses and all other houses so occupied."

So, therefore, the words "apartment house" are included within the definition of "tenement house," and the accident happened to the plaintiff on September 26, 1912, at which time the act as amended was in full force and effect, and this amendment was brought about by reason of the *Grimmer Case*, *supra*. The plans as offered in evidence, Exhibit 2, show that the premises were to be occupied by two or three families on a floor, and that cooking was to be done on the premises, because each apartment contains a kitchen; so therefore the premises in question came within the purview of the Tenement House Act. Section 76 of the Tenement House Law provides as follows:

"Public Halls. In every tenement house a proper light shall be kept burning by the owner in the public hallways, near the stairs, upon the entrance floor, and upon the second floor above the entrance floor of said house, every night from sunset to sunrise throughout the year, and upon all other floors of the said house from sunset until ten o'clock in the evening. This section shall also apply to cities of the second class. * * *"

In the absence of maintaining such a light the owner has been held to be guilty of negligence (*Bornstein v. Faden*, 149 App. Div. 37, at page 41, 133 N. Y. Supp. 608; affirmed 208 N. Y. 605, 102 N. E. 1099; *Jones v. Ryan*, 125 App. Div. 282, 109 N. Y. Supp. 156; *Downs v. Brown Realty Co.*, 152 App. Div. 451, 137 N. Y. Supp. 327; *Brown*

v. Wittner, 43 App. Div. 135, 59 N. Y. Supp. 385. In the Bornstein Case, 149 App. Div. at page 41, 133 N. Y. Supp. at page 610, Laughlin, J., said:

"We are of opinion that the Legislature in enacting this statute contemplated by the use of the words 'proper light' that the light to be maintained in the lower hallways near the stairs on the entrance floor should be sufficient to light the entire lower stairway, and to enable people lawfully using the stairs, by exercising proper care, to see the steps and avoid slipping, stumbling or missing their foothold. Tested by this rule the evidence of negligence on the part of the defendants was sufficient to take the case to the jury."

But the want of light was not the proximate cause of the accident. The dangers of the situation were obvious. The plaintiff failed to await the defendant's employé to lead him out with the lantern that was used when he carried in the couch and mattress into the superintendent's room, and should not have assumed the risk of attempting to go through a darkened hallway without the assistance of some light to enable him to reach the superintendent's office; therefore the plaintiff, I have no doubt from the facts and circumstances surrounding this case, assuming the obvious risk in the manner which he did, and thereby contributing towards his own injury, this court concludes, from the reasoning as laid down by the Court of Appeals in the case hereinbefore cited, that the plaintiff in not using such precaution as he should have used under the circumstances was guilty of contributory negligence.

The motion for a new trial must therefore be granted. Settle order on one day's notice.

IN RE WISE'S ESTATE.

(Surrogate's Court, New York County. March 24, 1914.)

1. WILLS (§ 434*)—PROBATE—CONCLUSIVENESS—MATTERS CONCLUDED.

A decree of the Surrogate's Court in New Jersey admitting decedent's will to probate, not being an adjudication of decedent's last domicile, does not prevent the Surrogate's Court in New York from making an independent inquiry into the question of domicile for the purpose of the domestic taxing act.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 937-945; Dec. Dig. § 434.*]

2. TAXATION (§ 867*)—TRANSFER TAX—PLACE OF TAXATION—DOMICILE OR RESIDENCE OF PERSON TAXED.

Unless a decedent's last domicile was in the state of New York, his intangible personal property in that state is not subject to the transfer tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1681-1684; Dec. Dig. § 867.*]

3. DOMICILE (§ 10*)—EVIDENCE—SUFFICIENCY.

In a proceeding to determine the last domicile of a decedent for the purpose of the transfer tax, evidence held not to show beyond doubt either the intent of decedent to change his domicile from New York to New Jersey or the fact of his residence in New Jersey.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 39; Dec. Dig. § 10.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. DOMICILE (§ 8*)—EVIDENCE—PRESUMPTIONS.

A man's domicile of origin or domicile of choice once established is presumptively retained until it is shown affirmatively that it was either abandoned or changed by him.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 36, 37; Dec. Dig. § 8.*]

5. DOMICILE (§ 4*)—CHANGE OF DOMICILE.

In order to constitute a change of domicile, both intent and the fact of residence must concur.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 5-23; Dec. Dig. § 4.*]

6. DOMICILE (§ 9*)—CHANGE OF DOMICILE—PROOF OF INTENT.

Intent, as applied to the principle of domicile, is susceptible of proof, and may be established prima facie by proof of declarations of the person whose domicile is in question.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 38; Dec. Dig. § 9.*]

7. DOMICILE (§ 10*)—CHANGE—EVIDENCE.

In a proceeding to determine, for the purpose of the transfer tax, whether a decedent a few months prior to his death changed his domicile from New York to New Jersey, acts and conduct of deceased inconsistent with *animus manendi* annulled his declarations to the contrary or rendered them merely declarations of an intent to be carried out in the future.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 39; Dec. Dig. § 10.*]

Proceeding by the State Comptroller against the executors of Charles E. Wise, deceased, to assess the transfer tax. On stipulation that the Surrogate determine the domicile of deceased on evidence taken before the appraiser. Question determined, and proceedings ordered continued.

Fletcher, McCutchen & Brown, of New York City (George H. Fletcher and James H. Richards, both of New York City, of counsel), for executors.

Thomas E. Rush, of New York City (George Thoms and Theodore du Moulin, both of New York City, on the brief, and of counsel), for State Comptroller.

FOWLER, S. The executors of decedent's estate and the State Comptroller of the State of New York have filed a stipulation consenting that the surrogate determine the question of decedent's domicile upon the evidence taken before the appraiser. The evidence is not so full on some points as I could wish.

[1, 2] The decedent died in New Hampshire on the 5th day of September, 1911, while temporarily residing in that state. His will was probated in the surrogate's court of Monmouth county, N. J. The decree of probate is not an adjudication upon the question of decedent's domicile, nor is there any proof before me that domiciliary residence in New Jersey must be proved in order to entitle a will to probate in that jurisdiction. The decree of probate is not an adjudication of the last domicile, nor does it prevent this court from making an independent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

inquiry into the question of decedent's last domicile for the purpose of our domestic taxing act. A determination of the last domicile is necessary in the proceeding brought in this county to assess the transfer tax upon the estate of decedent, because if the decedent had his domicile in New Jersey his intangible personal property in this state is not here taxable; whereas, if it is held that he was domiciled in this state, such property is subject to a tax. The value of decedent's intangible personal property in this state amounts to about \$105,000.

[3] The decedent came to New York between 1860 and 1870 and was engaged in business here until the time of his death. His domicile of origin is not apparent, but that he acquired a domicile of choice in New York is established. For many years he exercised his right of franchise as an elector in this state. He never voted in any other state. For about four years prior to his death he and his wife occupied an apartment in a hotel in this city. The furniture in the apartment belonged to his wife, and it was not removed by decedent's wife from the apartment until after her husband's death. The testimony taken before the appraiser does not show whether Mr. Wise had an annual lease of the apartment or whether he rented it from month to month. But in any event he was possessed of this home at the time of his death, and his clothes and wearing apparel were there when he died.

About the 1st of May, 1911, decedent had gone to Long Branch, N. J., and while there he occupied a room in a house owned by his son, a practicing physician residing in Long Branch. Decedent then purchased some real estate there and entered into a contract for the erection of a house. He told his son in effect that he intended to make Long Branch his residence. At the time of his death the house which was being erected for him at Long Branch was not completed, and it was never occupied by him. Upon these facts it is contended by the executors that the decedent's last domicile in New Jersey is established. This is the question.

[4-8] A man's domicile of origin or a domicile of choice once established is presumptively retained until it is shown affirmatively that it was either abandoned or changed by him. In order to constitute such change both animus, or intent, and factum, residence, must concur. This is so well established by decisions of authority and is so primary and familiar in the solution of questions of conflicting claims or assertions of the principle of domicile that no citations of authority are essential. A domicile of choice is frequently established by proof of a permanent "home," which is not a term of art, but a very important matter of fact which enters greatly into the solution of the principle of domicile. *Whicker v. Hume*, 1858, 28 L. J. Ch. 396, 400, per Lord Cranworth; *Dicey, Domicile*, 93. That Mr. Wise had a permanent home in New York in the unfurnished apartment hotel at the time of his death is established. There his wife was with him and she remained during his absence, and until after his death. To be sure, Mr. Wise went to Long Branch, N. J., on May 1, 1911, apparently alone, and while there he stopped with his son, who resided there. During this sojourn Mr. Wise bought land, contracted for a house, and made

his declaration as given in evidence to the effect that "he had come down there with the intention of establishing his power to vote there." While not high evidence of animus, this is not contradicted. Animus may be established *prima facie* by proof of declarations of the decedent. Intention, although a mental operation, was always deemed susceptible of proof by the Roman lawyers, a position now reluctantly acquiesced in by the common law. Phipson on Evidence, 133.

There is unfortunately no proof that Mr. Wise abandoned his New York home or residence for good and all. It was, until his death, in a condition for him to return there, so no abandonment is established. Unless this is established, the element of a New Jersey domicile, called *factum*, is not made out sufficiently in law for the purposes of this proceeding.

Now as to the proof of animus or intention on the part of Mr. Wise: Did his intention relate to his future, or to his present action? Was his intent to take up his residence in New Jersey when his new residence was completed and he had given up his apartment in New York and removed his apparel and furniture, or was it to take up his residence there, at the moment of making the declaration? This is the doubt. An animus which is in doubt is not controlling in law.

[7] Animus, whether it relates to the great doctrine of possession or to the principle of domicile, is a very subtle thing and a matter of such great refinement that it occasions juridical perplexity oftentimes. In connection with domicile the juridical element is *animus manendi*. Dicey, Conf. Law, 85. Consequently, any conduct or act of the subject which is inconsistent with *animus manendi* will annul his declaration or will give it a futuristic significance, which is inconsequential in law, because an intent to do a thing at a future time may always be recalled. Animus, therefore, is said by lawyers to differ in degree. There is animus of the highest degree, and animus of lower degrees. When an intent is for a moment relaxed or in doubt, it is of the lowest degree.

When, as here, neither animus nor *factum* is made out beyond doubt, a change of an established domicile of choice is not proved and the last established domicile of choice prevails in law. For the reasons stated I find that the last domicile of decedent was in New York. The proceeding for the appraisal of the estate will be continued before the appraiser in accordance with this finding. Settle decree on notice.

(83 Misc. Rep. 675)

In re ENGEL. (two cases).

(Surrogate's Court, Kings County. January, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 35*)—REMOVAL—GROUNDS—DEFENSE.

Where an executrix has been guilty of misconduct authorizing revocation of her letters under Code Civ. Proc. § 2685, subd. 2, the fact that her continuance in office can do no harm will not prevent revocation of her letters.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.*]

2. EXECUTORS AND ADMINISTRATORS (§ 35*)—REMOVAL—GROUNDS—DEFENSE.

The fact that at the institution of a proceeding to revoke letters testamentary there is before the court the account of the executors sought to be removed, that they are amply responsible for the return of the money misappropriated, and that there is no necessity for their removal to protect the estate, will not preclude their removal as unfit for the due execution of their office, where they have been guilty of misconduct authorizing removal under Code Civ. Proc. § 2685, subd. 2.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.*]

3. TRUSTS (§ 166*)—TRUSTEE—QUALIFICATIONS—REMOVAL.

While the fact that an executrix is abundantly able to respond for any default, and that such default may be liquidated on an accounting, will not preclude revocation of her letters testamentary for misconduct pursuant to Code Civ. Proc. § 2685, subd. 2, such circumstances may authorize permitting her to remain as trustee under the will.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 217, 218; Dec. Dig. § 166.*]

Application was made by Henry Doscher and others to revoke the letters testamentary of Gesine Engel, as executrix of Claus Doscher, deceased, and for her removal as trustee under his will. Gesine Engel and another thereafter applied to revoke the letters testamentary of said applicants as executors under the same will. Decreed according to opinion.

See, also, 155 App. Div. 921, 140 N. Y. Supp. 1117.

Henry F. Cochrane, of Brooklyn, for petitioners on the first-named application and for the respondents on the last-named application.

Rambaut & Wilson, of New York City (Edward H. Wilson, of New York City, of counsel), for respondent on the first-named application and for the petitioners on the last-named application.

KETCHAM, S. Four of the six children of the decedent are executors of his will and trustees thereunder. Three of them, brothers, have brought a proceeding against the fourth, a sister, to have her letters revoked and to have her removed as trustee. The accused and another sister holding no office under the will thereafter bring a proceeding against the executors for the revocation of their letters. In the first-named proceeding the court, after trial, denied the application for revocation and removal upon the ground, stated in the findings, that a proceeding was pending in which all the executors, including the sister, were about to render their account for judicial settlement, that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

the estate was in no peril by reason of any act of the accused executor, and that the said accounting proceeding was adequate to protect the rights and equities of any of the parties interested.

Upon appeal, the decree denying the application for revocation and removal was reversed, upon a declaration of the law which is the guide for both matters now under advisement. *Matter of Engel*, 155 App. Div. 467, 140 N. Y. Supp. 286.

[1] There was a time when it was supposed that although an accused executor had been guilty of acts of the kind defined in subdivision 2 of section 2685 of the Code of Civil Procedure, revocation of letters need not follow if, despite such acts, the estate or fund could not suffer damage or loss from the continuance in office of the accused. In this belief there was an evident failure to perceive that in the inquiry as to whether an accused person was fit for the due execution of his office, the court had no right to regard the condition of the estate and the relations thereto of the accused. The objection available under the subdivision cited is not that the executor complained of has committed one or more of the acts therein reprobated. The only objection which it permits is that, by reason of having done the things therein described, the person is unfit for the due execution of his office. The misfortune of the notion, now corrected in *Matter of Engel* supra, lay in the delusion that, in determining whether a man was fit to do a given thing, the court might look at the nature and situation of the thing to be done, and that fitness for a given work might depend as much upon the kind of work it was as upon the kind of workman associated with it. These impressions are now known to have been heresies. In proceedings like these, it is error to look beyond the conduct of the respondent, and to mix up the question of his fitness for executorial duties by any consideration of what these duties may be. If an executor has made a fault within the classification contained in subdivision 2 of section 2685 of the Code of Civil Procedure, the fact that his continuance in office can do no harm is foreign and immaterial to the question of his fitness for the due execution of his remaining obligations.

In the prevailing opinion in *Matter of Engel*, supra, it is said of the statute on this subject:

"It is plain and unambiguous; it imposes the duty of revoking the letters when the surrogate is convinced of the truth of the allegations of the petition, except in the cases arising under the third, fourth, and fifth subdivisions of section 2685 of the Code of Civil Procedure."

That the surrogate, in becoming convinced as to the truth of the allegations of the petition, must exclude evidence of the condition of the estate, the stage of its administration, the inability of the respondent to do it harm, and every other element tending to show that it is the kind of an estate which such a person as the accused is fit to have in charge, not only appears generally, but is clearly defined in the opinion from which the last quotation is taken. There the court, speaking of findings which set forth the pendency of the proceeding in which the respondent was about to account, the lack of danger to the estate from her acts and the adequacy of the accounting proceeding to preserve all the rights of the parties concerned, says:

"Indeed, the so-called findings of fact made by the learned surrogate have practically no bearing upon the issues tendered by the petition."

By the rule thus affirmed the executrix respondent in the first proceeding must forfeit her letters testamentary.

[2] By the same standard her associates, the three executors of whom she complains, must be judged, and their letters must be revoked. They have wasted the moneys of the estate in their hands, and have improperly applied the same by taking them to their own use. Under their personal retainer counsel of their own selection rendered service to them. This service pertains solely to the duties which the executors bore to the estate, but none the less it was rendered to the executors personally. It created only a personal obligation on their part. Its payment could not be lawfully made to the counsel from the funds of the estate. The three executors paid for this service the sum of \$30,000 from moneys which were of the estate, and which were in their hands solely as executors. This was an improper application within the terms of the statute. Their act has not imperiled the estate. There is now before the court, soon to be adjusted, the account of these executors, and they are amply responsible for the return of any part of the item in question which may be disallowed. There is no necessity for their removal, so far as the safety of the estate need be regarded. But none of these things can move the court. It is the law that they "have practically no bearing upon the issues tendered by the petition."

Counsel for the executors, in his brief, states with perfect accuracy that his clients would, in the absence of misconduct, be entitled among them to \$90,000 commissions from this estate, and argues therefrom as follows:

"Thus for this misconduct [the payment of the \$30,000] they are to be removed when the estate had more in its treasury by three times to which these respondents were entitled than the amount of the payment which, if improperly made, could be the basis of surcharging them."

This suggestion is forbidden by the ruling which the executors have obtained against their sister through a denial of the like argument when made in her behalf. They are unfit for the due execution of the duties of their office, since their fitness or unfitness in no wise depends upon whether or not their continuance in office endangers the estate in their charge.

[3] But the law which thus deals with them and their sister looks with benignity upon their right to remain as trustees under the will of which they can no longer remain executors. The same circumstances which have nothing to do with her fitness for the executorship are of controlling force to demonstrate her fitness for the trust.

With respect to the removal of trustees upon proof of misconduct, it is said by the court above, in *Matter of Engel*, supra:

"In such a case the usual practice would prevail, no doubt, and the Surrogate's Court would be justified in exercising a sound judicial discretion in determining whether there should be a removal of a testamentary trustee"

—and it is well settled, and was recognized in the opinion of the court above, that in cases of trustees the usual practice ordains that, even

where violation of duty or breach of trust appears, removal may be denied if the fund is in no danger of being lost.

The finding will be that the executrix is as good a trustee of the funds bequeathed to her and her associates in the trust as if she had not been subjected to the criticisms for which she loses her office as executrix. She is not unfit for the due execution of her trust, and her fitness for continuance therein will be based upon the further finding that she is abundantly able to respond for any default, and such default may be liquidated upon her pending account.

There has been no attempt in the foregoing discussion to enumerate the acts which seem to constitute misconduct. In their proposed decision, the parties may set forth such matter of accusation, not specifically considered in this opinion, as may seem to them to be justified. They may also present decrees in accordance with this memorandum.

Decreed accordingly.

(83 Misc. Rep. 655)

In re OATLEY'S ESTATE.

(Surrogate's Court, Oneida County. January, 1914.)

1. DESCENT AND DISTRIBUTION (§ 34*)—DESCENDANTS.

Under Decedent Estate Law (Consol. Laws, c. 13) § 98, subd. 12, providing that no representation shall be admitted among collaterals after brothers' and sisters' descendants, the descendants do not include children of deceased first cousins, as the brothers and sisters referred to are those of the intestate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 97-101; Dec. Dig. § 34.*]

2. DESCENT AND DISTRIBUTION (§ 40*)—NEXT OF KIN.

Under Decedent Estate Law (Consol. Laws, c. 13) § 98, subd. 5, providing that if there be no widow and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin in equal degree to the deceased, and subdivision 10, providing that where the descendants or next of kin of the deceased entitled to share in his estate are all in equal degree to the deceased, their share shall be equal, where the next of kin of a decedent were his first cousins, and there were also his second cousins, the first cousins were entitled in equal amounts to the exclusion of the second cousins.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 114, 115, 118-120; Dec. Dig. § 40.*]

Proceeding on the judicial settlement of the accounts of George W. Oatley, administrator of the estate of George Washington Oatley, deceased.

Dunmore & Ferris, of Utica, for administrator.

Burns & Burns, of Rochester, for objectors Baker and Wilbur.

Josiah Perry, for objectors Logan and Oatley.

Charles G. Irish, for objector Robertson.

SEXTON, S. On September 22, 1913, George W. Oatley, as administrator of the estate of George Washington Oatley, deceased, filed his petition and account, and duly cited all interested parties to appear. The administrator, under schedule F of his account, gave the names

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of those to whom he proposed to distribute the estate, which list of names included first and alleged second cousins of deceased. Hiram Baker, Katharine B. Wilbur, and Charles P. Baker, first cousins of deceased, duly objected in writing to any of the estate being distributed to second cousins; they claiming that first cousins only were entitled to share in the distribution. Henrietta E. Logan, and Harietta S. Oatley, alleged second cousins of the deceased, objected in writing to any distribution of the surplus which would exclude them. Objections were also filed by Elma E. Robertson, alleged second cousin of deceased, in which she asked—

“that the entire personal estate be distributed to first cousins and to second cousins who are the children and descendants of deceased first cousins, of whom the objector is one.”

The relation of all the parties cited claiming to be first and second cousins was conceded; hence only a question of law is presented.

Said Elma E. Robertson claims to be a second cousin because she is the descendant of a deceased first cousin of the intestate. If all of the persons classified in the accounting as second cousins are in fact descendants of first cousins, then there are no second cousins of the intestate involved in this accounting, for the reason that a child of a deceased first cousin of the intestate is not his or her second cousin, though the error of so designating the children of first cousins is very common. A first cousin of the intestate must descend from his or her grandparent; a second cousin of the intestate must descend from his or her great grandparent.

[1] Subdivision 12 of section 98 of the Decedent Estate Law reads as follows:

“No representation shall be admitted among collaterals after brothers and sisters descendants.”

It is urged by the contestants that the word “descendants” is broad enough in its meaning to permit them to share in the distribution. Those urging their claims under this subdivision I fear have misconceived its meaning and scope. There being no descendants of brothers or sisters involved in this accounting, subdivision 12 has no application here. It has long been settled that the brothers and sisters referred to in this subdivision are those of the intestate. *Adee v. Campbell*, 79 N. Y. 52.

[2] Subdivision 5 of section 98 of the Decedent Estate Law is in part as follows:

“If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives.”

In the case at bar, deceased left no widow, descendant, brother or sister, or descendants of a brother or sister, and no uncle or aunt, his next of kin being 11 first cousins. Said subdivision 5 directs distribution “to the next of kin in equal degree to the deceased.” If the 24 persons cited on this accounting as second cousins are in fact second cousins, they are not entitled to any portion of this estate, for the reason that first and second cousins are not “next of kin in equal degree

to the deceased"; second cousins being one degree further removed from the deceased than first cousins.

Subdivision 5 as it now stands was construed by the Court of Appeals in *Matter of Davenport*, 172 N. Y. 454, 65 N. E. 275, and under that decision "legal representatives" of deceased first cousins are not involved in this decision. In that case the court said:

"The surviving nephew and niece, the two uncles, and the two aunts are all of the same degree of kinship, to wit, the third, and under these circumstances it is unnecessary to invoke the rule of representation."

Subdivision 10 of section 98 of the Decedent Estate Law provides:

"Where the descendants, or next of kin of deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal."

It therefore follows that the first cousins and alleged second cousins, being of unequal degree of kinship to the deceased, cannot both share in decedent's estate; and subdivision 5 says:

"The whole surplus shall be distributed to the next of kin."

I hold and decide that the first cousins take the whole surplus of the estate in equal amounts. All objections to a distribution of the surplus as above indicated are overruled.

Decreed accordingly.

(83 Misc. Rep. 673)

In re CHAPPELL'S ESTATE.

(Surrogate's Court, Kings County. January, 1914.)

JUDGMENT (§ 717*)—CONCLUSIVENESS—TRANSFER TAX.

As soon as it is found in a transfer tax proceeding that the interest of remaindermen in an estate is contingent, there no longer remains any question between them and the state to which the then existing value of the residuary estate is material; and hence a finding therein as to such value is not conclusive upon the remaindermen.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1248; Dec. Dig. § 717.*]

In the matter of the transfer tax upon the estate of James Chappell, deceased. Motion by the Comptroller of the State to fix a transfer tax on the transfer of contingent remainders, which have vested in possession on the death of the intermediate tenant. Decreed according to opinion.

Thomas E. Rush, of New York City (Joseph F. McCloy, of New York City, of counsel), for State Comptroller.

Edward G. Nelson, of Brooklyn, for administratrix McGraw.

John E. O'Brien, of New York City, for administratrix Chappell.

KETCHAM, S. The comptroller moves that a transfer tax be fixed upon the transfer of contingent remainder interests which have vested in possession upon the death of the intermediate tenant, and that the date of the accrual of such tax be declared.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The life tenant died on June 12, 1912. In the order made in 1900, by which the tax was adjusted upon the transfer of the life estate, the value of the estate involved was stated at \$13,445.43. It is conceded that this value was erroneous, and that the true value was \$11,445.43. But the comptroller insists that he is entitled to avail himself of this wrong determination as against the remaindermen as an adjudication, and that the tax now to be fixed must therefore be calculated upon a confessedly fictitious amount. There was no finding reached in the original tax proceeding which was conclusive upon the remaindermen. As soon as it was found that their interest was contingent, there remained no question between them and the state to which the then existing value of the residuary estate was essential. All that ever arose in that proceeding which then concerned the remaindermen was the issue as to whether their interests were vested or contingent, and an adjudication not material to that issue could not bind them.

The present value of the transfer in remainder is \$11,330.28; and the date of the accrual of the tax is declared for practical convenience to be the 2d day of June, 1912.

Decreed accordingly.

PEOPLE v. ANTONIELLO.

(Kings County Court. March 24, 1914.)

HOMICIDE (§ 128*)—INDICTMENT—SUFFICIENCY—ALLEGATION OF INTENT TO EFFECT DEATH.

An indictment, accusing the defendant of the crime of murder in the first degree committed as follows, "the defendant, unlawfully, feloniously and of his malice aforethought struck deceased with a dirk, thereby inflicting injuries of which he died," does not state facts sufficient to charge the defendant with the crime of murder in the first degree as defined by Penal Law (Consol. Laws, c. 40) § 1044, since it fails to allege that the injury was inflicted with intent to cause death, and that intent cannot be inferred from the fact that death ensued.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 195, 196; Dec. Dig. § 128.*]

Rocco Antonello was indicted for murder in the first degree. Demurrer to the indictment sustained.

James C. Cropsey, Dist. Atty., of Brooklyn, for the People.
John L. Danzilo, of Brooklyn, for defendant.

BAKER, J. The defendant has demurred on the ground that the indictment does not conform to the requirements of sections 275 and 276 of the Code of Criminal Procedure, and upon the further ground that the facts stated do not constitute a crime. The indictment is as follows:

"County Court of the County of Kings. The People of the State of New York, plaintiffs, against Rocco Antonello, defendant. The grand jury of the county of Kings, by this indictment, accuse the defendant of the crime of murder in the first degree, committed as follows: The defendant, on December 19, 1913, in the county of Kings, willfully, feloniously and of malice aforethought,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

struck Alessandro Lazarano with a dirk, thereby inflicting injuries of which he died on December 19, 1913. James C. Cropsey, District Attorney."

Supplementing the demurrer, counsel for defendant upon the argument presents specifications alleging several defects in the indictment. The objection which impresses me as being best taken is that the indictment fails to allege that the mortal wound was inflicted with an intent to kill. The indictment must state facts which constitute the crime of murder in the first degree as defined by at least one of the subdivisions of section 1044 of the Penal Law. Clearly this indictment does not state the acts constituting the crime of murder in the first degree, as defined by subdivisions 2, 3, or 4 of that section. Subdivision 1 of that section defines murder in the first degree:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: (1) From a deliberate and premeditated design to effect the death. * * *"

The indictment charged that the defendant "willfully, feloniously and of malice aforethought struck Alessandro Lazarano with a dirk"; but it is barren of any allegation of a design to effect the death of Alessandro Lazarano or of any human being. The concluding phrase, "thereby inflicting injuries of which he died," cannot by any fair inference mean that the death of the victim was premeditated by the defendant. If the indictment had disclosed that the injury had been inflicted at a part of the person well known to be vital, under the rule that a person intends the natural and necessary consequence of an act done by him, a willful intention to kill might be inferred; but it is as consistent to guess that an artery in the victim's hand had been severed as to say the mortal injury was at a more vital point. Any pleading which requires an inference to sustain it is poor; especially is this true in a criminal action. But the facts stated in this indictment contain no statement from which even an inference of a murderous intent can be gathered. One of the principal facts of a common-law murder which is attempted to be charged here is a willful, premeditated intention to kill.

"It is not sufficient to allege the facts from which * * * the principal facts may be drawn, without charging the principal fact. The settled rule of criminal pleadings requires that all the elements which enter into the definition of an offense must be stated in the indictment." *People v. Kane*, 161 N. Y. 380, 55 N. E. 946.

I am compelled to the conclusion that this indictment does not state the principal facts which constitute the crime of murder in the first degree.

The demurrer sustained.

(161 App. Div. 429)

UNITED STATES FIDELITY & GUARANTY CO. v. CARNEGIE TRUST CO. et al.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. SUBROGATION (§ 33*)—SURETY—PREFERENCE.

Code Civ. Proc. § 746, authorizes the State Comptroller to designate a depository of court funds in the county in which the fund belongs. Banking Laws (Consol. Laws, c. 2) § 189, and section 190 as amended by Laws 1909, c. 240, provide that all moneys brought into court may be deposited with such depository; that, if dissolved, debts due from the depository shall have the preference; and that before receiving any such deposits it shall give a surety bond. A trust company designated by the Comptroller went into liquidation, and, on demand, the surety company paid the amount of its liability to the Comptroller and received an assignment of the state's rights; there being then in the hands of the superintendent of Banks as receiver undistributed assets of the depository more than sufficient to pay the surety's claim. *Held*, that the surety was entitled to a preference in the distribution of the depository's assets.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 96-98; Dec. Dig. § 33.*]

2. SUBROGATION (§ 33*)—LIQUIDATION—CLAIMS—INTEREST.

In such case, the surety was not entitled to a preference as to the accrued interest on such sum, as to which it was only entitled to share ratably with the unpreferred creditors.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 96-98; Dec. Dig. § 33.*]

3. DEPOSITARIES (§ 13*)—LIABILITY ON BOND—PARTY ENTITLED TO PAYMENT.

Under Code Civ. Proc. § 1969, giving the state an action to recover public moneys, although a right of action therefor exists in some other public authority, and whether an action by such authority is pending or not, and section 1974, providing for the disposition of proceeds of actions by the state, the State Comptroller, upon liquidation of a designated depository of court funds, was entitled to demand and receive the amount of the deposit from its surety and to assign state's rights therein to the surety.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. § 27; Dec. Dig. § 13.*]

Action by the United States Fidelity & Guaranty Company against the Carnegie Trust Company and George C. Van Tuyl, Jr., as Superintendent of Banks of the State of New York. Submission of controversy upon an agreed statement of facts under sections 1279-1281 of the Code of Civil Procedure. Judgment ordered for plaintiff.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

H. Snowden Marshall, of New York City, for plaintiff.

Frank M. Patterson, of New York City, for defendants.

SCOTT, J. The sole question to be determined in this controversy is whether or not the plaintiff which was a surety for the Carnegie Trust Company, an authorized depository for court and trust funds and for moneys paid into court, and which has fulfilled the condition of its obligation by paying the full amount for which it was liable as such surety, is entitled to a preference and priority of payment in the distribution of the funds of said trust company.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 146 N.Y.S.—51

The Carnegie Trust Company, a domestic banking corporation, was on March 20, 1908, duly designated by the Comptroller of the State of New York, pursuant to section 746 of the Code of Civil Procedure, as a depository for court and trust funds and for moneys paid into court in and for the county of New York. At about the same time the plaintiff executed a bond to the people of the state of New York conditioned, as provided by law, for the proper security for funds deposited with the Carnegie Trust Company pursuant to such designation, and more particularly guaranteeing that the said trust company would faithfully account for and pay over all such moneys received pursuant to such designation to the people of the state of New York, or to the persons entitled thereto.

On January 7, 1911, under the provisions of the Banking Law of the State of New York, the defendant George C. Van Tuyl, Jr., as Superintendent of Banks of the State of New York, took possession of the property and business of the said Carnegie Trust Company, and has ever since retained such possession and is, at the present time, engaged in the liquidation of the affairs of said trust company.

On said 7th day of January, 1911, there were on deposit with the Carnegie Trust Company funds, deposited in pursuance of the aforesaid designation, representing money paid into court in and for the county of New York, and deposited with the chamberlain of the city of New York, and by said chamberlain deposited in the Carnegie Trust Company, amounting to the sum of \$34,184.16.

Thereupon and on the 12th day of January, 1911, upon demand of the Comptroller of the State of New York, the plaintiff paid to said Comptroller for the people of the state of New York and in satisfaction of its aforesaid bond said sum of \$34,184.16, and received an assignment, executed by said Comptroller, of the claim of the people of the state of New York against said Carnegie Trust Company, which assignment recited that said plaintiff thereby became subrogated to any and all of the rights of the people of the state of New York. The plaintiff thereupon duly filed with the Superintendent of Banks a claim for reimbursement out of the funds and assets of said trust company, which claim was in due course allowed. Plaintiff did not at that time, or at any time prior to February 4, 1913, assert a claim to a preference or priority of payment over other creditors of said trust company. No part of said claim has been paid except the sum of \$11,964.46. It is conceded that there remains in the hands of the Superintendent of Banks an undistributed amount of money, assets of said Carnegie Trust Company, more than sufficient to pay plaintiff's claim in full.

It is conceded by the agreed statement of facts that the moneys with respect to which plaintiff paid the state as surety for the trust company were "funds deposited pursuant to such designation (of the trust company as depository), representing money paid into court." They were therefore what is known to the law as court funds. Section 189 of the Banking Law (Consolidated Laws, c. 2; Laws 1909, c. 10),

referring to depositaries designated as was the Carnegie Trust Company, provides as follows:

"All moneys brought into court by order or judgment of any court of record may be deposited with any such corporation, that has been designated by the Comptroller of the State of New York, as provided by the Code of Civil Procedure."

And section 190 of the same act (as and by Laws 1909, c. 240) further provides:

"* * * If dissolved by the Legislature or the court, or otherwise, the debts due from the corporation as such executor, administrator, guardian, trustee, committee or depositary shall have the preference. * * * Whenever any such corporation shall be designated by the Comptroller of the State of New York as a depositary for funds and moneys paid into court, before receiving any such deposit, it shall give to the people of the state of New York a bond in the form and manner, as provided by section forty-four of this chapter."

[1-3] There can be no doubt that the moneys deposited in the Carnegie Trust Company by the chamberlain of the city of New York, being court funds, were entitled to a preference and priority of payment out of the assets of said company. The plaintiff therefore when it paid this indebtedness paid a debt for which the creditor would have been entitled to a preference if there had been no surety, or if the surety had defaulted in its obligation. Upon plain principles of law the surety thereupon became subrogated to all the rights, liens, and privileges of the principal creditor, including the right to a preference in the distribution of the assets of the principal debtor. We have taken occasion to discuss this subject at some length in a decision handed down at the same time as the present in a case in which this plaintiff claims a similar preference for having paid, as surety for the same trust company, an indebtedness due to the state for state funds deposited. *United States Fidelity & Guaranty Co. v. Carnegie Trust Co.*, 146 N. Y. Supp. 804.

For the same reasons which led us to hold that the plaintiff was entitled to a preference in that case, we are of opinion that it is entitled to a like preference in this.

It is contended by the defendants that payment to the State Comptroller was not a payment to one who was entitled to a priority of payment as to the funds in question. We can find no sound basis for this contention. It is to be observed that the preference given by the statute is not given to the creditor as such, but it is the debt which is preferred, and necessarily whoever is entitled to claim payment of the debt is also entitled to claim a preference in payment. That the state was entitled to claim payment of this debt, and to call on plaintiff for the fulfillment of its obligation as surety for the depositary trust company, was not only admitted by the defendant Superintendent of Banks when he allowed plaintiff's claim, but is clearly provided by statute. See sections 1969 and 1974, Code Civil Procedure; *People v. Shepard*, 37 App. Div. 119, 55 N. Y. Supp. 1130. The objection that plaintiff has waived its right to claim a preference because it did

not prefer such claim at the outset has been considered in the case between the same parties above referred to.

We are therefore of opinion that plaintiff is entitled to a preference in payment, out of the assets of the trust company, of the amount it paid in satisfaction of its liability as surety for said company as a designated depository of court funds, but not with respect to the accrued interest on said sum as to which it is entitled to share ratably with the unpreferred creditors. *People v. Am. Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200; *United States Fidelity & Guaranty Co. v. Carnegie Trust Co.*, supra.

Judgment is therefore ordered in favor of the plaintiff in accordance with the foregoing opinion, with costs. All concur.

(161 App. Div. 435)

UNITED STATES FIDELITY & GUARANTY CO. v. CARNEGIE TRUST CO. et al.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. STATES (§ 110*)—TRUST COMPANIES—INSOLVENCY—CLAIMS—PREFERENCE.

The state was entitled to a preference upon the liquidation of an insolvent trust company, designated as a state depository, in which state funds were deposited.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 108; Dec. Dig. § 110.*]

2. SUBROGATION (§ 7*)—RIGHTS OF SURETY—REMEDIES OF CREDITOR.

In such case, a surety by virtue of its payment to the state of the amount for which it was liable became subrogated to the state's right to reimbursement out of the assets of the depository.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. §§ 17, 18, 21-29, 58, 77, 83, 92; Dec. Dig. § 7.*]

3. SUBROGATION (§ 31*)—SURETY—CREDITOR'S RIGHTS AND PRIVILEGES.

A surety paying the debt of his principal is subrogated to all of the creditor's rights, liens, judgments, and mortgages, without assignment from the creditor.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. §§ 70-91; Dec. Dig. § 31.*]

4. SUBROGATION (§ 33*)—SURETY—PREFERENCE.

A surety which on liquidation of its principal, a trust company designated as a depository of state funds, paid the amount of its liability to the state, was thereby subrogated to the state's preference in the distribution of the depository's funds.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. §§ 96-98; Dec. Dig. § 33.*]

5. SUBROGATION (§ 35*)—SURETY—WAIVER OF PREFERENCE.

In such case, the surety filing its claim for reimbursement immediately after its payment of its liability, but not claiming a preference until after the Court of Appeals had sustained the state's claim to a preference, did not thereby waive its right to be subrogated to the state's preference.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. §§ 107, 108; Dec. Dig. § 35.*]

6. SUBROGATION (§ 33*)—LIQUIDATION—CLAIMS—INTEREST.

In such case, the surety was not entitled to a preference for the accrued interest upon the sum paid by it from the date of payment, but as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against the trust company was entitled, if the assets were sufficient, to interest ratably with the claims of other creditors.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 96-98; Dec. Dig. § 33.*]

7. EXECUTORS AND ADMINISTRATORS (§ 416*)—ADMINISTRATION—INTEREST.

During administration of an insolvent estate, no interest should be allowed to creditors as between themselves.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1652-1654; Dec. Dig. § 416.*]

Action by the United States Fidelity & Guaranty Company against the Carnegie Trust Company. Submission of controversy upon an agreed statement of facts under sections 1279-1281 of the Code of Civil Procedure. Judgment ordered in favor of the plaintiff.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

H. Snowden Marshall, of New York City, for plaintiff.

Frank M. Patterson, of New York City, for defendants.

SCOTT, J. The sole question to be determined in this controversy is whether or not the plaintiff, as a surety for the Carnegie Trust Company, an authorized depository of state funds, and which has fulfilled the condition of its undertaking by paying to the state the full amount for which it was liable thereunder, is entitled to be subrogated to a preference and priority of payment in the distribution of the funds of said trust company; it having been decided that the state itself is entitled to such preference and priority. Matter of Carnegie Trust Co., 151 App. Div. 606, 136 N. Y. Supp. 466; s. c., 206 N. Y. 390, 99 N. E. 1096, 46 L. R. A. (N. S.) 260.

The Carnegie Trust Company, a domestic banking corporation, was a duly designated depository for the receipt of canal funds of the state of New York under the provisions of section 62 of the State Finance Law (chapter 413, Laws 1897, as amended by chapter 372, Laws 1905). On or about October 3, 1910, plaintiff, a foreign corporation duly authorized to transact business in this state, executed a bond to the people of the state of New York in the sum of \$75,000 conditioned as required by law for the proper security of funds deposited on account of the canal fund and the general fund of the state of New York, and more particularly guaranteeing that the Carnegie Trust Company would safely keep, and well and truly account for and pay over, all moneys which were then and should thereafter be on deposit with or held by said trust company, or that were due or should become due from said trust company, or for which said trust company in any way should become liable to the state of New York. In said bond the liability of plaintiff was conditioned to be such proportion of the total liability of the Carnegie Trust Company to the state of New York as the amount of said plaintiff's obligation as surety (\$75,000) should bear to the total amount of the principal's obligation (\$265,000).

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On January 7, 1911, under the provisions of the Banking Law of the state of New York, George C. Van Tuyl, Jr., as Superintendent of Banks of the state of New York, took possession of the property and business of the said Carnegie Trust Company, and has ever since retained such possession and is, at the present time, engaged in the liquidation of the affairs of said trust company.

On said 7th day of January, the state of New York had on deposit with the Carnegie Trust Company the sum of \$135,839.90 of moneys belonging to the canal fund and the general fund of the state of New York, and on January 12, 1911, the plaintiff paid to the Treasurer of the State of New York the sum of \$37,471.12, being $\frac{15}{100}$ of the amount so on deposit with said Carnegie Trust Company belonging to the canal fund and the general fund of the state of New York. The state of New York executed an assignment to plaintiff in an instrument which acknowledged payment "in accordance with the provisions of said bond," and which recited that plaintiff "is duly subrogated to any and all of the rights of the people of the state of New York thereunder, and any and all rights of the people of the state of New York in the premises are hereby assigned" to the plaintiff. This assignment was executed by the State Comptroller. Plaintiff promptly and duly filed a claim for reimbursement out of the funds of the Carnegie Trust Company, and later claimed a preference and priority in the payment of such amount in subrogation to the right of the state of New York to such preference and priority. In consequence of the default of another surety for said Carnegie Trust Company, which had given a bond similar, save in amount, to that given by plaintiff, the state of New York was obliged to resort to the assets of said trust company for the payment of so much of the indebtedness to it from said company as had not been paid by this plaintiff. In making its claim the state asserted its right to a preference and priority in payment out of said assets, and its claim in this regard was upheld by this court and the Court of Appeals. *Matter of Carnegie Trust Company, supra*. The right of the plaintiff to reimbursement out of the assets of the Carnegie Trust Company is not questioned, and it has already been paid, in common with other general and unpreferred creditors, 35 per cent. of its claim. It is conceded that there remains in the hands of the Superintendent of Banks an undistributed amount of money, assets of said Carnegie Trust Company, more than sufficient to pay plaintiff's claim in full.

[1, 2] We find therefore as a starting point for the consideration of the question submitted the following propositions either conceded by the defendants, or firmly established by law: First, that the claim of the state, for the payment of which plaintiff was the surety, was entitled to a preference and priority of payment over general creditors. Second, that plaintiff, by virtue of its payment to the state of the amount for which it was bound as surety, has become entitled, by subrogation, to the reimbursement out of the assets of the trust company, of the amount paid to the state in satisfaction of its obligation as surety.

[3, 4] The sole question remaining is whether or not the plaintiff is also subrogated to the state's right to a preference over general creditors.

Although this question has not been directly passed upon in this state, it has been the subject of frequent consideration in other jurisdictions, and it appears to have been invariably held, save in the case of bail given for a person charged with crime, that a surety, paying a debt to the state for which the latter would have been entitled to a preference, takes by subrogation a like preferential right against his principal. Where the right to such subrogation was denied to bail for an alleged criminal, the decision was put upon grounds of public policy because it was considered that the general rule should not be extended to such cases, "for this would be to aid the bail to get rid of their obligation and to release them from the motives to exert themselves in securing the appearance of the principle." But the court was careful to show that it considered this case to be an exception to the general rule, for, speaking of that rule, it says: "This is clearly the rule where the principal obligation is payment of money or the performance of a civil duty." *United States v. Ryder*, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 308. In *Manisty v. Churchill*, 58 L. J. Ch. 136, 39 Ch. Div. 174-1889, the plaintiff who had been surety for Lord Churchill for the payment of a debt due the crown, and who had paid the debt, claimed, in proceedings to administer the insolvent estate of the principal debtor, "to stand in the place of the crown with all incidents of priority to other creditors." It was held that he was so entitled, and while the court refers to the *Mercantile Law Amendment Act of 1856* as one which had removed any possible obstacle in the way of the successful assertion of such a claim, it expressed the opinion that, without that act, the plaintiff would have been entitled to the priority which he claimed. The plaintiff calls our attention to a number of other cases which, under one set of circumstances or another, seem to sustain its contention. *Rex v. Bennett, Wrightwick*, 1; *Am. Bonding Co. v. Reynolds* (D. C.) 203 Fed. 356; *Enders v. Brune*, 4 Rand. (Va.) 438; *Orem v. Wrightson*, 51 Md. 41, 34 Am. Rep. 286; *Am. Bonding Co. v. Mechanics' Bank*, 97 Md. 598, 55 Atl. 395, 99 Am. St. Rep. 466; *Myers v. Miller*, 45 W. Va. 595, 31 S. E. 976; *Watts v. Eufaula Nat. Bank*, 76 Ala. 478; *Lewis v. U. S. F. & G. Co.*, 144 Ky. 425, 138 S. W. 305, Ann. Cas. 1913A, 564. The defendant criticises some of these authorities, but it is significant that we are cited to no case, save that of bail for an alleged criminal, that supports the contention of defendant that the surety paying a debt due from his principal to the government may not avail himself of all the rights and remedies which the government had, including the right to priority.

But apart from the reported decisions we consider that the plaintiff's contention is wholly sound. It is familiar law that a surety paying the debt of his principal is entitled to be subrogated to all of the creditor's rights, privileges, liens, judgments, and mortgages, and that to enjoy the benefit of these no assignment from the creditor is necessary. The surety, by the mere fact of payment is put into the shoes

of the creditor. If, in the case at bar, the state had had a lien, in the conventional sense, upon the assets of the Carnegie Trust Company, and plaintiff as surety had paid the debt of the trust company, it would have been entitled upon the plainest principles to be subrogated to the state's lien and to enforce the same. *Memphis R. R. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595; *Sgobel v. Capadonia*, 8 App. Div. 303, 40 N. Y. Supp. 946. The state's absolute right to preference in the distribution of the assets of the trust company, if not technically a first lien thereon, was equivalent to a lien and had all the effect which a specific lien would have had. If, as seems to be undoubted, the plaintiff would, upon payment, have succeeded to a lien, we can see no reason why it should not be held to have succeeded to the equivalent. No injustice will be done to the general creditors of the trust company by allowing plaintiff's claim to a preference, as it merely continues in force the preferential right of the state, subject to which all creditors become such, and it is to be borne in mind that plaintiff's bond was not given for the benefit of any other creditor than the state.

[5] It is further urged, in behalf of the defendant, that plaintiff waived its right to a preference because, while it filed its claim for reimbursement immediately after its payment of the trust company's debt, it did not claim a preference until after the Court of Appeals had decided favorably the claim of the state to a preference. We do not consider that this constituted a waiver, which is generally a question of intention. By filing its claim generally, without then claiming a preference, the plaintiff did nothing inconsistent with its subsequent and present claim that it was entitled to priority of payment, and there is no claim that by postponing this claim the plaintiff has put the trust company or its creditors at a disadvantage, or has in any way estopped itself.

[6, 7] We do not think, however, that the plaintiff is entitled to a preference for the accrued interest upon the sum paid by it, since the date of payment. As against the trust company, if the assets be sufficient, it will be entitled to interest ratably with the claims of other creditors; but the rule is in the administration of an insolvent estate that as between the creditors themselves no interest should be allowed during the process of administration. *People v. American Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200.

Judgment is therefore ordered in favor of the plaintiff in accordance with the foregoing opinion, with costs. All concur.

(161 App. Div. 280)

In re CARNEGIE TRUST CO.

In re SECURITY BANK OF NEW YORK.

(Supreme Court, Appellate Division, First Department. March 6, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 263*)—CLAIMS—COSTS.

Costs against executors, administrators, assignees for the benefit of creditors, and receivers, are payable out of the estate and have priority over the claims of general creditors.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 975-1000; Dec. Dig. § 263.*]

2. BANKS AND BANKING (§ 817*)—REGULATIONS—STATE SUPERINTENDENT AS RECEIVER.

The State Superintendent of Banks taking possession of the assets and property of a trust company pursuant to Banking Laws (Consol. Laws, c. 2) § 19, for purposes of liquidation may sue and be sued in effect as a receiver.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1222; Dec. Dig. § 817.*]

3. BANKS AND BANKING (§ 817*)—LIQUIDATION—CLAIMS—INTEREST ON COSTS.

Under Code Civ. Proc. § 3246, providing that, in any action by or against a trustee or a person authorized by statute to sue or be sued, costs may be awarded as in an action by or against a person suing or defending in his own right, a creditor of a trust company in liquidation by the State Superintendent of Banks as receiver was entitled to interest on costs from the date when the court directed the payment of a dividend on its judgments against such receiver.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1222; Dec. Dig. § 817.*]

4. BANKS AND BANKING (§ 817*)—LIQUIDATION—CLAIMS—INTEREST ON DIVIDEND.

A creditor of a trust company in liquidation whose dividend was deferred by reason of an unsuccessful contest of the claim notwithstanding the allowance of interest in computing the amount of the judgment was entitled to interest on the dividend to put it on an equality with other creditors who had received their dividends and had the use of their money, and who had presumably been credited with interest in the computation of the amount of their claims; such interest being at the legal rate and not limited to the amount received by the creditor for the use of money in the meantime.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1222; Dec. Dig. § 817.*]

5. CORPORATIONS (§ 568*)—INSOLVENCY—CLAIMS—INTEREST.

Creditors of an insolvent corporation as between themselves are only entitled to interest upon their claims to the date when the receiver took possession of the assets.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2288, 2289; Dec. Dig. § 568.*]

Appeal from Special Term, New York County.

In the matter of the Carnegie Trust Company, in liquidation. Application by Security Bank of New York for order directing Superintendent of Banks to pay interest on dividends due applicant. From the order the Carnegie Trust Company and George C. Van Tuyl, Jr., Superintendent of Banks, appeal. Order modified and affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Frank M. Patterson, of New York City (Frederick Mellor and Norman M. Behr, both of New York City, on the brief), for appellants.

Philip W. Russell, of New York City, for respondent.

LAUGHLIN, J. Pursuant to the provisions of section 19 of the Banking Law, appellant Van Tuyl, as Superintendent of Banks of the State of New York, took possession of the assets and property of the Carnegie Trust Company on the 7th day of January, 1911, and has ever since been in charge thereof liquidating the same. Thereafter and prior to the 15th day of April, 1911, the Nineteenth Ward Bank filed with him proof of two claims against the Carnegie Trust Company for \$2,066, and \$20,439.98 respectively, and demanded interest on the larger claim from the 14th day of July, 1910, to the date of filing, and on the smaller claim to the date of filing. He rejected both claims, and a special action was brought on each against the Carnegie Trust Company and said Van Tuyl as Superintendent of Banks. Judgment was recovered against both on the 28th day of December, 1911, for the amount of the large claim and interest to said 7th day of January, 1911. The action on the smaller claim was not tried; but pursuant to a stipulation between the attorneys for the respective parties, by which the claimant waived interest "from January 7, 1911," judgment was entered in favor of the claimant against the appellant on the 1st day of February, 1912, for the amount of the claim and interest to said 7th day of January, 1911. It thus appears that with respect to interest neither claim was established in full as filed. Counsel for appellant claims, therefore, that the respondent was not entitled to the order from which the appeal has been taken. The fact that the claims were not recovered in full might have justified withholding costs, but that matter has been foreclosed by the judgments and it has no bearing on the point now before the court. After the rejection of the two claims and on the 26th day of May, 1911, an order was entered in the "Matter of the Carnegie Trust Company, in Liquidation," which, among other things, directed the Superintendent of Banks to pay a dividend of 25 per cent. upon claims filed and allowed as general claims, and on the 1st day of June, 1911, the dividend was paid. After the entry of the judgments in favor of the Nineteenth Ward Bank, the Security Bank gave due notice of motion, returnable on the 13th day of February, 1912, for an order requiring the Carnegie Trust Company and the Superintendent of Banks to pay to it out of the funds of the Carnegie Trust Company 25 per cent. of the amounts recovered as damages in the two judgments, together with interest thereon from said 1st day of June, 1911, to the date of payment, and of the entire amount recovered as costs and disbursements in and by said judgments "and for such other and further relief as may be just and proper." On that motion the court on February 14, 1912, duly directed the payment of 25 per cent. of the amounts recovered as damages and gave the petitioner leave to submit answering memorandum and additional papers with respect to its demand for the payment of costs and interest. The dividend of 25 per cent. without interest was paid as authorized by said order. Thereafter and on the 28th day of

February, 1913, the court made the order from which this appeal has been taken, and in and by that order confirmed the intermediate order of February 13, 1912, and authorized and directed the Superintendent of Banks to pay to the Security Bank on or before March 6, 1913, out of the funds of the Carnegie Trust Company, interest at the rate of 6 per cent. from June 1, 1911, to February 14, 1912, upon the dividend paid and the costs and disbursements included in the two judgments, and interest thereon, respectively, from the dates of the entry of the respective judgments to the date of payment.

The learned counsel for the respondent claims, in support of the order, that the claims were rejected in the interests of the other creditors of the bank in liquidation, and that the Superintendent of Banks is a "trustee of an express trust, or a person expressly authorized by statute to sue or to be sued," within the provisions of section 3236 of the Code of Civil Procedure, and that therefore by virtue of the express provisions of said section the costs "are exclusively chargeable upon, and collectible from, the estate, fund, or person represented, unless the court directs them to be paid, by the party personally, for mismanagement or bad faith in the prosecution or defense of the action."

[1] It is well settled that costs against executors, administrators, assignees for the benefit of creditors, and receivers are payable out of the estate and have priority over the claims of general creditors. In *re Albert Friedlander, Deceased*, 145 N. Y. Supp. 678 (1st Dept. January 23, 1914); *Cunningham v. McGregor*, 12 How. Prac. 305; In *re Randall's Estate (Sur.)* 8 N. Y. Supp. 652; In *re Mahoney's Estate*, 37 Misc. Rep. 472, 75 N. Y. Supp. 1056; *Camp v. Receiver of the Niagara Bank*, 2 Paige, 283; *Columbian Ins. Co. v. Stevens*, 37 N. Y. 536; *People v. John D. Locke Co.*, 42 Hun, 484.

[2, 3] The learned counsel for the appellants claims, on the authority of *Lafayette Trust Co. v. Higginbotham*, 136 App. Div. 747, 121 N. Y. Supp. 489, and in that connection draws attention to the concurring opinion of the writer in *Richardson v. Cheney*, 146 App. Div. 686, 131 N. Y. Supp. 594, that the Superintendent of Banks was not a necessary party to the actions, inasmuch as the trust company retained its corporate existence, and that therefore the provisions of said section 3246 of the Code of Civil Procedure are not applicable. It is further argued, in support of that contention, that this case is distinguishable from the authorities cited on the ground that here the costs were recovered against the trust company and became part of its indebtedness. It is also contended that the relation of the Superintendent of Banks to a state bank is analogous to that of the Comptroller of Currency to a national bank, in which case interest is not recoverable in the actions, and, it is claimed, costs are not given a preference. See *Ocean Nat. Bank v. Carll*, 7 Hun, 237; *White v. Knox*, 111 U. S. 784, 4 Sup. Ct. 686, 28 L. Ed. 603; *Cook County Nat. Bank v. United States*, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537; *Nat. Bank v. School District*, 94 Fed. 705, 36 C. C. A. 432. The points presented by this appeal are not to be determined by federal statutes or decisions, but by the construction of the statutes of our own state; and the right of the Superintendent of Banks in such case to sue and to be sued, in effect

as a receiver, must now, I think, be deemed settled by controlling precedents. *Van Tuyl v. Scharmann*, 208 N. Y. 53, 101 N. E. 779; *Matter of Union Bank*, 204 N. Y. 313, 97 N. E. 737. See, also, *Van Tuyl v. Robin*, 145 N. Y. Supp. 121 (1st Dept. December 31, 1913).

It would seem therefore that said section 3246 of the Code of Civil Procedure is applicable, and under the authorities cited costs recovered by the Security Bank were entitled to payment as preferred claims. It follows logically, I think, that the Security Bank is entitled to interest on the costs, at least, from February 14, 1912, the date when the court directed the payment of the dividend. The notice of motion did not expressly demand interest on the costs, but the order directs payment of interest from the date of the recovery of the costs. The respondent, however, in its points claims interest only from the time the dividend was ordered paid.

[4, 5] The remaining question relates to the interest on the dividend. The judgments conclusively establish that the claims, as to the principal, were valid in toto. Therefore dividends should have been paid on them the same as on the claims allowed by the Superintendent of Banks. The rule seems to be well settled that, when the payment of a dividend is deferred "by reason of an unsuccessful contest of the claim, the creditor so delayed should be allowed interest on the dividend" in order to be put on an equality with other creditors who received the dividend and had the use of the money. *People v. E. Remington & Sons*, 59 Hun, 307, 12 N. Y. Supp. 829, affirmed 126 N. Y. 672, 28 N. E. 249; *Chenango Valley Savings Bank v. Dunn*, 40 App. Div. 552, 58 N. Y. Supp. 38; *Armstrong v. American Exchange Nat. Bank*, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; *Malcomson v. Wappoo Mills (C. C.)* 99 Fed. 633. The rule is, however, that the creditors of an insolvent corporation, as between themselves, are only entitled to interest on their claims to the date when the receiver took possession of the assets. *People v. Merchants' Trust Co.*, 187 N. Y. 293, 79 N. E. 1004; *Attorney General v. Nat. American Life Co.*, 89 N. Y. 94; *People v. American Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200; *White v. Knox*, *supra*. That is doubtless the theory upon which interest was recovered by the judgments only until the 7th day of January, 1911, and in the one case interest after that date was waived. That waiver should be deemed for the purposes of action only, and it is not a bar to any part of the claim made here.

It is contended by the learned counsel for the appellants that to require the payment of interest on the dividend is in effect giving the Security Bank interest upon the interest included in the judgments for damages, and that therefore the order requires the payment of compound interest. I think that contention is without force, for the reason that by the judgments with respect to damages the Security Bank was placed upon the same footing with other creditors, and presumably their dividends were based on the amounts of their claims with interest until the same date that the Security Bank was allowed interest by the judgments. Therefore the Security Bank was entitled to a dividend on the face of its claims with interest to the date on which the Superintendent of Banks took charge, and, under the rule stated, it is

now entitled to interest on the dividends from the date when it should have received them, and that interest should be at the legal rate and is not limited to the amount received by the appellants for the use of the money in the meantime.

It follows that the order should be modified by limiting the interest on the costs to the period from February 14, 1912, to the date of payment thereof, and as so modified affirmed, with \$10 costs and disbursements to the respondent. All concur.

DE RAISMES v. UNITED STATES LITHOGRAPH CO. et al.

(Supreme Court, Appellate Division, First Department. March 13, 1914.)

1. CORPORATIONS (§ 640*)—FOREIGN CORPORATIONS—LIABILITY OF DIRECTORS—ACTION BY CORPORATION.

The General Corporation Law of New Jersey (Act April 21, 1896 [P. L. p. 286]) § 30, as amended by Act March 28, 1904 (P. L. p. 275), provides that the directors of a corporation shall not make dividends except from its net profits, and that, in case of violation of the section, the directors, under whose administration the same happened, shall be liable to the stockholders to the full amount of any loss sustained by such stockholders, or, in case of insolvency, to the corporation. New York Stock Corporation Law (Consol. Laws, c. 59) § 28, provides that the directors of a stock corporation shall not make dividends except from surplus profits, and upon violation of the section the directors, under whose administration the same happened, shall be liable "to such corporation and the creditors thereof." Section 70 provides that, except as otherwise provided in the chapter, the directors and stockholders of a foreign corporation shall be liable under the chapter to the same extent as the directors of a domestic corporation for the making of any unauthorized dividends, and such liabilities may be enforced in the same manner as similar liabilities imposed by law on directors of domestic corporations. *Held* that, since an action could not be maintained in New Jersey to recover a judgment in the name of the corporation against directors for dividends unlawfully declared, an action cannot be maintained in New York by a stockholder of a New Jersey corporation to recover a judgment in the corporate name for the amount of unauthorized dividends declared by the directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2532, 2533; Dec. Dig. § 640.*]

2. CORPORATIONS (§ 640*)—FOREIGN CORPORATIONS.

The internal management of a foreign corporation should be left entirely to the state of its origin.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2532, 2533; Dec. Dig. § 640.*]

Ingraham, P. J., and Scott, J., dissenting.

Appeal from Special Term, New York County

Action by Francis J. J. De Raismes, for himself and other stockholders of the United States Lithograph Company, against the United States Lithograph Company and others, impleaded with another. From an order granting a motion for judgment on the pleadings, the defendant named and others appeal. Reversed, and motion denied.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Henry L. Stimson, of New York City, for appellants United States Lithograph Co. and others.

William Travers Jerome, of New York City, for appellant Ryan.

Harrison Clark, Jr., of New York City, for respondent.

McLAUGHLIN, J. Action by a stockholder of the United States Lithograph Company, a New Jersey corporation, on behalf of himself and other stockholders similarly situated, to recover, in the name of the corporation, damages for the payment of unauthorized dividends. All of the defendants except Sweasey and Ryan demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and that the court did not have jurisdiction of the subject-matter. Ryan demurred only upon the former ground. After the demurrers had been interposed, the plaintiff moved, under section 547 of the Code of Civil Procedure, for judgment on the pleadings. The motion was granted and judgment awarded in favor of the corporation against the defendants, except Sweasey, for \$300,000. The order awarding judgment against Ryan is not contained in the record on appeal, but by stipulation his appeal is to be heard upon the record before us with the same effect as though such order had been set forth therein.

The United States Lithograph Company was organized under the statutes of New Jersey on the 2d day of May, 1901, with an authorized capital of \$3,200,000 preferred and \$3,300,000 common stock, of which plaintiff is the owner of 49 shares of the preferred of the par value of \$4,900. On April 27, 1908, the corporation was duly authorized to do business in the state of New York, where it has since maintained offices, held directors' meetings, and performed all the acts of which complaint is made.

The complaint alleges that certain dividends were declared during the years 1909, 1910, and 1911 by the individual defendants acting as directors, and the same were paid out of the capital stock of the corporation, contrary to the laws and statutes of the state of New Jersey and sections 28 and 70 of the Stock Corporation Law of the state of New York (Consol. Laws, c. 59); and that by reason thereof the corporation has been damaged to the extent of \$300,000, for which judgment is demanded in its favor against the defendants.

Section 30 of the General Corporation Law of New Jersey is set forth as it existed at the time of the incorporation of the Lithograph Company and as amended in 1904. This statute, as it existed at the time of the incorporation, provided:

"No corporation shall make dividends, except from the surplus or net profits arising from its business, * * * and in case of any violation of the provisions of this section, the directors under whose administration the same may happen shall be jointly and severally liable, * * * to the corporation. * * *" Act April 21, 1896 (P. L. p. 286).

As amended in 1904, it provides:

"The directors of a corporation shall not make dividends except from its surplus, or from the net profits arising from the business of such corporation,

* * * in case of any willful or negligent violation of the provisions of this section, the directors under whose administration the same may have happened, * * * shall jointly and severally be liable, * * * to the stockholders of such corporation, severally and respectively, to the full amount of any loss sustained by such stockholders, or in case of insolvency to the corporation or its receiver. * * * " Act March 28, 1904 (P. L. p. 275).

Section 28 of the New York Stock Corporation Law, as it existed at the time the dividends were made and this action commenced, provided:

"The directors of a stock corporation shall not make dividends, except from the surplus profits arising from the business of such corporation. * * * In case of any violation of the provisions of this section, the directors under whose administration the same may have happened, * * * shall jointly and severally be liable to such corporation and to the creditors thereof. * * *"

Section 70 provided:

"Except as otherwise provided in this chapter the officers, directors and stockholders of a foreign stock corporation transacting business in this state, except moneyed and railroad corporations, shall be liable under the provisions of this chapter, in the same manner and to the same extent as the officers, directors and stockholders of a domestic corporation, for: (1) The making of unauthorized dividends. * * * Such liabilities may be enforced in the courts of this state, in the same manner as similar liabilities imposed by law upon officers, directors and stockholders of domestic corporations."

In *Hutchinson v. Stadler*, 85 App. Div. 424, 83 N. Y. Supp. 509, action was brought by a stockholder of a New Jersey corporation, on behalf of himself and other stockholders, similarly situated, to recover, as here, a judgment for the corporation against directors who had paid dividends out of capital stock. The statute of New Jersey then in force was the one which existed at the time the Lithograph Company was incorporated, and, upon reference to its provisions above quoted, it will be seen that it expressly provided such an action might be maintained for the benefit of the corporation. The statutes of the state of New York then in force were sections 23 and 60, which were substantially the same as sections now 28 and 70 of the Stock Corporation Law. The court held, considering the provisions of the statutes of the two states, the action could be maintained. A majority of the court, however, was of the opinion that, in the absence of a statutory provision, the directors of a corporation were not liable to the corporation for a distribution as dividend to the stockholders of the capital of the corporation so long as the payment of such dividend did not impair the power of the corporation to pay its indebtedness. This was upon the ground that the capital of a corporation belongs to its stockholders after its indebtedness is paid. Mr. Justice Ingraham, who delivered the prevailing opinion, said:

"In the absence of a statutory prohibition, distribution of a portion of the capital of the corporation to the stockholders according to their respective interests, where each stockholder received his proportionate share of the total amount distributed, would not give to the corporation a cause of action to compel the director to repay into the treasury of the corporation the amount of money thus distributed."

This decision was made in 1903, and in 1904 the New Jersey statute was amended, as above set forth. The amended statute made the directors making unauthorized dividends liable, not to the corporation, but to the stockholders severally and respectively for the full amount of any loss sustained by such stockholders, or, in case of insolvency, to the corporation or its receiver; in other words, after the amendment of the New Jersey statute in 1904, an action in the form in which this one is brought could not be maintained in that state. This action could not be maintained in the state of New Jersey, and this was practically conceded by respondent's counsel upon the argument of the appeal.

[1] The question presented, therefore, is whether, in view of our own statutes bearing upon the subject of unauthorized dividends, a stockholder of a foreign corporation can maintain an action in the state of New York to recover a judgment in the name of the corporation for the amount of the dividends so declared, when such action could not be maintained in the state where the corporation had its origin.

There is no allegation in the complaint that the plaintiff has individually been damaged, and there could not well be, because he does not sue in the right of any individual claim, but solely in the alleged right of the corporation itself, which right was taken from the stockholders by the amendment of 1904; nor is there any allegation that the corporation is insolvent. The learned justice sitting at Special Term was of the opinion that the action could be maintained because plaintiff was merely seeking to enforce a right created by the statutes of New Jersey by means of a remedy to enforce the same by the state of New York. This view, it seems to me, is erroneous. The right here sought to be enforced is one created, not by the statute of the state of New Jersey, but by the statute of the state of New York. The right given by the statute of New Jersey is for the benefit of the individual stockholders, and the one given by the state of New York for the benefit of the corporation—different causes of action, requiring different evidence to establish, and for which different relief must be given. Reading section 28 in connection with section 70, it seems to me the only right intended to be given, or liability to be imposed upon the directors of a foreign corporation for making unauthorized dividends, is the same liability or obligation as that imposed by the statute of the state from which the corporation received its charter. Force is given to this view when these two sections are read in connection with section 34, relating to the filing of reports, and sections 14 and 15, relating to combinations and mergers.

[2] The state of New York has, for many years, recognized that the internal management of a foreign corporation should be left entirely to the state of its origin. *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654; *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 77 N. E. 877, 113 Am. St. Rep. 863; *Southworth v. Morgan*, 205 N. Y. 293, 98 N. E. 490. What the Legislature of the state of New York has attempted to do in the sections of the statute to which reference has heretofore been made is to give a remedy by which a liability imposed by the statutes of another state, ei-

ther upon stockholders or directors, may be enforced in the state of New York in precisely the same way and to the same extent, and no other, that it could in the state where such foreign corporation obtained its charter.

The complaint, in my opinion, does not state a cause of action, and for that reason the order appealed from should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs, with leave to the plaintiff to amend within 20 days on payment of said costs.

CLARKE and HOTCHKISS, JJ., concur.

HOTCHKISS, J. I concur in the conclusion reached by Mr. Justice McLAUGHLIN. Section 70 is extremely vague, and to interpret its meaning is little better than guesswork. In this situation I prefer to construe it in line with what I think the Legislature should have done to conform our statutes to what I conceive to be the better policy, which is to leave the liability of directors and stockholders to the organic law of the corporation but to confine the remedy to the law of the forum. Such a construction is consistent with a homogeneous system, whereas a different one opens the door to as many kinds of liability as there may be states in which the corporation becomes domiciled. I express no doubt as to the power of the Legislature to admit a foreign corporation to do business in this state on terms which affect the liability of its directors and stockholders rather than such as relate to the mere operations of the corporation itself, but an intention so to do should be plainly expressed, and I prefer not to construe vague expressions as producing that result.

INGRAHAM, P. J. (dissenting). The plaintiff, suing on behalf of himself and other stockholders of the defendant the United States Lithograph Company, a corporation incorporated under the laws of the state of New York, asked for judgment in favor of the corporation and against the individual defendants, who are directors of the corporation, to compel the individual defendants to return to the corporation the amount of certain dividends, which the directors have declared and paid not out of net earnings. The complaint alleges that this corporation, while having upon its books an alleged surplus of \$600,000, did not in fact have or make any surplus or net profits; that this apparent surplus was obtained by carrying property and accounts receivable as assets largely in excess of their actual value, and in fact did not have any surplus or net profits; that the said individual defendants willfully and negligently made and declared dividends quarterly at the rate of $1\frac{3}{4}$ per cent. on the outstanding preferred stock of said company, payable on or about the 1st day of March, June, September, and December, 1910, and on or about the 1st days of March, June, and September, 1911; that such dividends in the aggregate amounted to \$200,000; that the said individual defendants paid the said dividends ostensibly out of the said pretended and fictitious surplus, but did in fact willfully and negligently and contrary to the laws and statutes of the said state of New Jersey, and sections

28 and 70 of the Stock Corporation Law of the state of New York in such case made and provided, divide, withdraw, and pay to the preferred stockholders of said corporation the capital stock of said corporation, and wasted and impaired the capital stock of and damaged the said corporation to the extent of about \$200,000; that the payment of the said unauthorized and illegal dividends and the said dissipation and waste of the capital stock of the company has resulted in the impairment of its finances and credit, which forced the said company to place a mortgage of \$1,500,000 on its property for the purpose of borrowing money with which to discharge debts for the payment of which creditors were pressing, to the said company's special damages in the sum of \$100,000, and the complaint demands judgment against the individual defendants jointly and severally for \$300,000 and for other and further relief. The complaint further alleges that the corporation was organized under the laws of the state of New Jersey and had an authorized capital of \$3,200,000 preferred and \$3,300,000 common stock; that on April 27, 1908, the corporation filed in the office of the secretary of the state of New York a sworn copy of its charter and a statement under its corporate seal in compliance with and as required by section 16 of the General Corporation Law of the state of New York, in order to enable it to do business in the state of New York; that on or about April 27, 1908, it received from the secretary of the state of New York a certificate under section 15 of the General Corporation Law of the state; that since April 27, 1908, the corporation has continuously done business and is now doing business in the state of New York, and has maintained and still maintains offices in the city of New York; that the offices of the executive officers and the books of account of the said corporation have been and now are in the city of New York; that the board of directors since April 27, 1908, have held and now hold their meetings in the state of New York; and that these dividends were actually declared in the state of New York. The complaint further alleges that section 30 of the General Corporation Law of the state of New Jersey, as amended by chapter 143 of the Laws of 1904, provides:

"The directors of a corporation shall not make dividends except from its surplus, or from the net profits arising from the business of such corporation, nor shall it divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of such corporation, or reduce its capital stock, except as authorized by law."

The section further provides:

"In case of any willful or negligent violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large upon the minutes of such directors at the time, or who not then being present, shall have caused their dissent therefrom to be so entered upon learning of such action, shall jointly and severally be liable at any time within six years after paying such dividend, to the stockholders of such corporation, severally and respectively, to the full amount of any loss sustained by such stockholders, or in case of insolvency to the corporation or its receiver to the full amount of any loss sustained by the corporation, by reason of such withdrawal, division or reduction."

The demurrer admitting the facts alleged in the complaint, the declaration of this dividend was clearly a violation of the provisions of the General Corporation Law of the state of New Jersey, and the directors of the corporation, therefore, were not authorized to declare and pay such dividend, and the dividend was therefore an "unauthorized" dividend. The liability imposed by the statute of the state of New Jersey for a violation of its statute is not attempted to be enforced in this action. The complaint does not allege damage to the plaintiff as stockholder, as distinct from the corporation, nor does the complaint allege that the corporation is insolvent. Therefore, as long as the corporation had confined its operations to the state of New Jersey, its directors, for a violation of the statutes of New Jersey, could be held liable only as provided in the statutes of the state of New Jersey. The defendant corporation, however, has come into the state of New York, and, as provided by law, has obtained authority to do business within this state, has maintained its offices here, and has transacted its business in this state. It has therefore assumed the obligation to obey the laws of this state, and has subjected itself to such liability as the laws of this state impose upon foreign corporations coming into this state and transacting business here.

To sustain this action the plaintiff must allege facts to show that, under the laws of this state, its directors have become responsible to the corporation to the amount of these dividends thus illegally declared in violation of the statutes of the state under which it received its right to exist and authority to do business. By section 28 of the Stock Corporation Law of New York (Laws 1890, c. 564, as amended by Laws 1892, c. 688, and Laws 1901, c. 354; Laws 1909, c. 61; Consol. Laws, c. 59) it is provided that:

"The directors of a stock corporation shall not make dividends, except from the surplus profits arising from the business of such corporation, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital of such corporation or reduce its capital stock, except as authorized by law. In case of any violation of the provisions of the section, the directors, under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large upon the minutes of such directors, at any time, or were not present when the same happened, shall jointly and severally be liable to such corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or its directors respectively by reason of such withdrawal, division or reduction."

This provision applies solely to domestic corporations. It directly prohibits the declaration or payment of dividends except from the surplus profits arising from the business of such corporation and is substantially the same as the provision of the statute of New Jersey, to which reference has been made. In both New York and New Jersey the declaration or payment of dividend out of the capital stock of the corporation, and not out of surplus or net profits arising from the business of the corporation, is illegal. The liability imposed for the payment of such a dividend upon the directors of the corporation is somewhat different, but the main object of both statutes is to prohibit the payment of dividends out of capital and to restrict the payment of such dividends to cases where the corporation actually has surplus

or net profits over and above its capital which is applicable to the payment of dividends. Section 70 of the Stock Corporation Law of New York (Laws 1890, c. 564, as amended by Laws 1897, c. 384; Laws 1909, c. 61; Consol. Laws, c. 59) relates to corporations organized under the laws of other states, which have come into this state, and which are transacting business herein. That section provides:

"The officers, directors and stockholders of a foreign stock corporation transacting business in this state, except moneyed and railroad corporations, shall be liable under the provisions of this chapter, in the same manner and to the same extent as the officers, directors and stockholders of a domestic corporation, for (1) the making of unauthorized dividends. * * *

When this New Jersey corporation came into this state, obtained permission to transact its business here, and established its executive offices here, it acquired the rights of a domestic corporation to the protection of the laws of this state, to transact its business here, and to the substantial benefits that accrue to a domestic corporation. By its voluntary act, and to secure to itself the benefits of recognition herein as a corporation duly authorized to transact its business here, it necessarily accepted and subjected itself to the provisions of the laws of this state in relation to the regulation of its corporate affairs and to the obligations imposed upon such a foreign corporation by the laws of this state. It subjected itself to taxation, in accordance with the laws of this state; it subjected itself to such regulations as this state prescribed for the management and conduct of corporations acquiring authority to transact business here and to the imposition of such penalties or liabilities for a violation of the laws of this state in relation to the transaction of business as are imposed by the laws of this state. It was under no obligation to come here, to transact its business here, or to subject itself to the laws of this state. But, when it voluntarily acquired the right to transact business here, it necessarily subjected itself to the regulations which this state has seen fit to impose upon corporations acquiring such privileges, and its officers, directors, and stockholders, who brought this corporation here and performed on behalf of the corporation the duties of their respective offices, also subjected themselves to the provisions of law regulating their conduct as such directors and officers, assumed the obligation to the state to obey its laws in relation to the performance of their duties, and subjected themselves to the liabilities imposed for a violation of the laws of this state in the performance of their duties as officers and directors.

I assume that it could not be disputed that if the laws of this state provided that the declaration of such unauthorized dividends was made a crime, and the officers and directors had met and declared such a dividend in this state, they would have been subject to the penalty prescribed, although the laws of New Jersey imposed no such penalty for a violation of its laws. Whether or not the dividend was authorized or unauthorized, of course, must be determined by the laws of New Jersey, under whose authority the corporation existed. Whether or not this state could prohibit foreign corporations from declaring a dividend in the state where it was incorporated is not the question here presented, as the state has not attempted to regulate the internal affairs

of foreign corporations so far as to regulate what is and what is not an unauthorized dividend. What the state has done is to say that the officers and directors of a foreign corporation shall not make dividends, prohibited by the laws of the state under whose laws it exists; and it then provides that, if the directors of such a foreign corporation shall make such an unauthorized dividend, such directors, under whose administration the same way have been declared and paid, shall jointly and severally be liable to the corporation and the creditors thereof to the full amount of any loss to such corporation or creditors by reason of such withdrawal, division, or reduction of the capital stock. For the purpose of enforcing that liability, section 70 of the Stock Corporation Law of New York further provides that:

"Such * * * liabilities [i. e., the liability prescribed by the chapter of the Stock Corporation Law containing section 70] may be enforced in the courts of this state in the same manner as similar liabilities imposed by law upon the officers, directors and stockholders of a domestic corporation."

Thus, the directors of a foreign corporation doing business in this state shall be liable to the corporation in the same manner and to the same extent as the directors of a domestic corporation, which liability may be enforced in the same manner as a similar liability imposed by the law upon the directors of a domestic corporation. The liability for the declaration of an unauthorized dividend depends upon the law of this state and not upon the law of the state of New Jersey. As to what is or is not an unauthorized dividend recourse must be had to the powers given to the corporation by the statutes of New Jersey. If the dividend declared by the directors of a foreign corporation, organized under the laws of the state of New Jersey, doing business in this state, is prohibited by the statute of the state of New Jersey, it is an unauthorized dividend, and the law of this state says that, if the directors of this corporation have declared an unauthorized dividend, they shall be liable, not as provided by the laws of the state of New Jersey, but in the same manner and to the same extent as the officers, directors, and stockholders of a domestic corporation, and such liability may be enforced in this state in the same manner as a similar liability imposed upon the directors of a domestic corporation. For the declaration of unauthorized dividends, the directors were jointly and severally made liable to such corporation and the creditors of such corporation to the full amount of any loss sustained by said corporation or creditors by reason of such withdrawal, division, or reduction.

It is to be noticed, in construing the New Jersey statute, that the prohibition is directed against the directors of the corporation and not against the corporation itself. The New Jersey statute provides that the directors of a corporation shall not make dividends except from the surplus or net profits arising from the conduct of the business of such corporation. By section 28 of the Stock Corporation Law of New York, the prohibition is also directed against the directors of a stock corporation, and they are prohibited from making any such dividend. So the action of these individual defendants, acting as directors of said corporation, was in violation of the laws of the state

of New Jersey, wherein the corporation was incorporated, and the laws of the state of New York, where it had been domiciled and had applied for and received permission of the authorities of New York to do business here. Thus it seems to me the question that is here presented is whether the state of New York has distinctly prohibited the directors of a foreign corporation from declaring a dividend in violation of the laws of the state which incorporated it, and whether the violation of such a statute exposes a director to the liability which the law of this state imposes upon the directors of a domestic corporation for a violation of its provisions, and, if the laws of this state have imposed such a liability, whether there is any reason why such a law should not be enforced. This question was examined in *Hutchinson v. Stadler*, 85 App. Div. 424, 83 N. Y. Supp. 509, and in that case I tried to establish that the liability of directors of a corporation neither rested upon the common-law liability of directors, nor could liability of directors of corporations incorporated by another state, imposed by the laws of the state of their incorporation, be enforced in this state. But I came to the conclusion that this liability could be enforced under section 60 of the Stock Corporation Law of New York (Laws 1892, c. 688, as amended by Laws 1897, c. 384), which is now the provision of section 70 of the Stock Corporation Law of 1909. It is not necessary to repeat what I said in that case. The conclusion at which I then arrived has been confirmed by subsequent study, as follows:

"Reading these two sections together, it would seem that it was the intention of the Legislature to impose upon the directors of a foreign corporation, transacting business in this state, a liability to the corporation for the amount of its capital divided among stockholders, when such dividend was prohibited by the state from which the corporation had received its charter."

That the state has power to impose upon foreign corporations coming into this state and its officers and directors such liability for a refusal to comply with the laws of this state is, I think, clear. See *Hovey v. De Long Hook & Eye Co.*, 147 App. Div. 881, 133 N. Y. Supp. 25.

Therefore I think there is a good cause of action alleged, and that the order should be affirmed, with \$10 costs and disbursements to the respondent.

SCOTT, J., concurs.

ROAKE V. DI MARCO.

(Supreme Court, Appellate Division, Second Department. March 27, 1914.)

GUARANTY (§ 36*)—CONSTRUCTION—SCOPE AND EXTENT OF LIABILITY.

Defendant executed to plaintiff the following written guaranty: "I understand from Sullivan Parisano * * * that you are to supply him with building material to the amount of \$270.00; of which you have received \$50.00. * * * I am willing to secure you for the balance which is \$220.00," etc. *Held*, that the \$220, the payment of which defendant guaranteed, was not a limit for a standing credit, but was exhausted when the sales amounted to \$220.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 88-45; Dec. Dig. § 36.*]

Appeal from Westchester County Court.

Action by Charles G. Roake against Antonio Di Marco. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before JENKS, P. J., and CARR, RICH, STAPLETON, and PUTNAM, JJ.

Solomon Goodman, of New York City, for appellant.

C. C. Fenno, of White Plains, for respondent.

PER CURIAM. On April 16, 1912, defendant gave this written guaranty:

"I understand from Sullivan Parisano, of No. 6 Third street, New Rochelle, that you are to supply him with building material to the amount of \$270, of which you have received \$50. That the balance is to be paid at the rate of \$50 per month.

"I am willing to secure you for the balance, which is \$220, should Sullivan Parisano fail to do so, by sending you the sum of \$50, my personal check to your order on the 15th days of each and every month, until the sum of \$220 is paid."

Plaintiff supplied materials, delivering on April 16th lumber and nails to the amount of \$86.55, towards which the principal debtor had already paid \$50.

By April 26th, plaintiff had delivered materials up to \$269.60, but up to November, the total sales aggregated \$369.26, against which the debtor's part payments amounted to \$185. Plaintiff testified that he had always kept the balance due him under \$220. Judgment was given for the balance of the final account—\$206.26—with costs.

This appeal raised the question of the intent and scope of the guaranty. Was the \$220, mentioned, a limit for a standing credit, or was that sum (plus \$50 then paid) the limit upon the entire sales?

The first sentence of the above letter limits its scope. It contains a recital, very precise and definite, of the amount of material to be furnished, namely, \$270, on which \$50 had been paid; the \$220 balance to be payable \$50 monthly. The trial proofs did not show any error in this summary of the original agreement. Thus defendant showed just how and for what payments he was "willing to secure" plaintiff, and confined it to a single transaction as definitely as his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

guaranty had been indorsed upon a written contract for lumber sales. After furnishing \$270 worth of material, there are no words looking to further supplies or carrying the dealing beyond the first sales, as in *McShane Co. v. Padian*, 142 N. Y. 207, 36 N. E. 880. Sales to that amount reached the limit imposed by defendant, and exhausted his guaranty. *Fellows v. Prentiss*, 3 Denio, 512, 45 Am. Dec. 484; *Lamport v. Greenberg*, 48 Misc. Rep. 513, 96 N. Y. Supp. 143; *Sherman v. Mulloy*, 174 Mass. 41, 54 N. E. 345, 75 Am. St. Rep. 286.

The judgment and order of the County Court of Westchester County must therefore be reversed, with costs of appeal to defendant, and judgment for the plaintiff for \$35, with appropriate costs to defendant.

In re PENNDORF.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

APPEAL AND ERROR (§ 1178*)—DISPOSITION OF CAUSE—REVERSAL—ORDERING NEW TRIAL.

Where, in a proceeding for the settlement of the accounts of an executrix, several of the findings of the referee were not sustained by the evidence, and incompetent evidence was admitted, the decree will be reversed, with orders to vacate the order of reference and order a new reference, so that the facts could be brought out with greater clearness and the incompetent evidence eliminated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

Appeal from Surrogate's Court, New York County.

Proceedings for the settlement of the account of Mary Penndorf, executrix of Margarethe Knaus, deceased. From a decree denying a motion to vacate and set aside the referee's report, the moving party appeals. Reversed, with directions.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and HOTCHKISS, JJ.

Gilbert W. Minor, of New York City, for appellant.

Henry K. Davis, of New York City, for respondent.

PER CURIAM. The evidence was insufficient to establish a gift to Mrs. Penndorf of the check for \$10,175 received by the testatrix in payment of the Harris mortgage. The refusal of the referee to charge the executrix with the \$1,500 drawn from the Harlem Savings Bank and the \$478.70 remaining on deposit to the credit of the account in that bank was against the weight of evidence, as was likewise his failure to charge the executrix with the \$1,451.21 drawn from the German Savings Bank and invested in the Messerschmidt mortgage, all of the moneys to make up which seem to have belonged to the deceased. The failure of the referee to charge the executrix with \$1,060.45, the amount of the deposit in the Harlem Savings Bank, was likewise against the weight of evidence, and the same is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

true of the \$1,058.60, the amount of the deposit in the Bowery Savings Bank.

We think that it is fairly to be inferred from the evidence that the deceased commonly used Mrs. Penndorf as the medium through which she transacted her business, including her deposits of money with banks and her investments. The evidence also indicates that there may have been a confusion of moneys which were the separate property of Mrs. Penndorf, and which were not derived from the deceased, with moneys of the latter, but to what extent it is impossible to say. It may also be inferred that a portion of the \$10,175 check, and perhaps of other sums which came into the hands of Mrs. Penndorf, were reinvested by her in some mortgage or other security, thus creating an apparent duplication of items. The referee improperly admitted much evidence of a hearsay and otherwise improper nature. A new trial will afford an opportunity to bring out the facts with greater clearness and to avoid the admission of palpably incompetent testimony.

For these reasons, the decree is reversed, with costs to abide event, the order of reference vacated, and the matter referred to a new referee, to be appointed by this court.

NATIONAL SURETY CO. v. WINSTON et al.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

CONTRACTS (§ 310*)—TERMINATION—INSOLVENCY.

Defendants, upon being awarded a city construction contract, gave an undertaking by a surety company, and at the same time executed an agreement to indemnify the surety company and pay it an annual premium. The surety afterwards became insolvent and reinsured its risks with plaintiff surety company, assigning to it all of its indemnity agreements, etc. The original surety company still exists, in liquidation, and apparently its bond is still good, notwithstanding its insolvency. *Held*, that plaintiff surety company could sue for a premium due under the original indemnity contract executed by the insolvent company, as against an objection that the insolvency of the surety company necessarily terminated the indemnity contract; the city having accepted the substituted surety.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1447; Dec. Dig. § 310.*]

Appeal from Trial Term, New York County.

Action by the National Surety Company against James O. Winston and Thomas S. Winston, partners as Winston & Co., and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

A. T. Clearwater, of Kingston, for appellants.

William R. Page, of New York City, for respondent.

SCOTT, J. Defendants were awarded a contract to construct a portion of the new aqueduct for the city of New York. They gave

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the city an undertaking of the Empire State Surety Company in the sum of \$80,000, and at the same time executed an agreement to indemnify the Surety Company and to pay it an annual premium of \$1,200, payable in advance on the 20th day of September, afterwards changed to the 20th day of February, in each year. The Empire State Surety Company became insolvent and is now in process of liquidation.

On September 18, 1912, the Empire State Insurance Company re-insured all of its risks with plaintiff and assigned to it all of its good will, agreements of insurance and reinsurance, indemnity agreements, and the like; plaintiff agreeing on its part to assume and fulfill all the outstanding contracts of the Empire State Surety Company. Neither the city of New York nor defendants were parties to this agreement, nor so far as appears have consented to it; but, on the other hand, it does not appear that the city has called on defendants to substitute other security. This action is for the premium which fell due February 20, 1912, which defendants refused to pay.

The appellant argues that by becoming insolvent the Empire State Company necessarily broke its contract with the city of New York to insure defendant's faithful performance of its contract, and consequently that the contract of indemnity failed of consideration to support it. This argument is supported by a line of cases holding that an insurer or casualty company upon becoming insolvent or reinsuring its policies, breaks its contract with its *policy holders*, and that they are not required to go on paying premiums or to accept the substitution of the reinsuring company.

The analogy is not perfect, however. Defendants are not, in the usual sense, policy holders of the Empire State Company. That company does not insure defendants. Its agreement with them is that it will insure the city of New York against any default on the part of defendants. If the city is content to accept the substituted surety, as it appears to be, defendants get all that they contracted for. So long as the city is satisfied, it can make no difference to defendants who the city accepts as surety. If it accepts any one, the defendants have received consideration for their indemnity agreement.

The Empire State Company still exists and is still liable upon its bond, and for all that appears its bond is perfectly good, notwithstanding its insolvency. It has simply superadded to its own responsibility that of plaintiff, and it, or its assignee, are entitled to enforce the indemnity agreement.

Judgment appealed from is affirmed, with costs. All concur.

IN re VAN ALST AVENUE IN CITY OF NEW YORK, BOROUGH OF QUEENS.

(Supreme Court, Appellate Division, Second Department. March 20, 1914.)

EMINENT DOMAIN (§ 243*)—JUDGMENT—RES JUDICATA—MATTERS CONCLUDED.

Where the question whether land burdened with easements was entitled to more than a nominal award was determined against the city in a former proceeding, its contention that a damage parcel so burdened should receive only a nominal award could not be considered in a subsequent proceeding.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 551, 627-629, 700; Dec. Dig. § 243.*]

Appeal from Special Term, Queens County.

Application of the City of New York relative to acquiring title, etc., for opening and extending Van Alst Avenue from Nott Avenue to Hoyt Avenue, etc., Borough of Queens, City of New York. Report of the referee confirmed, and Joseph Wild & Co. and others appeal. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Clarence Edwards, of Elmhurst, for appellant Payne.

Arthur C. Bostwick, of New York City, for appellants Joseph Wild & Co.

Nathan A. Smyth, of New York City, for petitioners Gerard and others.

John J. Kearney, of New York City (Joel J. Squier, of New York City, on the brief), for the City of New York.

PER CURIAM. The city's contention that damage parcel No. 85 had been burdened with easements of light and air, and therefore should receive only a nominal award, cannot now be considered. That ground was presented upon the former condemnation proceedings, both here (143 App. Div. 564, 128 N. Y. Supp. 371) and in the Court of Appeals (203 N. Y. 570, 96 N. E. 1133). The question of easements burdening the land condemned, having been determined against the city, cannot be reopened upon the present record.

A further review of the testimony confirms the conclusion of the learned referee that a title in Messrs. Wild & Co. by adverse possession is not established.

The rights of Payne under the conveyance of 1898, upon the record as made in the condemnation proceedings, are not materially changed by the present evidence as to the negotiations leading up to that sale. With some transposition of clauses, the selling contract closely follows the terms of the deed. The words "all portions of said tract" are not to be read alone. Such a general expression of purpose or intent ordinarily does not have the broad scope to embrace and grant a separate and distinct subject-matter, but the language is rather to be taken as evidence of an intent to pass some incidental right or appurtenant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

interest. Such a purpose is certainly the more reasonable one to be applied to general expressions, where the existence of such a separate parcel was not then realized by either party to the conveyance. The further proofs, and the able argument in support of the claimant Payne, do not lead us to a different view from that expressed in the former opinion in the condemnation proceedings.

The order of the Special Term confirming the referee's report is therefore affirmed, with \$10 costs and disbursements to the respondents.

GILLERAN v. SPRINGFIELD, L. I., CEMETERY SOCIETY et al.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

INJUNCTION (§ 12*)—RESTRAINING CORPORATE ACTION—RIGHT TO SUE—SHOWING OF DAMAGE.

Where one, suing to restrain the holding of a special meeting of corporate directors on the ground that the call therefor was not properly issued, merely sues individually, and alleges that he is president of the association and the holder of some of its certificates of indebtedness, but does not show that anything proposed to be done will injure the certificate holders or the association, he cannot maintain the action.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 12; Dec. Dig. § 12.*]

Appeal from Special Term, New York County.

Action by Thomas Gilleran against the Springfield, L. I., Cemetery Society and others. From an interlocutory judgment overruling demurrer to the complaint, defendants appeal. Reversed, and demurrer sustained.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Antonio Knauth, of New York City, for appellants.

John M. Gardner, of New York City, for respondent.

SCOTT, J. The action is brought to restrain the holding of a special meeting of the directors of the defendant Cemetery Society, upon the ground that the call for such meeting was not issued in the manner prescribed by the by-laws. The ultimate purpose of the action is to prevent the adoption of certain amendments to the by-laws. We do not consider it necessary at this time to determine whether or not the amendments, if adopted at the meeting sought to be restrained, would be valid or not. The difficulty we find with the present action is that the plaintiff fails to show that the proposed meeting, if held, will injure him in any legal sense.

He sues individually, and alleges that he is president of the society and the holder of some of its certificates of indebtedness. He does not sue in behalf of the society, or in behalf of other certificate holders situated similarly to himself. Nor does he show that anything proposed to be done at the meeting will be injurious to the interests

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the society or its certificate holders, or specially injurious to him as the holder of a certificate. If the meeting be held, and the proposed amendments adopted, and any action be threatened or attempted under them in derogation of plaintiff's legal rights as president or certificate holder, it will be open to him to take appropriate legal measures to protect those rights. Even if the call for the meeting be irregular, it by no means follows, of necessity, that the action taken at the meeting will be invalid.

The judgment appealed from must be reversed, and the demurrer sustained, with costs to defendants in this court and in the court below. All concur.

PEOPLE ex rel. LESNIAK v. MIKULSKI.

(City Magistrates' Court of New York City. March, 1914.)

1. THREATS (§ 1*)—OFFENSES—STATUTE.

Under Penal Law (Consol. Laws, c. 40) § 551, making any person knowingly sending, or delivering or making, and, for the purpose of delivering or sending, parting with possession of any letter or writing with or without a name subscribed thereto, with intent to annoy any person, guilty of a misdemeanor, it is not necessary to the offense to prove that the author of the writing addressed or caused it to be directly delivered to the person affected thereby if he intended that it should reach such person; and the offense may be also committed by sending a letter containing a threat of some other person, provided it is sent to annoy; and hence defendant's anonymous letters to the police department, complaining of the illegal conduct of complainant's saloon, not communicated to or intended for complainant, who had no knowledge until he obtained them from the department, in the absence of privilege constituted an offense.

[Ed. Note.—For other cases, see Threats, Cent. Dig. §§ 1-6; Dec. Dig. § 1.*]

2. THREATS (§ 1*)—COMPETENCY—PRIVILEGE.

It is against public policy for police officers to disclose their source of information of the commission of crime.

[Ed. Note.—For other cases, see Threats, Cent. Dig. §§ 1-6; Dec. Dig. § 1.*]

3. THREATS (§ 1*)—OFFENSES—ANNOYANCE.

Under Penal Law (Consol. Laws, c. 40) § 551, making it a misdemeanor to knowingly send or deliver any letter or writing, with or without a name subscribed thereto, with intent to annoy, the writing must be calculated to cause real annoyance and disturbance in the mind of the person affected, and not merely a whimsical or capricious annoyance, although no precise words are required to convey a threat or cause annoyance. But the statute does not prevent bona fide complaint of the commission or suspicion of crime.

[Ed. Note.—For other cases, see Threats, Cent. Dig. §§ 1-6; Dec. Dig. § 1.*]

4. THREATS (§ 1*)—STRICT CONSTRUCTION—PENAL STATUTE.

Under such statute, one charged with an offense is entitled to a strict construction.

[Ed. Note.—For other cases, see Threats, Cent. Dig. §§ 1-6; Dec. Dig. § 1.*]

5. THREATS (§ 1*)—OFFENSES—COMPLAINT TO POLICE.

Under such statute anonymous communications in writing, addressed to the police department, and complaining of complainant's illegal conduct of his saloon, without any unlawful intent, or any intent that they should be communicated to complainant, were privileged so as to constitute an offense.

[Ed. Note.—For other cases, see Threats, Cent. Dig. §§ 1-6; Dec. Dig. § 1.*]

6. THREATS (§ 8*)—QUESTION FOR JURY—PROBABLE CAUSE.

Where a person, interested in the maintenance of law and good order, in good faith furnishes the administrative authorities with information as to a crime, or a supposed crime, the question of qualified privilege, is one of law for the court, while malice, good faith, etc., are questions of fact.

[Ed. Note.—For other cases, see Threats, Cent. Dig. § 13; Dec. Dig. § 8.*]

7. THREATS (§ 7*)—BURDEN OF PROOF—MALICE.

In such case the people, charging that the informer acted with actual malice, have the burden of proving such malice.

[Ed. Note.—For other cases, see Threats, Cent. Dig. § 12; Dec. Dig. § 7.*]

8. THREATS (§ 7*)—INTENT—EVIDENCE.

Under Penal Law (Consol. Laws, c. 40) § 551, making it a misdemeanor to send or deliver a letter or writing with intent to annoy, such intent may be inferred from all the circumstances of the case, the law only presuming an unlawful intent from the intentional commission of an act in itself unlawful.

[Ed. Note.—For other cases, see Threats, Cent. Dig. § 12; Dec. Dig. § 7.*]

Prosecution by the People of the state of New York, on the complaint of Adam Lesniak against Walter Mikulski. Complaint dismissed, and defendant ordered discharged.

Louis Bleier, Deputy Asst. Dist. Atty., of New York City, for the People.

John A. O'Rourke, of New York City, for defendant.

FRESCHI, City Magistrate. The prosecution here charges a violation of section 551 of the Penal Law, which makes it a misdemeanor to send threatening or annoying letters under circumstances and in a manner not amounting to blackmail. The exact language of the statute under consideration is as follows:

"A person who, knowing the contents thereof, sends, delivers, or in any manner causes to be sent or received any letter or other writing threatening to do any unlawful injury to the person or property of another, or any person who shall knowingly send or deliver or shall make and, for the purpose of being delivered or sent, shall part with the possession of any letter, postal card or writing, with or without a name subscribed thereto or signed with a fictitious name or any letter, mark or other designation, with intent thereby to cause annoyance to any person, is guilty of a misdemeanor."

The principal witness for the people conducts a poolroom and a saloon, regularly licensed for the retail traffic of liquor at the premises No. 523 Sixth avenue, in the city and county of New York. During the year 1913 it seems that the defendant complained, in writing, concerning alleged unlawful acts committed by the complainant at his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

place of business. All these letters were anonymous and, in my opinion, were written by the defendant and by him addressed, sealed, and sent to the mayor and the police commissioner. These communications charged, in substance, violations of the Liquor Tax Law, gambling, and other unlawful acts on the premises. Without setting forth verbatim the subject-matter of these letters, a mere summary of them suffices to a discussion of the law points in the case. The first letter, dated March 11, 1913, states that "all kinds of games of chance" are permitted and "that the place is open at all hours of the night and fighting is a daily occurrence." The next letter bears date September 8, 1913, and repeats the gambling charge, and that the place is a "hang-out for persons of bad repute." The third letter of September 26, 1913, is practically to the same effect and the letter to the mayor, dated October 20, 1913, says that the place runs as a "poolroom without a license." The defense claims that no crime has been committed, and moves at the close of the people's case for a dismissal of the complaint and for the discharge of the defendant on this ground.

This section in its present amended form has not been construed by the courts, so far as my research has gone, except in one instance by Mr. Justice Mayer in *People v. Loveless*, 84 N. Y. Supp. 1114. That case, however, is not analogous to the facts in the case under consideration. In the *Loveless Case* the defendant addressed a letter that was the basis of the charge there, directly to the complainant, demanding payment of an account held for collection, and stating that if it was not paid without its being placed in the hands of an attorney, various members of an association of which he was a member would be notified that the claim against him had been unpaid and placed in the hands of an attorney for collection, which communication evidently had no other purpose than to annoy and substantially embarrass the complainant by affecting his credit, and to compel the payment by him of a disputed claim.

[1] Two points are urged by defendant's counsel. He contends: First, that because the letters in question were not addressed to the complainant and received by him, the statute does not apply; and, secondly, that, assuming the disputed letters to have been written by the defendant, they are *prima facie* privileged communications.

As to the first contention, I must hold against the defendant. It is perfectly clear that the legislative intent, as expressed in the Penal Law, *supra*, is to prohibit any person from making or knowingly delivering written threats to do an unlawful injury to person or property, or, by a writing, willfully to cause annoyance to another. Obviously the plain object of the law is to safeguard the person and to preserve and secure property rights inviolate and to guard against injury and annoyance.

Although there is no threat involved here, the same principle applies to this class of cases which come under the second subdivision of the statute, that is, the amendment (chapter 120, p. 288, Laws 1891) of the above-stated Penal Law, which deals with letters of an annoying nature.

Nothing in the letter or the spirit of this law, I think, makes it necessary, as a condition precedent to a conviction, to prove that the author of the writing addressed, or its messenger, with knowledge of its nature delivered the communication directly to the person to be affected by it. I take it that if a threatening or annoying letter is meant for him, and it ultimately reaches the person to be threatened or annoyed, even though the writing be addressed or delivered to another, the crime is committed, provided that the author or messenger, or both, intend that the subject-matter should reach the person for whom it is intended directly or indirectly; but it must be so made, and under such circumstances, as to operate, to some extent at least, on the mind of the one whom it is expected to influence. *State v. Brownlee*, 84 Iowa, 473, 51 N. W. 25. Like a threat, so the annoyance must come from the author or his messenger with guilty knowledge; but the proof is not necessary to show that the threat was against the person to whom the letter was directed. The offense may be committed by sending a letter conveying a threat of some other person, provided it is sent for the unlawful purpose mentioned. *People v. Braman*, 30 Mich. 460.

The English and American Encyclopedia of Law (volume 28, p. 145 [2d Ed.]) states it as a rule that the communication, whether oral, written, or printed, must be intended for the person threatened, and must actually come to his knowledge, even though the statute does not in terms say so.

Brownlee Case, supra, presented a charge against the defendant therein with having unlawfully threatened to kill another in order to procure his signature to a promissory note, seeking thereby to obtain remuneration in that way for a grievance of a financial nature, and to that end communicated his plans to an accomplice, who, in turn, told the complainant of them. The court said (84 Iowa, 477, 51 N. W. 27), in writing for a reversal of the conviction for extortion:

"It is clear that in this case the threats were not made to or in the presence of Wright [complainant], and it is certain it was understood that they should not be communicated to him, and that the defendant, until after his arrest, had no knowledge that they had been so communicated."

I would infer from all the circumstances of the case at bar that the defendant understood that the contents of his letters should not be communicated to, nor were they intended for, the complainant, and it seems to be the fact that the complainant had no knowledge that these matters had been stated about him until after his own waiter's arrest for a violation of the Liquor Tax Law (Consol. Laws, c. 34) in selling whisky on Sunday, November 9, 1913, for which he has been held for trial in the Court of Special Sessions. And in this connection it may be stated as a significant fact that it appears from the police report that a license for complainant's poolroom was not procured until October 30, 1913, the day following defendant's last letter.

How the complainant procured the original letters from the authorities has not been shown by competent evidence, and this phase of the case is left entirely to conjecture. Attached to the deposition before me are the anonymous letters, report of the police department, affidavit

of a handwriting expert, reports of police officials, and the correspondence between the mayor and the police commissioner, all being the original records of the police department in this case.

[2] There is no express evidence that the letters were ever sent or shown, or their contents in any other manner made known, to the complainant at the request of or with the knowledge and consent of the defendant. From the standpoint of the defendant, it is improbable that the letters were ever intended for the perusal of the complainant, and surely the police were not required to make known to him the source of their information that led to action on their part. It is against public policy for police officials to disclose their source of information. Aside from any legal obligations, there is certainly a moral obligation to keep all such communications secret. I question the right of the officials to divulge them to others. See *Shinglemeyer v. Wright*, 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129.

The New York police are empowered to enter and inspect to a reasonable extent all places of business having excise or other licenses to carry on business, all houses of ill-fame or prostitution, and all gambling houses. Greater New York Charter, § 315 (Laws 1901, c. 466).

[3, 4]. It is fair to assume from the record here that the defendant intended that the officers charged with the duty to suppress crime should make an investigation on police lines, with the least possible publicity and annoyance to the person accused, in the matter of the charges, and then take only such police action as was warranted by the evidence that developed. The defendant, I am satisfied, acted "upon a proper occasion, from a proper motive, in a proper manner, and upon reasonable and probable cause."

True it is that annoyance may result, no doubt, from the means employed by the city officials, and not from the written complaint itself. But is such "annoyance" within the contemplation of this law?

A broad construction of the statute in question might, however, include every form of writing which may, in the relation of things under the rule of cause and effect, actually annoy any person, whether he be the person addressed or intended. Such a rule of law could be carried to extremes and work considerable injustice.

The writing must be calculated to cause real annoyance and disturbance in the mind of the person affected, and not be merely a whimsical or capricious annoyance. Trivial annoyance and idle threats are outside the pale of the law. Serious and malicious cases come within its inhibition. If the operation of the mind of such person were the sole test, then I fear that almost any letter might be held to cause annoyance. While no precise words are required to convey a threat or cause annoyance, still the inhibition deals with such cases only as have a substantial basis for the fear or annoyance caused another.

To hold that the Legislature intended by the use of the words "cause annoyance" that any person would be prevented from complaining of the commission of a crime, or the suspicion of a crime, would be to defeat the very purpose of this law, which is to prevent groundless and vicious annoyance. Every person has a right to make a complaint to the authorities, if made bona fide, and with the purpose of aiding in

the detection and prosecution of offenses against the law (*Pierce v. Oard*, 23 Neb. 833, 37 N. W. 677; *Eames v. Whittaker*, 123 Mass. 342; *Garn v. Lackhard*, 108 Mich. 196, 65 N. W. 764), and such complaints may cause annoyance, at times, more particularly when they result in an arrest and conviction. Annoyance of that kind is not within the purview of this statute. The defendant is entitled to a strict construction, which, in my judgment, limits the effect of this law to the cases that I have above indicated.

[5-8] As to the second contention, I hold that the communications are privileged.

If a crime or supposed crime has been committed, and a person interested in the general welfare, and concerned in the maintenance of law and good order, and charged with a duty to uphold them, furnishes the authorities upon whom rests the duty to administer the law with information concerning it, and the communication is made in good faith, with honest motives, and for justifiable ends and in a proper manner, there arises at once that question of qualified privilege, which is one of law for the court; and, if the party seeking to hold the defendant liable criminally charges that he acted with actual malice, the burden of proving it rests upon the party seeking to hold the accused, and if such evidence is adduced, the questions of malice, good faith, etc., are questions of fact to be submitted to a trial court or the jury, although it contained defamatory matter which without such privilege would be actionable and slanderous. 1 *Cooley on Torts* (3d Ed.) p. 436; *Byam v. Collins*, 111 N. Y. 143, 150, 19 N. E. 75, 2 L. R. A. 129, 7 Am. St. Rep. 726; *Coloney v. Farrow*, 5 App. Div. 607, 608, 39 N. Y. Supp. 460; *Decker v. Gaylord*, 35 Hun, 584; *Dale v. Harris*, 109 Mass. 193; *Hamilton v. Eno*, 81 N. Y. 116; *Mattice v. Wilcox*, 147 N. Y. 624, 42 N. E. 270; *Klinck v. Colby*, 46 N. Y. 427; *Sickles v. Kling*, 60 App. Div. 515, 69 N. Y. Supp. 944; *Lovell Co. v. Houghton*, 116 N. Y. 520, 22 N. E. 1066, 6 L. R. A. 363; *Payne v. Rouss*, 46 App. Div. 315, 61 N. Y. Supp. 705; *Annotated Penal Law*, § 1350, and cases there cited.

The whole case resolves itself into one of intent. This statutory offense must have the necessary ingredient of intent to cause annoyance that seems to be lacking here. I appreciate that letters charging the commission of unlawful acts without any justification therefor may be sent to the police authorities with the deliberate design of annoying a business rival, for instance; nevertheless in such cases it becomes a question of law and fact on the evidence as to whether such was the real purpose of the writer in respect to the person to be affected. The statute requires proof of the existence of intent. While the acts charged must be accompanied by a criminal intent, which may be inferred from all the circumstances of the case (*Gardner v. People*, 62 N. Y. 299), the law will only presume an unlawful intent from the intentional commission of an act in itself unlawful (*People v. Herrick*, 13 Wend. 87). This case presents no suggestion or innuendo from anything written or spoken, or from the relations of the parties themselves, indicating rivalry or animus by the defendant to injure or annoy the complainant.

It is not a reasonable inference that the defendant had any unlawful design or motive, or that he acted arbitrarily. The presumption of good faith which privilege supplies repels the idea of malice. The police were entitled to the information, and it is quite clear that the defendant did not make the statements for repetition, but, on the other hand, made them for the exclusive use of the authorities. One of the charges culminated in a criminal prosecution against the complainant's employé.

The offense is, in my judgment, incomplete and the prosecution has failed to sustain the burden of proof. The complaint is dismissed, and the defendant is ordered discharged.

(83 Misc. Rep. 659)

IN RE AFFLECK et al.

(Surrogate's Court, Westchester County. January, 1914.)

1. WILLS (§ 682*)—CONSTRUCTION—TRUSTEES.

In determining the persons entitled to a dividend on stock held in trust pursuant to a will, the testator's intention, when clear, must be carried out so far as it does not result in any unlawful accumulation of income.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1602, 1607-1611; Dec. Dig. § 682.*]

2. WILLS (§ 684*)—ORDINARY STOCK DIVIDENDS—TO WHOM PAYABLE.

Ordinary dividends on stock held under a testamentary trust for a life tenant and remaindermen should be paid to the life beneficiary regardless of when the surplus out of which they are payable was accumulated.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614-1628; Dec. Dig. § 684.*]

3. WILLS (§ 684*)—EXTRAORDINARY STOCK DIVIDENDS—TO WHOM PAYABLE.

Extraordinary dividends on stock, held under a testamentary trust, when payable from the accumulated earnings of the company, either in cash or stock, belong to the life beneficiary, unless they intrench in whole or in part on the capital of the trust fund, in which case they should be returned to the trust fund, or apportioned between it and the life beneficiary, in accordance with the amount thereof accumulated before and after creation of the trust or purchase of the stock.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614-1628; Dec. Dig. § 684.*]

4. WILLS (§ 684*)—STOCK DIVIDENDS—APPORTIONMENT—LIFE TENANTS AND REMAINDERMEN.

The residue of an estate, including certain corporate stock, was bequeathed to testator's widow and a nephew, in trust to pay the income to her for life, with remainder to others, including such nephew. The corporation later apportioned its accumulated earnings and profits among its stockholders by an issue of additional stock. *Held*, that the stock increase paid to the trustees under the will should be treated as an extraordinary stock dividend, and apportioned between the life tenant and remaindermen so as to award to the remaindermen the earnings and profits accumulated prior to the creation of the trust, and to the life beneficiary or her successors the portion accumulated and earned subsequently.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614-1628; Dec. Dig. § 684.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. APPEAL AND ERROR (§ 1195*)—LAW OF THE CASE—CONCLUSIVENESS OF JUDGMENT.

A decree of the Appellate Division, on appeal from the decree of the surrogate, that the life tenant by signing certain vouchers was not estopped from claiming an extraordinary stock dividend was conclusive in a retrial, in proceedings on the judicial settlement of the accounts of the trustees, where there were no further facts shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

Accounting by Lizzie D. Affleck and another, as trustees under the will of James Affleck, deceased, and by James G. Affleck, as sole trustee under said will since the death of Lizzie D. Affleck. Decreed according to opinion.

See, also, 155 App. Div. 339, 140 N. Y. Supp. 345.

Michel Kirtland, of New York City, for trustee.

David F. Toumey, of New York City, for executor Barlow.

SAWYER, S. James Affleck died November 24, 1900, leaving a last will and testament, which was duly admitted to probate by the Surrogate's Court of Westchester county on February 9, 1901.

By the "Eighth" paragraph of said will a trust was created, as follows:

"Eighth: After the satisfaction of the foregoing provisions of my will, I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, to my executors, to lease or sell my real estate and to invest and keep invested the proceeds of such sales and also my personal estate, and to collect and pay the net rents, interest and income thereof, remaining after paying taxes, insurance and all other necessary and proper expenses, to my said wife during her life, and in case such net rents, interest and income shall not amount to the sum of six thousand dollars in any one year, then to pay my said wife in addition thereto so much of the principal of my estate as may be necessary to make up the deficiency; it being my wish and intention that my said wife shall not receive less than six thousand dollars per annum under this clause of my will for her support and maintenance; the amount so taken from the principal of my estate to make up such deficiency not to be returned by my executors to said principal."

After the death of his wife all the rest, residue, and remainder of his estate was devised and bequeathed by the testator, as follows:

"Ninth: At and after the death of my wife I direct my executors to convert into personalty, as soon as practicable, all my estate not then so converted out of which I do give and bequeath the sum of five thousand dollars to my two nieces, Jennie and Mary, the daughters of my deceased sister Mary Burgess, that is to say: the sum of twenty-five hundred dollars to each, but in case said Jennie and Mary, or either of them, shall not then be living, the share the one so deceased would otherwise have received shall revert to and become a part of my residuary estate to be disposed of as hereinafter mentioned.

"Tenth: I do give and bequeath after the death of my wife, the sum of two thousand dollars to each of the children of my brother David who may then be living.

"Eleventh: I do give and bequeath to my brother-in-law, James A. Halley, after the death of my wife, the sum of five thousand dollars, but in the event of his death before the death of my wife, the said sum shall be paid to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his widow and in case his widow also shall be dead, then I give and bequeath the sum of twenty-five hundred dollars to his daughter.

"Twelfth: I do give and bequeath, after the death of my wife, to the Young Men's Christian Association of the city of Yonkers, the sum of one thousand dollars.

"Thirteenth: I do give and bequeath, after the death of my wife, to the Homeopathic and Maternity Hospital of the city of Yonkers, the sum of one thousand dollars.

"Fourteenth: All the rest, residue and remainder of my estate and property, remaining after the death of my wife and after satisfying the foregoing provisions of this my will, I direct my executors to divide into six (6) equal parts, which I do give and bequeath to the following persons, that is to say:

"To my nephew, William R. Affleck, if he shall then be living, one of such sixth parts, and if the said William R. Affleck shall not then be living, the same shall go to his lawful issue who may then be living in equal shares.

"To my executor, hereinafter named, one of such sixth parts, in trust, to invest the same and keep the same invested during the life of Mary S. Affleck, wife of my said nephew, William R. Affleck, and to pay the interest and income therefrom to the said Mary S. Affleck, during her life, and after her death I give and bequeath said sixth part to the lawful issue of my said nephew, William R. Affleck, who may then be living, in equal shares.

"To my nephew, James G. Affleck, if he shall then be living, two of such sixth parts, and if the said James G. Affleck shall not then be living, the same to be divided among his lawful issue in equal shares.

"To my nephew, Frank B. Affleck, if he shall then be living, one of such sixth parts, and if the said Frank B. Affleck shall not then be living, the same to go to his lawful issue, in equal shares, and in case of the death of the said Frank B. Affleck before the death of my wife, without leaving lawful issue, the said sixth part shall be divided between the children of my nephews, William R. Affleck and James G. Affleck, per capita and not per stirpes.

"The remaining sixth part I do give and bequeath to my brother William Affleck, if he shall then be living, and in case of his death before the death of my wife, then I give and bequeath the remaining sixth part to Emma M. Affleck, the widow of my said brother William Affleck, and in case of her death before the death of my wife, then said remaining sixth part shall be paid to the lawful issue of my brother William Affleck, then living, in equal shares.

"Fifteenth: I do hereby authorize and empower my executors, or such one or more of them as may qualify, and undertake the execution of this my will and the survivor, to sell any and all real estate whereof I may die seised, at any time and from time to time and in such manner and at such prices as they may deem proper and give necessary deeds to carry such sales into effect, except, however, that no sale shall be made during the life of my wife of the premises the use of which I have devised to my wife without her consent.

"My executors may, in their discretion, change or retain the investments in which my personal estate may, at the time of my death, be invested, and I leave it discretionary with them in what securities the estate which may come to them may from time to time be invested, except that any promissory notes held by me at the time of my death payable on demand shall not be called in during the life of my wife, provided the interest on such notes is regularly paid, but the amount of any such promissory note or notes made by any person named as a legatee in this my will shall be deducted from the amount herein bequeathed to the makers of said notes respectively.

"My executors are authorized to invest any funds belonging to my estate in such securities as ordinarily prudent men would purchase for investment of their own funds.

"If any securities should come to my executors or should afterwards be purchased by them which commanded a premium but which will depreciate in value as they approach maturity, my executors are authorized and directed to apply the whole income derived from such securities, in the manner in which the income of my estate is to be applied, without deducting

therefrom any portion of such income to provide against such depreciation in value.

"Sixteenth: I will and direct and declare that the provisions which I have made in this my will for my wife shall be accepted by her in lieu and bar of dower and all other interest in my estate.

"Lastly: I do hereby appoint my wife, Lizzie D. Affleck, and my nephew, James G. Affleck, executors and trustees of this my last will and testament and in case of the death of both my said executors and trustees, I do hereby appoint the Knickerbocker Trust Company of New York City to be executor and trustee in their place and stead, and my executors and trustees shall not be required to give any security for the faithful performance of their duties.

"All the powers and trusts hereby conferred on my executors and trustees, herein named, may be exercised by them or such of them as qualify and assume the trusts and by the survivor of them."

The death of Frank B. Affleck, unmarried, vests his interest in the remainder of the estate in his brother, William R. Affleck, as administrator.

The wife of the testator died on February 25, 1908, leaving a last will and testament, which was duly admitted to probate by the Surrogate's Court of Westchester county. Her nephew, E. Dudley Barlow, was appointed as executor of her estate, and is the objectant in this proceeding.

James G. Affleck, the surviving trustee, on or about April 14, 1908, commenced this proceeding for the judicial settlement of his account.

A portion of the estate of the testator consisted of 150 shares of the capital stock of the Pullman Company. The capitalization of the Pullman Company at the time of the death of the testator was \$74,000,000. At a meeting of the directors of the Pullman Company, held at Chicago on the 14th day of November, 1906, the following resolutions were adopted:

"Resolved, that the president be requested to present to the stockholders at their annual meeting to be held this afternoon, the following statement, namely:

"The directors desire to call the attention of the stockholders to the annual statement for the fiscal year, ending July 31, 1906, which shows that after writing off various amounts for depreciation, the value of the assets was \$27,122,020.57 in excess of the par value of the capital stock of the company. This excess has not been diminished since the date of that statement.

"The directors are of opinion that, in view of the prevailing conditions, and the exigencies of the company's business, a distribution of any part of its assets would not be for the interest of the company or its stockholders.

"The growth of the business of the company has rendered necessary a very large increase of its equipment, and notwithstanding the construction of new cars constantly going on to replace old and worn-out cars, as well as to meet the added demands of increasing travel, there is now a necessity for additional equipment calling for a very large expenditure, and employing all the company's existing capacity for sleeping car building for the construction of such equipment.

"The manufacturing business of the company developed during the last year to a higher degree than it ever before attained, and it gives satisfactory evidence of further development in the near future. This development requires and will continue to require increased facilities and improved and enlarged instrumentalities of construction. The unprecedented demand for cars has demonstrated the necessity of improving and enlarging the company's manufacturing plant to enable it to be in a position to obtain its share of the business which such demand will create.

"The tendency, of greater or less extent, toward the substitution of steel for wood in the construction of the whole or a part of cars, particularly of freight cars, has determined your board to direct the construction for the manufacture of such cars or parts of cars, of a plant of the most improved and therefore necessarily of a somewhat expensive character.

"The stockholders of the company are entitled to the immediate benefit of the investments and improvements thus made and contemplated to be made. The directors therefore recommend, to the end that the capital stock may bear a just and proper relation to the actual assets of the company, that the surplus assets to the extent of twenty-six million dollars (\$26,000,000) be capitalized, and that for such purpose the capital stock of the company be increased to one hundred million dollars (\$100,000,000) by the issue of additional stock to the amount of twenty-six million dollars (\$26,000,000); and that said additional stock, with a necessary additional amount from the stock held in the treasury of the company, be distributed pro rata to stockholders of the company in the ratio of thirty-six (36) shares to each one hundred (100) shares held by stockholders of record at the close of business on the 30th day of November, A. D. 1906."

"Whereas, the value of the assets of this company exceeds the par value of the capital stock by more than twenty-six million dollars (\$26,000,000): Resolved, that for the purpose of representing in the capitalization of this company existing surplus assets to the extent of twenty-six million dollars (\$26,000,000), the capital stock of the company is hereby increased to one hundred million dollars (\$100,000,000); and the proper officers of the company are hereby directed to issue additional stock to the amount of twenty-six million dollars (\$26,000,000), and resolved, that the directors be authorized to distribute said twenty-six million dollars (\$26,000,000) capital stock with a necessary additional amount from the stock held in the treasury of the company, pro rata, to stockholders of the company in the ratio of thirty-six (36) shares to each one hundred (100) shares held by stockholders of record at the close of business on the 30th day of November, A. D. 1906."

"Whereas, the capital stock of this company has been increased by twenty-six million (\$26,000,000) dollars; and whereas, certain stock of the company is held in the treasury from which properly a distribution may be made to the stockholders of the company: Resolved, that said increase of twenty-six million dollars (\$26,000,000) capital stock, with the necessary additional amount from the stock held in the treasury of the company, be distributed pro rata to the stockholders of the company in the ratio of thirty-six (36) shares to each one hundred (100) shares held by the stockholders of record at the close of business on the 30th day of November, A. D. 1906, and the proper officers of the company are hereby directed to carry this resolution into effect."

Pursuant to said resolutions 54 shares of stock were allotted to the trustee in this proceeding. The question arises as to who is entitled to these 54 shares of stock as between the life beneficiary under the trust and the remaindermen.

It seems to me that nearly all, if not all, of the stock increase may be treated as a stock dividend. It was issued out of the existing surplus assets of the corporation pursuant to the resolutions of the company as above set forth. The testimony shows very clearly that nearly all of the surplus arose from the carrying out of the business of the corporation, and constituted a part of the profits earned by the company after the payment of the current charges, maintenance, operation, and regular cash dividend. In other words, it was the accumulated earnings and profits of the company.

In Cook on Corporations (6th Ed., chapter 33, § 552) it is said:

"Where shares of stock are held by an estate, and the income of the estate is to go to a life tenant for life, and the remainder to another party, the

question of whether the life tenant or the remainderman is entitled to a stock dividend or extraordinary cash dividend is a perplexing one. The stock dividend or extraordinary cash dividend may represent profits which were earned or accumulated before the life tenancy began. In that case it is clear that in justice the remainderman should receive it. If, however, it was earned after the life tenancy began, it is clear that the life tenant should have it. If it was earned partly before and partly after the life tenancy began, then it is apparent that in justice some apportionment should be made, if possible."

The troublesome question herewith presented has been considered by the courts in this and other states and countries in many and various forms from time to time since the decisions and opinions of the courts have been published. It has been said that no question before the courts has been more troublesome. Certainly none has resulted in greater contrariety of views. Decisions that are apparently contradictory either in the same court or in the courts of different states and countries have, however, been caused in part by different facts and circumstances existing in the cases decided and the effect necessarily given to the language of the will or instrument creating the trust in the particular cases in which the decisions have been rendered.

[1-3] In determining who is entitled to a dividend upon stock held in trust the intention of the testator or the maker of the trust must be carried out when such intention is clear, so far as such intent does not result in an unlawful accumulation of income. Very many cases arise, however, where the testator or maker of the trust had not considered the possibility of enormous dividends being declared by corporations to effectuate their reorganization, or in the division of accumulated profits made necessary by new statutes, changed circumstances, and modern rules and conditions, or, if such testator or maker of the trust had considered such possibility, he failed to express himself in the instrument creating the trust so as to show any clear intention regarding the same. See *Matter of Osborne*, 209 N. Y. 450, 103 N. E. 723, 823.

There seems to be, however, no doubt now as to the law in this state. The recent case in *Matter of Osborne*, supra, has fixed the rule in cases similar to the one under consideration. Judge Chase in writing the opinion in the *Osborne Case* lays down the following rule:

"It is manifest that any apportionment of a dividend is more or less troublesome in the practical handling of trust estates. It may be necessary in many cases to make the apportionment of dividends in an accounting by the trustee where all the parties interested are bound thereby. The dividends usually declared by corporations are the ordinary dividends such as are declared from year to year or other regular dividend periods. Extraordinary dividends are the exception. In all cases of ordinary dividends the courts uniformly hold that they should be paid to the life beneficiary of the trust in conformity with the general rule that dividends are deemed to have been earned as of the date of their declaration. In cases of extraordinary and unusual dividends, declared in whole or in part from earnings actually accumulated prior to the creation of the trust or the purchase of the stock, an adherence to the rule that dividends are deemed to have been earned as of the date of their declaration in many cases shocks the sense of justice.

"Notwithstanding the difficulty in many cases of apportioning dividends, it is wiser and better to leave an apportionment to courts of equity, in preference to adhering to a rule that depends more upon its simplicity and con-

venience of enforcement than upon justice and right. The distinction between ordinary and extraordinary dividends is necessary to make a workable rule and at the same time preserve the integrity of the trust fund. The integrity of the trust fund and rights of the life beneficiary under the trust should each be considered, determined, and preserved by a court of equity. As far as the courts in this state have made statements to the contrary, it has been in opinions where such statements have been unnecessary to the determination of the case then under consideration, and such statements are disapproved. It should be held: (1) Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. (2) Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they intrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary"—

in accordance with the amount thereof accumulated before and after the creation of the trust or purchase of the stock.

[4] The dividend in this case is an extraordinary one composed wholly of stock, and should be apportioned between the life beneficiary and the remaindermen.

The portion of the earnings and profits accumulated prior to the creation of the trust should be awarded to the remaindermen, and the portion thereof which was accumulated and earned subsequently to the creation of the trust should be awarded to the life beneficiary or her successors in interest.

There is nothing in this case to show the source of the issue of the \$640,000 worth of treasury stock, and there is nothing to show whether or not the same was issued from the surplus earnings and profits of the Pullman Company. This being so, I am of the opinion, therefore, that the issue of said treasury stock should not be included in the distribution of the stock apportionable to the life tenant. The result would be that $\$40,000 / \$6,000,000$ of the 54 shares distributed or allotted should be deducted from the amount of the distribution to the said trustee, predicated upon surplus earnings and profits. The testimony shows that there were upward of \$20,000,000 of earnings and profits accumulated subsequently to the death of the testator, and that about \$6,000,000 of the earnings and profits were accumulated prior to the creation of the trust. The figures given above are only approximate and same may be corrected and adjusted upon the settlement of the findings and decree.

The method of apportioning the extraordinary stock dividend is explained in a motion made for that purpose in Matter of Osborne, 209 N. Y. 485, 103 N. E. 823, and is as follows:

"The intrinsic value of the trust investment is to be ascertained by dividing the capital and the surplus of the corporation existing at the time of the creation of the trust by the number of shares of the corporation then outstanding, which gives the value of each share, and that amount must be multiplied by the number of shares held in the trust. The value of the investment represented by the original shares after the dividend has been made is ascertained by exactly the same method. The difference between the two shows the impairment of the corpus of the trust. If the dividend is of money, the amount of that difference is to be retained by the trustee as capital, and

the remainder paid to the life beneficiary. If the dividend is in stock the amount of impairment in money must be divided by the intrinsic value of a share of the new stock, and the quotient gives the number of shares to be retained to make the impairment good—the remaining shares going to the life beneficiary. Market value, good will, and like considerations cannot be considered in apportioning a dividend.”

[5] The attorney for the accounting trustee urges rather strenuously that the life tenant by signing certain vouchers has estopped herself or her representatives from claiming any portion of the 54 shares of stock in question. The vouchers referred to and the question of estoppel in this case were before the Appellate Division in *Matter of Affleck*, 155 App. Div. 339, 140 N. Y. Supp. 345, an appeal having been taken from the decree of the former surrogate. That court held that the introduction in evidence of the vouchers signed by Mrs. Affleck did not estop her representatives from claiming the stock in question. As there is nothing further before the court upon the retrial of this case, I must be controlled by the decision of the Appellate Division. I, therefore, decide that the vouchers signed by Mrs. Affleck do not estop her representatives from claiming the 54 shares of stock in question. Submit findings and decree on notice.

Decreed accordingly.

IN re BASSETT'S WILL.

(Surrogate's Court, Lewis County. March 28, 1914.)

1. WILLS (§ 302*)—PROBATE—SUFFICIENCY OF EVIDENCE.

Evidence on the probate of a will held sufficient to show that testator told the witnesses that it was his will and asked them to sign as witnesses thereto, and that when the will was presented to them testator's subscription thereto was in plain sight.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 575, 581, 700-710; Dec. Dig. § 302.*]

2. WILLS (§ 303*)—PROBATE—SUFFICIENCY OF EVIDENCE.

If the circumstances surrounding the execution of a paper show that it was executed as a will, it may be probated against the testimony of the subscribing witnesses, or on the testimony of one contrary to that of the other.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 711-723; Dec. Dig. § 303.*]

3. WILLS (§ 119*)—EXECUTION—PUBLICATION AND ACKNOWLEDGMENT.

Where a testator produces a paper personally drawn and subscribed by him with the subscription in plain sight, declares to the witnesses that it is his will, and asks them to sign as witnesses, there is a sufficient publication of the will and acknowledgment of his subscription.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 305-313; Dec. Dig. § 119.*]

4. COURTS (§ 87*)—PRECEDENTS—AFFIRMANCE WITHOUT OPINION.

An affirmance of a judgment by the Court of Appeals without an opinion is not necessarily an approval of the opinion of the court below, but only of the point decided.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 306-310; Dec. Dig. § 87.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

Proceeding to prove the will of James F. Bassett, deceased. Will admitted to probate.

Edward J. Boshart, of Lowville, for proponent.
Frank Bowman, of Lowville, for contestant.

CARTER, S. The paper propounded for probate as the last will and testament of James F. Bassett, deceased, is written and subscribed by testator in his own handwriting on an ordinary blank form of will, and has a full attestation clause subscribed by two witnesses, viz., A. H. Linstruth and Jay E. Reed.

The only question to be determined is whether said paper was executed according to law.

[1] It appears from the testimony of the witness Reed: That he and the witness Linstruth went to the house where the testator resided, and, the two witnesses and testator being together alone in the same room in said house, that testator laid the will on a secretary or desk in such manner that the whole of the last page of the will, including the clause appointing an executor, date of will, signature of testator, and the attestation clause were all exposed to view, and testator then said:

"I made out a will thirteen or fourteen years ago in favor of my wife, but she has gone and I had to make out a new one and I want you two to sign as witnesses."

That said testator then pointed out to him (Reed) where to sign, and he signed his name under the attestation clause of the will. That at the time he signed his name he saw the signature of the testator at the end of the will. That he had seen the testator's writing and knew his signature, and that the signature, "James F. Bassett," at the end of the will, was the signature of said testator. That the will was not picked up. That the witness Linstruth signed the attestation clause. That before Linstruth signed he hesitated and asked testator whether the witnesses weren't supposed to know what was on the other side before they signed, and testator told him no, and then Linstruth signed the attestation clause of the will.

The witness Linstruth testified (referring to the occasion when the will was executed): That he, Reed, and testator were together. That testator handed him (Linstruth) the will. That he read the words, "I hereby appoint W. S. Goutremout executor," and no more. That while he held the paper in his hand he said to testator, "Hadn't we ought to know what was on the other side of the paper?" Testator replied, "No, I have looked it up and you don't need to know." That he signed the attestation clause. That the testator did not tell him it was his will. That testator did not ask him to sign as a witness. That he could not remember that any one asked him to sign. That he did not see testator's name subscribed to the will and did not know whether it was there. That when he held the instrument in his hand he understood it was a will. That the written part of the will is in the handwriting of testator, and the name, "James F. Bassett," at the end of the will, is the signature of the testator. That he never before wit-

nessed a will. That testator's wife died a short time before the execution of the will.

The words, "I hereby appoint W. S. Goutremout executor," which Linstruth says he read, are less than two inches above the signature, "James F. Bassett," at the end of the will, and said name is approximately three inches above where Linstruth signed his name to the attestation clause. There is no intimation by any one that the paper was folded at any time so as to prevent the witnesses seeing the whole of the last page of the will, and it could not have been so folded that Linstruth could read what he says he did, and signed where he signed, without being in a position to see testator's signature.

It would seem that the inquiry of Linstruth, "Hadn't we ought to know what is on the other side of the paper?" must have been made in response to some request of testator to sign the will. It is not likely that Linstruth made the above inquiry, hunted up the place to sign, and signed the will without any one telling him what the instrument was nor asking him to sign. The evidence of Linstruth is not reasonable nor probable; and I am satisfied that he has forgotten the transaction, that his statement does not correctly express what occurred at the time the will was executed, and that the signature of the testator was at that time subscribed to the will and could and must have been seen by the witnesses. It has been held if the witness could see then legally he did see. *Matter of Carl*, 38 Misc. Rep. 471, 474, 77 N. Y. Supp. 1036; and see *Matter of Laudy*, 161 N. Y. 429, 433, 55 N. E. 914, and *Matter of Stockwell*, 17 Misc. Rep. 108, 40 N. Y. Supp. 734.

After a careful consideration of all the evidence, I am convinced that the witness Reed gave a substantially correct statement of what occurred at the time the will was executed, and that the testator presented the will, which had been previously and personally drawn and subscribed by him to said two witnesses, with the subscription in plain sight of them, and in substance and effect told the witnesses that it was his will and asked them to sign as witnesses thereto, and that in obedience to this request they did sign the attestation clause to said will in his presence and in the presence of each other.

[2] If the circumstances surrounding the execution of a paper show that it was executed as a last will and testament, it may be admitted to probate against the testimony of all the subscribing witnesses, or on the testimony of one contrary to the testimony of the other. *Matter of Cottrell*, 95 N. Y. 329; *Trustees of Auburn Seminary v. Calhoun*, 25 N. Y. 422, 425, 426; *Matter of Marley*, 140 App. Div. 823, 125 N. Y. Supp. 886.

[3] Where a testator produces a paper personally drawn and subscribed by him, with the subscription in plain sight, and declares to the witnesses that it is his last will and testament and asks them to sign as witnesses, he does all that is required, and it is a sufficient publication of the will and acknowledgment of his subscription. *Baskin v. Baskin*, 36 N. Y. 416; *Matter of Laudy*, 161 N. Y. 429, 55 N. E. 914; *Matter of Marley*, 140 App. Div. 823, 826, 125 N. Y. Supp. 886; *Matter of Akers*, 74 App. Div. 461, 464, 77 N. Y. Supp. 643, affirmed on opinion below in 173 N. Y. 620, 66 N. E. 1103.

In Matter of Akers, supra, the court said:

"In the present case we have the fact that the subscription was actually made by the testator; that one of the witnesses saw and knew it; that the testator declared it to be his will; that he requested the witnesses to witness it as such. This * * * constituted a substantial compliance with the statute as to subscription, acknowledgment, and publication."

In Matter of Marley, supra, the evidence of one of the witnesses was rejected as untruthful.

"The other witness (Buchman) and the deceased had long been intimate friends. Some time before the attempted execution of the paper by the deceased, Buchman had made his will and had asked the deceased to subscribe it as a witness, which he did, and the occurrence was clearly remembered by both. After the deceased (Marley) had prepared and signed the paper in question, he presented it to Buchman and said: 'I would like you to sign this paper. This is the same kind of a paper that you asked me to sign for you.' The witness (Buchman) testified that he understood the deceased to ask him to sign his last will and testament as a subscribing witness, and that he did sign the paper directly under the attestation clause in testator's presence, and saw and recognized the testator's signature, with which he was perfectly familiar, at the time of so doing."

The court said:

"We are of the opinion that what took place was a sufficient publication, acknowledgment of signature, and request to sign as a witness to meet the requirements of the statute," and the will was admitted to probate.

In Matter of Levenston, 158 App. Div. 69, 142 N. Y. Supp. 829, the will was written by the testator, a layman, upon a sheet of letter paper. After writing the will and signing it, the testator called witness Maybee over to the desk where he had written it, and, showing him the instrument, asked him to sign it, saying it was his last will and testament. Maybee saw the signature of the testator thereon, and in testator's presence signed his name as a witness thereto. The same day testator requested the witness A'Hearn to sign the will as a witness, which he did in the testator's presence, after reading it over. Held, that the evidence above referred to was sufficient to establish the execution and the attestation of the will as required by law.

In Matter of Nussbaum, 144 N. Y. Supp. 443, the court said:

"Where a will is not signed by testator before an attesting witness, but it is produced by testator with testator's signature visible thereon, and testator then acknowledges to the witness that the instrument is testator's will, a distinct acknowledgment of the testator's signature is necessarily involved in the testator's acknowledgment of the will and the request to witness same."

And to the same effect, Matter of Holmberg, 83 Misc. Rep. 245, 145 N. Y. Supp. 846.

[4] Mitchell v. Mitchell, 16 Hun, 97, affirmed without opinion in 77 N. Y. 596, and Matter of Keffe, 155 App. Div. 575, 141 N. Y. Supp. 5, affirmed without opinion in 209 N. Y. 535, 102 N. E. 1104, relied upon by contestant, are not in point for the reason that in each of said cases when the testator presented the will to one of the witnesses it was so folded that the signature of the testator to the instrument could not be seen. True, the court in the Mitchell Case said:

"He (testator) never acknowledged or stated to either of them (witnesses) that the subscription which appears at the end of the paper was made by him. He did, it is true, declare that the whole instrument was his will. But that is not enough."

This was not necessary to the determination of the case, and, while this decision was affirmed in the Court of Appeals, it was without opinion. An affirmance without opinion does not necessarily mean approval of the opinion by the court below, but makes the Court of Appeals responsible only for the point decided (which in that case was that the will should not be admitted to probate). *Rogers v. Decker*, 131 N. Y. 490, 30 N. E. 571.

But if said *Mitchell v. Mitchell* be considered as holding that where a testator presents an instrument, previously written and subscribed by him, to the witnesses, with his subscription in plain sight, and declares the instrument to be his will, is not a sufficient acknowledgment of the subscription, then it (*Mitchell v. Mitchell*) is in direct conflict with *Baskin v. Baskin*, *Matter of Laudy*, *Matter of Akers*, *Matter of Marley*, *Matter of Levingston*, *Matter of Nussbaum*, and *Matter of Holmberg*, all of which are cited above.

I am satisfied that the will was executed as required by law, and a decree may be entered admitting same to probate.

In re EICHLER et al.

(Surrogates' Court, New York County. March, 1914.)

1. DIVORCE (§ 320*)—OPERATION AND EFFECT—RIGHT TO REMARRY.

A decree of divorce following 2 Rev. St. (1st Ed.) pt. 2, c. 8, tit. 1, § 49, prohibiting the marriage of a defendant divorced for adultery, prior to the complainant's death, prevented the remarriage of the same parties before the enactment in 1880 of Code Civ. Proc. § 1761 (Domestic Relations Law [Consol. Laws, c. 14] § 8), authorizing the remarriage of such parties, which indicated that the Legislature regarded such marriages as forbidden.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 818, 819, 844; Dec. Dig. § 320.*]

2. MARRIAGE (§ 40*)—PRESUMPTIONS—COHABITATION.

Cohabitation between persons divorced and without right to remarry is presumed to be illicit, and, being illicit in its inception, will be presumed to so continue unless a remarriage be shown by direct proof, or by circumstantial evidence which is strong, positive, and convincing.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 58-69, 79; Dec. Dig. § 40.*]

3. MARRIAGE (§ 50*)—COHABITATION OR REPUTATION—SUFFICIENCY OF EVIDENCE.

Mere circumstances of cohabitation or common reputation of marriage, etc., do not constitute a valid marriage, but are only evidence of a marriage contract.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-89; Dec. Dig. § 50.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. MARRIAGE (§ 50*)—COHABITATION—SUFFICIENCY OF EVIDENCE.

Where a woman divorced for adultery cohabited with her former husband while their marriage was prohibited, the continuance thereof after the removal of the prohibition was not sufficient to show a remarriage, though they held themselves out as husband and wife, and executed conveyances as such, especially in view of her subsequent marriage to one who boarded with them.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-80; Dec. Dig. § 50.*]

5. MARRIAGE (§ 50*)—SUFFICIENCY OF EVIDENCE—CHARACTER OF PARTIES.

In determining the existence of a marriage between persons cohabiting together, the character of the parties is of much importance; stronger evidence being required to establish a marriage circumstantially where the woman is of a loose and immoral character.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-80; Dec. Dig. § 50.*]

6. MARRIAGE (§ 50*)—SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE.

In establishing a marriage by circumstantial evidence, all the circumstances should be considered, and the decision should follow the line of the greatest probability.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-80; Dec. Dig. § 50.*]

7. CRIMINAL LAW (§ 325*)—EVIDENCE—CONFLICTING PRESUMPTIONS.

Where there are conflicting presumptions, one of which will impute a felony, and the other a crime of lesser degree, the presumption for the lesser offense will be followed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 729; Dec. Dig. § 325.*]

8. MARRIAGE (§ 40*)—EVIDENCE—CONFLICTING PRESUMPTIONS.

While in order to legitimize issue, or in the interest of order and decency, a marriage will, in a proper case, be presumed from cohabitation and reputation alone, where one party has married another, and would stand convicted of bigamy if a marriage were presumed, the presumption of innocence will prevail over the presumption of marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 58-60, 79; Dec. Dig. § 40.*]

9. MARRIAGE (§ 3*)—WHAT LAW GOVERNS.

The marriage in New Jersey of one prohibited from marrying in New York, because of having been divorced for adultery, will be recognized by the courts of New York; a marriage, valid where performed, being valid everywhere.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 3, 23; Dec. Dig. § 3.*]

Judicial settlement of the account of Auguste Eichler and Paul C. Schnitzler, as administrators of Clara Koschinsky, also known as Clara Koshinsky or Keutel, née Clara Weber, deceased. Law governing distribution of estate determined.

Paul C. Schnitzler and Harold W. Hastings, both of New York City, for sisters of decedent.

Carl L. Schurz, of New York City (W. B. Devoe, of New York City, of counsel), for Clara Schwarz, née Koschinsky.

FOWLER, S. This matter, for the distribution of the estate of Clara Koshinsky, or Keutel, comes before the surrogate upon the ju-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dicial settlement of the account of her administrators. It is submitted for decision upon an agreed statement of facts. It appears that Clara Weber was married in the city of Berlin, Germany, in the year 1868 to one Julius Keutel. Thereafter she and her husband came to this country, and they resided in the city of New York until the year 1873, when Julius Keutel obtained an absolute divorce from the deceased by decree of the Supreme Court of this state, made at the regular sessions held in and for the county of New York, by reason of the adultery of the now deceased woman. The judgment is dated June 27, 1873. Subsequently, and about the year 1874, the deceased and Julius Keutel, her former husband, as it appears, again lived together, in the same house in the city of New York, and were known as husband and wife, going under the name of Keutel continuously for a period of 18 years or thereabouts. It is conceded that during this period of 18 years in which they so lived together and cohabited in this city, they held themselves out as husband and wife. On December 3, 1893, the deceased, notwithstanding such intercourse, contracted a ceremonial marriage in Jersey City, New Jersey, with one Franz Koshinsky, who was at that time boarding with the deceased and the said Julius Keutel, as he had for a number of years prior thereto. At the time of this last ceremonial marriage of Clara Koschinsky or Keutel said Julius Keutel was still living, and no second judgment of divorce from him was obtained. Subsequently the deceased and the said Franz Koshinsky left this country and went to Germany, becoming residents of the city of Berlin, where they continued to reside as husband and wife until the death of said Clara, intestate, in Berlin, on December 16, 1910. The said Julius Keutel died in New York county on or about February 12, 1909, and Franz Koschinsky died in the city of Berlin, Germany, on January 12, 1912, intestate. The deceased woman left her surviving as next of kin three sisters, Augusta Eichler, Louise Westphal, and Marie Zschau.

[1] The sole question involved in this proceeding, the determination of which will control the method of distribution of the estate, presents for our consideration the validity of the alleged common-law or unceremonial marriage which it is claimed took place between the deceased, Clara Koshinsky, and Julius Keutel after their said divorce and the dissolution of their ceremonial marriage, such alleged unceremonial marriage being claimed to have taken place in the year 1874. The decree of divorce contained the usual provision, in effect, that Julius Keutel, the plaintiff in the action for divorce, was at liberty and had full power to marry again during the lifetime of Clara Keutel, the defendant, but that:

"The said defendant, Clara Keutel, shall not be and she is not at liberty to marry again until the plaintiff, Julius Keutel, shall be and is actually dead."

At the time of the inception of the alleged common-law marriage, the statute in force regarding the remarriage of divorced persons was section 49, pt. 2, c. 8, tit. 1, art. 3, Revised Statutes, which provided that:

"Whenever a marriage shall be dissolved, pursuant to the provisions of this article, the complainant may marry again during the lifetime of the defend-

ant, but no defendant convicted of adultery shall marry again until the death of the complainant."

It has never been directly decided by the courts of this state, except in one case in a court of first instance, whether or not the statute, or the prohibition contained in a decree of divorce pursuant to the statute, against remarrying applied only to marriages with a person other than the complainant, and did not prevent the remarriage of the parties to the action. Whether the innocent party who has the right to marry again may, under the circumstances, again enter into a new marriage relation with the same party against whom the divorce was obtained, and who by the decree was prohibited from marrying again, and such remarriage be legal and valid in this state, is the question now before me.

In *Colvin v. Colvin*, 2 Paige, 385, 22 Am. Dec. 644, where an application was made by a husband to vacate a decree of divorce obtained by him on the ground that he did not believe his wife to have been guilty of the adultery charged, the chancellor said, by way of dictum (which, of course, cannot be controlling authority, the question not being directly before the chancellor), that as long as the decree of divorce remained in force, the party prohibited from marrying again cannot marry even her former husband, and the chancellor said that if they cohabited without first applying to the court to have the decree of divorce vacated, the intercourse between them would be illicit and their issue illegitimate.

In *Moore v. Moore*, 8 Abb. N. C. 171, the court followed the dictum in *Colvin v. Colvin*, supra, and held that no exception was created by the statute in favor of the remarriage of the parties to the action. I say it with deference that I am of the opinion that this construction so placed upon the statute may be the correct one, as thought the Legislature, for in 1880, section 1761, C. C. P., was enacted, removing any statutory bar to the remarriage between the prior parties to a divorce. The amendment provided as follows:

"This section does not prevent the remarriage of the parties to the action."

Section 1761, C. C. P., is now embodied in section 8 of the Domestic Relations Law. It is apparent that this amendment assumed that the section of the Revised Statutes prohibited a remarriage between divorced persons, for the amendment must be assumed to have been enacted in contemplation of the terms of the original statute.

[2, 3] Thus it is that until the year 1880, when section 1761, C. C. P., was adopted (now section 8, Domestic Relations Law), permitting the remarriage of the parties to a divorce action, Clara Kosinsky and Julius Keutel could not have remarried in this state without first procuring the vacatur of the decree of divorce and the prohibition contained therein against remarriage. This they did not do. Being legally unable to remarry, their relationship and cohabitation, commencing in about the year 1874, is to be presumed illicit in its inception. A cohabitation, meretricious in its inception or origin, is presumed to continue such throughout its whole extent. (Clayton

v. Wardell, 4 N. Y. 230; Gall v. Gall, 114 N. Y. 109, 21 N. E. 106; Hynes v. McDermott, 91 N. Y. 451, 43 Am. Rep. 677), unless a change in the character of the relationship at some time during the cohabitation is affirmatively shown by direct proof or circumstantial evidence of the highest quality. When the evidence is circumstantial it must be very strong, positive, and convincing in order to establish that the meretricious relation has been changed by mutual consent to one lawful and matrimonial. Foster v. Hawley, 8 Hun, 68; Gall v. Gall, *supra*. Mere circumstances of cohabitation or common reputation of remarriage, etc., do not of themselves constitute a valid marriage; they are but presumptive evidence of a marriage contract. Clayton v. Wardell, 4 N. Y. 235; Hynes v. McDermott, *supra*.

[4-6] But it is argued that, even if the parties were prohibited from marrying prior to 1880, their living together after that year for upwards of 12 years raises a presumption of their remarriage after 1880, for in 1880, as already indicated, the ban against such remarriage had been removed by an amendment to the statute. Unfortunately for this contention, in Clayton v. Wardell, *supra*, the Court of Appeals has said that when the intercourse between parties was in its commencement meretricious, there is as much reason to presume that their subsequent connection continues of the same character, as there is to presume that a marriage had in fact taken place.

There is no fact submitted in the agreed statement of facts tending to show that there was ever any change of the illicit relationship denoted, and I would not be justified in assuming that a remarriage had taken place from mere cohabitation. A state of concubinage existing for a long period between two persons cannot be converted into a state of lawful matrimony without some evidence, circumstantial or otherwise, establishing an actual marriage between them. In cases of this kind the character of the parties to the alleged marriage is of much importance. Chamberlain v. Chamberlain, 71 N. Y. 423; Matter of Brush, 25 App. Div. 610, 49 N. Y. Supp. 803. It requires stronger evidence to establish a marriage circumstantially when the woman is shown to be of a loose and immoral character than it does in a case where the female is shown to be chaste, virtuous, and moral. The decedent was divorced on account of her adultery, and this is a matter of record in the Supreme Court. It is not harsh, therefore, to infer that she would be willing to cohabit again without the sanction of matrimony. I am of the opinion that no change of the illicit relationship is to be inferred in or after 1880. There is no evidence of a contract of marriage from or after that date. It is quite true that the decedent and Julius Keutel executed several conveyances and mortgages of real estate in which they styled themselves husband and wife. This, as is argued, is of considerable weight, but certainly it is not of great weight in this case. In establishing the validity of such a marriage as this, now claimed to be shown wholly by circumstantial evidence, *all* the circumstances ought to be considered by the court, and the decision should follow the line of the greatest probability. This is a rule of inference as well as of law. In the case of Clayton

v. Wardell, *supra*, it appeared that the parties had executed articles of separation in which they described themselves as husband and wife. Nevertheless, it was there held that this was insufficient to justify the inference of their marriage, because of other circumstances shown which detracted from that inference and overrode it.

[7, 8] Any mere presumption of the validity of a common-law marriage in this case after 1880 is affected by the fact that the decedent herself contracted a ceremonial marriage in New Jersey in 1893 with said Franz Koshinsky, who was a boarder in the home of Julius Keutel and Clara Koshinsky for several years previous to such marriage of Koshinsky with the decedent. Certainly Koshinsky must have had a somewhat intimate knowledge of the relationship existing between Mr. and Mrs. Keutel after their divorce. If one boarding in the home of the decedent for several years did not believe her to be a married woman, it cannot be said that her reputation as a woman then married to Keutel was general. If she was in fact in 1893 married to Julius Keutel, she committed a felony by marrying Koshinsky in 1893, and thus we have here a conflict of presumptions, or the presumption of the validity of the common-law marriage as against a presumption of innocence. As was said by the jurist Alciatus, "*Alia præsumptio aliam tollit.*" So in our law where there are conflicting presumptions and one will impute a felony and the other will impute a crime of lesser degree, the common law will presume for the lesser offense. *R. v. Twyning*, 2 B. & A. 386; and see cases cited, section 101, Jones on Ev. This is but a qualification of common justice.

It is quite true that in order to legitimize issue, or in the interest of order and decency, the court will, in a proper case, presume marriage from cohabitation and reputation alone, but in a case where to presume such marriage one party will necessarily stand convicted of bigamy, the presumption of innocence prevails over the presumption of marriage. *Foster v. Hawley*, 8 Hun, 68, and cases cited; Jones, Ev., § 101.

I am convinced, irrespective of presumptions, that the decedent's conduct and declarations rebut the idea that any marriage existed between Keutel and herself after their divorce. The decedent went out of this state to New Jersey to contract the ceremonial marriage with Koshinsky, and in the certificate of marriage, a copy of which is before me, she stated that she had been divorced, and that this was her second marriage. If she then believed she had been validly remarried to Keutel, she is chargeable with the knowledge that she could no more validly marry another man in the state of New Jersey than elsewhere. In the Matter of Smith, 74 Misc. Rep. 11, 133 N. Y. Supp. 730, the court said:

"A man and a woman may deceive their relatives, friends, and neighbors and the public generally into the belief that they are husband and wife, * * * and the force of declarations and conduct from which a marriage might be inferred is entirely destroyed by proof that the man and woman, in the privacy of their own hearts, did not consider that a marriage had been had."

[9] In view of all the facts and circumstances disclosed I am of the opinion that there was no valid marriage existing between Julius Keutel and the decedent after the entering of the judgment of their divorce in 1873. While the decedent was forbidden to marry again in this state, she could contract a marriage in New Jersey, which, if valid there, would be recognized by the courts of this state. *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189. Marriage valid under the laws of the state where it is performed is valid everywhere. I take it that there is no question concerning the validity of the New Jersey marriage to Koshinsky, provided the deceased woman was then not remarried to Keutel, and I hold that she was not.

The distribution of the estate should be made accordingly.

PEOPLE v. STEIN.

(Court of Special Sessions. New York County. March, 1913.)

GAMING (§ 68*)—OFFENSES—GAMES PROHIBITED—SLOT MACHINE.

A machine for dispensing gum, whereby the player in return for a penny inserted in the slot receives one cent's worth of gum and has a chance of receiving more gum or candy, depending on the channel in which the penny falls, is a gambling device which renders one who permits its operation in his place of business guilty of keeping a room to be used for gambling contrary to Penal Law (Consol. Laws, c. 40) § 973, and who permits a boy under 16 to operate the machine guilty of permitting him to be in a situation likely to impair his morals under section 483.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 140-162, 164, 165; Dec. Dig. § 68.*]

Information against Benjamin Stein for permitting a boy under 16 to be in a place likely to impair his morals and for keeping a room used for gambling. Defendant found guilty.

Charles S. Whitman, Dist. Atty., and Floyd H. Wilmot, Asst. Dist. Atty., both of New York City, for the People.

Nathan Folk, of New York City, for defendant.

DEUEL, J. The defendant was tried on an information containing two counts, one for permitting a boy under 16 years of age to be placed in a situation likely to impair his morals (section 483, P. L.) and the other for keeping a room to be used for gambling (section 973, P. L.). As a retail vendor of candy, stationery, and cigars, he permitted the installation, in his business premises, of a contrivance for dispensing gum by chance. It can scarcely be called a slot machine, because there is no machinery to be set in motion. A penny inserted in a convenient slot or opening falls by gravity and is guided by channels marked off by metal pegs into one of several receiving places designated, respectively, "G," "5," "10," "15." If it falls into "G," the player

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gets one package of gum, into "5" five, into "10" ten, into "15" fifteen cents worth of gum. Assuming each package of gum to be worth one cent, the device held out as an inducement to every one, child or adult, the possibility of getting 5, 10, or 15 cents worth of gum for each cent dropped through the slot.

Another case (*People v. Nahmias*, 146 N. Y. Supp. 856) came up for trial almost coincidentally with this case. Nahmias was similarly charged in two counts with impairing morals and keeping a room for gambling, by maintaining in his store an actual slot machine, which, being set in motion by dropping a cent in the slot, delivered a package of gum to the player, but it was represented that some of the packages contained a coupon which, depending on its number, entitled the player, in addition to the gum, to from one to ten cents worth of chocolate candy. In all legal essentials the facts are the same, and a determination in either case must be controlling in the other.

Slot machine devices like those in question come into competition with the ordinary automatic vending machines, which are a great convenience to many people, and differ from them in that into the latter mechanical genius has inserted various complicated devices which promise the purchasing operator, not only a definite return for the coin needed to set the machinery in operation, but an alluring opportunity to get some multiple thereof, 5, 10, and 15 in the Stein case, and not exceeding 10 in the Nahmias case. And these multiple recurrences, sometimes if not always, are within the control of the party interested in the profits, as shown in the Yale Wonder Clock, to which reference will later be made.

Even if the present contrivance were not subject to like manipulation, ordinary intelligence should convince any player that the ingenuity of the inventor was equal to the problem of insuring a profit to the machine during a given series of plays. This, however, would have slight weight with boys and girls, for whose patronage the devices now in question were specially constructed, for the tempting character of the bait with which each was set, the possibility of getting 10 or 15 times the amount hazarded, would entrap every penny an average boy possessed. The inducing cause to operate either device is not to get a penny's worth of gum for present enjoyment, but the chance of getting 10 or 15 times as much as the price of the play.

This seemingly stamps the operation as "gambling" under the reasoning of the Court of Appeals in *Lyman v. Kurtz*, 166 N. Y. 274, 59 N. E. 903, and would do so fully but for differences in the respective slot machines. In that case the player stood to lose the amount hazarded if he did not win one of the money prizes offered. Here he gets a package of gum with every play. The court said (166 N. Y. 279, 59 N. E. 905):

"The evidence shows the machine to be a contrivance, or apparatus, by which it is determined who, as between the player and the proprietor, is the winner, or loser, of the money hazarded. The player stakes, or hazards, his money on a chance, and that is sufficient to make out the gambling. Within the general understanding, such a machine is a gambling device."

This reasoning, however, did not suffice in *Cullinan v. Hosmer*, 100 App. Div. 148, 91 N. Y. Supp. 607, to forfeit a liquor tax certificate

for having a slot machine on licensed premises which, being operated by deposit of a nickel, gave out one five-cent cigar and possibly three, because the operators "could not lose anything and might * * * gain two cigars. There was absent any element of chance and resulting loss so far as he was concerned." This was in 1905, and one Justice dissented.

The following year that court, in the case of *Matter of Cullinan*, 114 App. Div. 654, 99 N. Y. Supp. 1097, reversed itself, largely on the ruling of the Court of Appeals in *People v. Lavin*, 179 N. Y. 164, 71 N. E. 753, 66 L. R. A. 601, 1 Ann. Cas. 165. Besides the dissenting justice, there were two others who had participated in the *Hosmer* decision. The *Peck* Case was another application to revoke a liquor tax certificate for having a slot machine on licensed premises, the *Yale Wonder Clock*, to which reference previously has been made, and was described by the court as follows:

"This machine * * * contained * * * four tubes in which tickets were placed to be rung up upon putting a nickel in the slot on the side of the machine. The tickets were placed in the tubes by the proprietor, and every time the machine was operated a metal disc or ticket was discharged. On the face of the machine arranged horizontally were four glass discs colored white, blue, green, and red, respectively, and whenever the metal ticket or disc was ejected from the machine one of the glass discs was illuminated. The white entitled the player to 5 cents in trade, the blue 10 cents, the green 15 cents, and the red 25 cents. The discs were inscribed correspondingly, 'Good for five cents in trade,' and so on."

In all essentials this machine corresponds to the one now in question and in like respects differs from the one involved in the case of *Lyman v. Kurtz*. In reversing its former position and in determining that the presence of this machine on licensed premises was sufficient justification for a forfeiture of the liquor tax certificate, the court was unanimous. As reasons for its decision and as a judicial guide for ascertaining the obnoxious character of all similar devices, Mr. Justice Spring said:

"The chief element of gambling is the chance of uncertainty of the hazard. The chance may be in winning at all, or in the amount to be won or lost. In using the present machine, we may assume the player cannot lose. By far the greater majority of the checks called in trade for the precise sum deposited in the slot. If every ticket represented five cents, the machine would not be patronized. The bait or inducement is that the player may get one of the checks for a sum in excess of the nickel he ventures, and that is the vice of the scheme. If he wins more than he pays, the proprietor must lose on that discharge of the ticket. To constitute gambling it is not important who may be the loser."

The most recently reported decision on the subject is *People ex rel. v. Jenkins*, 153 App. Div. 512, 138 N. Y. Supp. 449.

This slot machine was located in a cigar store. For the first nickel the machine indicated the precise results that would follow—a package of gum and a specified number of trade checks to be liquidated in the store. These were delivered to the player, and then the machine indicated that the next play would produce a package of gum with or without trade checks, which presented an uncertain option and "has in it such an element of chance as constitutes gambling. * * *"

In fact, this element of chance only gives the machine its value, and that its use is within the direct prohibition of the Penal Law, § 973, seems clear.

In the light of the foregoing decisions, which are controlling, all doubt, if such at any time existed in the mind of the court as to the legal character of the vending device which the defendant permitted to be installed in his store for the indiscriminate use of adults and children, must disappear, and the contrivance itself must be declared to be a gambling device.

The questions presented have been argued ably and instructively by respective counsel in the briefs submitted. Aside from being a menace to the morals of childhood, the presence in the city of slot machines possessing similar characteristics endanger large capital invested in legitimate business and are stimulative of both civil and criminal prosecutions. The justices of this court, by the prosecutions instituted, are in a position to know that such devices are on the increase. Some are specially adapted to childhood, and the favorite location for them is in a candy store near a public school. Others are constructed so as to appeal to adults, and chiefly are to be found in cigar and liquor stores. Some are cheaply made and of simple construction, like the exhibit in this case, and others are of elaborate outside encasement and intricate internal construction. To the ordinary unthinking business man they appear as an innocent or harmless novelty that may amuse customers and stimulate trade; hence they can be easily placed by owners who share in the profits.

Section 970 of the Penal Law makes ownership, agency, or superintendency of "a place, or of any device, or apparatus, for gambling" a felony; section 973 declares that "any corporation * * * or individual, who keeps a room * * * or any part thereof" for gambling is guilty of a misdemeanor. In addition to the criminal penalty, the Liquor Tax Law declares a forfeiture of the tax certificate, ipso facto, upon conviction for having such a gambling device on licensed premises, and independent thereof permits a forfeiture of the certificate through a civil proceeding. These facts and circumstances seemingly present a condition that may be dealt with more advantageously to the public by a formal discussion than by a perfunctory decision.

All the motions of counsel should be denied, and the defendant should be found guilty. All concur.

PEOPLE v. NAHMIAS.

(Court of Special Sessions, New York County. March, 1918.)

Information against Abraham Nahmias for permitting a boy under 16 to be in a place likely to impair his morals and for keeping a room used for gambling. Defendant found guilty.

Charles S. Whitman, Dist. Atty., and Floyd H. Wilmot, Asst. Dist. Atty., both of New York City, for the People.

Frank Wolfson, for defendant.

PER CURIAM. There are no legal questions presented by this case differing from those discussed and decided in the case against Stein, 146 N. Y. Supp. 852. The slot devices differ in construction, but not in practical results. In this case the child gets a package of gum for each penny used, but certain packages contained numbered coupons which entitled the player to chocolate candy ranging in value from one to ten cents; stated in the vernacular of the gambling fraternity, the player bets one cent that he will get, not only one piece of gum, but from one to ten cents worth of candy; the proprietor takes the opposite side, and the apparatus determines which is the winner. Under the ruling in the case against Stein, this slot machine is a gambling device, its use forbidden by the Penal Law (Consol. Laws, c. 40), and permitting its use by children under 16 years of age contravenes the inhibitions of section 483 thereof.

The motions of counsel are denied, and the defendant is found guilty.

PEOPLE v. DR. KELLY MEDICAL CO.

(Court of Special Sessions of City of New York. April 24, 1913.)

INDICTMENT AND INFORMATION (§ 121*)—REQUISITES—BILL OF PARTICULARS.

Penal Law (Consol. Laws, c. 40) § 421, makes it a misdemeanor to knowingly advertise any statement as to the quality, value, method of production, etc., of merchandise intended to present an offer advantageous to the purchaser which is untrue or calculated to mislead. An information thereunder set forth an advertisement of a discovery by defendant commercially known as a "Form Developer," concluding with a physician's testimonial that it was "a valuable formula for the purpose intended, * * * a scientific combination of remedies that will enrich the blood, * * * is absolutely harmless, * * * is admittedly designed to build up the general health as well as increase the development," and averred "which said statement of facts" was calculated and intended to mislead the purchaser into believing that the offer was advantageous, in that he would acquire a scientific combination of remedies beneficial and harmless, although it was not a harmless product. *Held*, that the averment liberally construed raised the questions whether the developer was a scientific combination of beneficial remedies and whether it was harmless, either or both of which the district attorney might elect to prove; but that, in view of defendant's knowledge of its ingredients, he was not entitled to a bill of particulars on the ground that a plea of not guilty did not present issues sufficiently definite to enable him to prepare for trial or to avoid unreasonable surprises.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316-320; Dec. Dig. § 121.*]

Information by the People against the Dr. Kelly Medical Company. Motion by defendant for a bill of particulars. Motion denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Charles S. Whitman, Dist. Atty., and Floyd H. Wilmot and Frederick Sullivan, Asst. Dist. Attys., all of New York City, for the People.

Whiteside & Stryker, of New York City, for defendant.

DEUEL, J. The defendant moves for a bill of particulars on the ground that a plea of not guilty to the information does not frame issues sufficiently definite to enable counsel to prepare for trial, or thereat to avoid unreasonable surprises.

The prosecution is under section 421 of the Penal Law, the subhead of which is "untrue and misleading advertisements."

The information sets forth the entire advertisement—a sixteen-page pamphlet—of a discovery by Dr. Kelly during a period of "specialized study" in quest of a specific for physical imperfections in herself wherein she claims to have succeeded. She also states that the remedy has proven equally efficacious with female patients similarly afflicted. It is a medicine to be taken internally, and it has been given the commercial name of "Form Developer."

The law in question denounces as a misdemeanor the act of any person, firm, corporation, or association, who, by any means of advertising, "knowingly makes or disseminates any statement or assertion of fact concerning the quantity, the quality, the value, the method of production, or manufacture, or the reason for the price of his or their merchandise * * * intended to give the appearance of an offer advantageous to the purchaser which is untrue or calculated to mislead." Section 421, P. L.

The advertisement concludes with a professional testimonial by a physician, who declares it to be "a valuable formula for the purpose intended, * * * a scientific combination of remedies that will enrich the blood, * * * is absolutely harmless, * * * is admittedly designed to build up the general health as well as increase the development." These representations are negated in the information by its concluding averment, as follows:

"Which said statement of fact was calculated and intended to mislead the purchaser into believing that said offer was an offer advantageous to the purchaser, in that by means of a purchase of the said product such purchaser would acquire a scientific combination of remedies beneficial in the manner aforesaid, and harmless. Although the said Dr. Kelly's Form Developer was not a harmless product, as the said defendant then well knew."

In deciding the motion, the first step is to determine what specific question is presented by a plea of not guilty. And this depends upon whether the district attorney's pleading is construed strictly or liberally. If the former, the sole question is: Is the advertised developer absolutely harmless? This, seemingly, is the view of defendant's counsel, who insisted that the people should be required to designate wherein or whereby the product is harmful, and on the oral argument the court was inclined to take his view.

Liberally construed, the district attorney's "which said statement of

fact" is resolvable into two representations, at least: (1) Is the "Developer" a scientific combination of remedies beneficial in the manner claimed for it? (2) Is it harmless?

It may not be a scientific combination of remedies, but a compound of harmless ingredients incapable of producing any noticeable effect on the human system, and therefore a fraud, beyond which the district attorney, doubtless, would not proceed. On the other hand, it may be a scientific combination of remedies, but publicly prudent only when administered on the advice and sanction of a skilled physician; a probable menace to health when used indiscriminately. "Harmless" means incapable of doing harm. Thus these are two possible issues of fact, and the burden is on the people to prove either or both as the district attorney may select.

Under all the circumstances, it is difficult to see how the defendant can be embarrassed in preparing for trial or, at it, be subjected to any unreasonable surprise. When it put the representations complained of before the world, thereon seductively appealing to credulity and giddiness and inviting indiscriminate use of its product, it must be assumed that it was fully prepared to maintain each and every "statement or assertion of fact * * * intended to give the appearance of an offer advantageous to the purchaser." Its officers then knew what medicative ingredients entered into the "combination," and the exact proportions of each. It is alleged to have been discovered by one physician while prosecuting a specialized study. It is certified to contain all the virtues claimed for it by another physician, who must have been minutely informed of each constituent part, or ascertained them by quantitative analysis, for he certifies it to be "a valuable formula for the purpose intended"; formula as used being "an expression by means of symbols and figures of the constituents of a compound."

The court must assume that, if there be a single vulnerable point in any of the representations made for the purpose of stimulating trade, no one can know it quite so well as the defendant. If there be more than one, the defendant must be likewise informed. It should be ready, upon any reasonable notice, to defend before the courts what it has so profusely and seductively placed before the world.

The court has approached the subject from two viewpoints—protection of the defendant from any technical disadvantage, and economy of judicial time in the matter of a needlessly protracted trial. At best it promises to be a battle between chemical and medical experts, and to narrow the issues down to the most reasonable and rational limit is a proper incentive. The law involved is comparatively new, and the application for a bill of particulars in a criminal action is somewhat novel. The omniverous editors of Cyc. were able to find but one successful application in this state. *People v. Bellows*, 2 N. Y. Cr. R. 12. Possibly one reason why citations are so few is that the question is addressed wholly to the discretion of the court, and is not appealable.

I find nothing before us to bring this case within the reasoning of Judge Brady in the case against Bellows. He said:

"The defendant should be advised of the accusation against him, with sufficient certainty to enable him to prepare for his defense. There is no good reason why such a requirement should not be enforced. Each person accused of crime should be given the benefit of every reasonable opportunity to prepare for his defense, and to prove his innocence."

The accusation in the present case is that the defendant publicly advertised its compound to be "a scientific combination of remedies and harmless"; the district attorney says it is not. This gives a reasonable opportunity to prepare for any attack on such public representation, and trial surprises are scarcely conceivable.

The defendant, reliant upon its publicly advertised representations, should welcome this prosecution as its most remunerative advertisement.

I am in favor of denying the motion. All concur.

(84 Misc. Rep. 96)

In re KORPOLINSKI.

GIANFRANCESCHI v. KORPOLINSKI.

(Niagara County Court. February, 1914.)

1. COURTS (§ 189*)—JUDGMENT OF MUNICIPAL COURT—SETTING ASIDE—JURISDICTION.

While the judgment of a City Court must under Code Civ. Proc. § 3017, be deemed a judgment of the County Court after being docketed therein, the latter court cannot set it aside.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 458; Dec. Dig. § 189.*]

2. EXECUTION (§ 360*)—SUPPLEMENTARY PROCEEDINGS—VALIDITY—VOID JUDGMENT.

Proceedings supplementary to execution under a void judgment are themselves void.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1093; Dec. Dig. § 360.*]

3. PARTIES (§ 67*)—DESIGNATION—PROCESS.

Where a judgment debtor whose given name was "Marylan" was named in the summons and complaint as "Mike," which name he gave to the judgment creditor and was the one by which he was generally known, the court acquired jurisdiction of his person.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 109; Dec. Dig. § 67.*]

4. COURTS (§ 189*)—MUNICIPAL COURT—JUDGMENT—VALIDITY—PARTIES—MISNUMBER.

Under Code Civ. Proc. § 721, providing that judgments of courts of record are not to be impaired by a mistake in the name of a party, a judgment granted in a City Court and docketed in County Court, being then deemed a judgment of the County Court, could not be impaired on account of a mistake in the name of the defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 458; Dec. Dig. § 189.*]

5. PARTIES (§ 66*)—DESIGNATION—DEFENDANT.

Where a debtor uses two given names, he may be sued by either.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 108, 110; Dec. Dig. § 66.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of the examination of Mike Korpolski, judgment debtor, in proceedings supplementary to execution, on application of Joseph Gianfranceschi, judgment creditor, under a judgment recovered in City Court by Joseph Gianfranceschi against Mike Korpolski. Motion to punish judgment debtor for contempt. Motion to dismiss denied, and motion to punish deferred.

Angelo F. Scalzo, of Niagara Falls, for judgment creditor.

Carl E. Tucker, of Niagara Falls, appearing specially for judgment debtor.

FISH, J. This is a motion to punish the judgment debtor for contempt on account of his failure to appear and be examined before a referee in supplementary proceedings on an adjourned day. On the return of the order to show cause herein, the judgment debtor appeared specially by his counsel, read his affidavit that his correct name was Maryian Korpolski, and moved to dismiss the proceedings because the judgment was against Mike Korpolski. The judgment upon which these proceedings are based was rendered in the City Court of Niagara Falls on the 4th day of November, 1912, and a transcript thereof was filed and the judgment docketed in the Niagara county clerk's office November 27, 1912. An execution thereon was thereafter duly issued, returned unsatisfied, and these proceedings instituted. The judgment debtor appeared on the return day of the order for his examination and was examined to some extent, whereupon the examination was, with his consent, duly adjourned; but he failed to appear on the adjourned day. The judgment creditor reads affidavits showing that the judgment debtor was known by the name of Mike Korpolski, that he was registered at a hospital by that name, was generally known by that name, and the party who served on the judgment debtor the order for his examination herein swears that when he served such order he asked the judgment debtor if his name was Mike Korpolski, to which the judgment debtor replied, "Yes, what is the matter now?" And the judgment creditor swears that the judgment debtor gave him the name of Mike Korpolski as his true name.

Section 723 of the Code of Civil Procedure provides as follows:

"The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding, * * * by correcting a mistake in the name of a party."

This section applies to all courts, including the City Court of Niagara Falls. Code Civ. Pro. §§ 1, 3347, subd. 6; Judiciary Law (Consol. Laws, c. 30) §§ 2, 3; Laws of 1904, c. 300, art. 10.

Section 721 of the Code of Civil Procedure provides as follows:

"Nor shall any judgment of a court of record be impaired or affected, by reason of either of the following imperfections, omissions, defects, matters, or things, in the process, pleadings or other proceedings: * * * (9) For a mistake in the name of a party or other person."

Section 722 of the Code provides that the omissions, etc., specified in section 721, not being against the right and justice of the matter,

and not altering the issue between the parties, or the trial, shall be supplied and the proceedings amended by the court wherein the judgment was rendered or by an appellate court.

[1] A transcript of this judgment having been filed and the judgment docketed in the Niagara county clerk's office, it is thenceforth deemed a judgment of this court and must be enforced accordingly. Code Civ. Pro. § 3017.

[2, 3] While the judgment in question is now to be deemed a judgment of this court, it has been distinctly held that this court cannot set the same aside. *Johnson v. Manning*, 75 App. Div. 285, 78 N. Y. Supp. 96. There is, however, ample provision, as above seen, for the amendment of the judgment and the proceedings upon which it is founded, provided a proper cause for the amendment is shown, and the question arises as to what court, whether this, or the City Court of Niagara Falls, has the power and is vested with the authority to grant the amendment; it is, however, unnecessary to determine whether this court can amend the judgment as these proceedings are founded on the judgment, and this court has unquestioned jurisdiction thereof, and it is only necessary to determine whether the judgment as it stands is void or valid. Of course, if it is void these proceedings necessarily fall. Prior to the decision of the Court of Appeals (*Stuyvesant v. Weil*, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562), it had been held in a number of cases that a mistake in the name of a party defendant was jurisdictional, and that neither the judgment nor the papers upon which it was founded could be amended unless the defendant appeared in the action; but in the *Stuyvesant Case* Chief Judge Parker referred to these various decisions stating that they had their foundations laid long before sections 721 and 723 of the Code came into existence "as marking features of a distinct legislative policy to stop the sacrifice of things of real substance upon the altar of mere technicality." And the court held that, where a party was named in the summons and complaint as "Emma J. Stockton" whose true name was "Mary J. Stockton," the mistake was not jurisdictional, and the papers could be amended to state the true name of the defendant, provided the court found that she was fairly apprised that she was the party the action was intended to affect; Judge Parker saying:

"It may happen, as in this case, that the defendant's name is not correctly stated in the summons, and in such case it is the duty of the court, when properly moved, to determine whether, notwithstanding the error, the defendant was fairly apprised whether he was the party the action was intended to affect, and, if the answer of the court be in the affirmative, its determination must be that the court acquired jurisdiction."

[4] I am satisfied that in this case the defendant was fairly apprised that he was the party to be sued; in fact, he does not make any claim to the contrary. He was generally known in the community under the name of Mike Korpolski and gave that as his true name to the judgment creditor. The City Court therefore acquired jurisdiction of his person, and the judgment is valid. The only difference between this case and the *Stuyvesant Case* is that the judgment in the latter case was rendered in a court of record; but section 723 of the Code, on

which the decision in the Stuyvesant Case was based, applies to all courts, and furthermore this judgment is now deemed a judgment of the County Court and judgments of courts of record are not to be affected or impaired on account of a mistake in the name of a party. Code Civ. Pro. § 721. The judgment debtor has neither been misled nor injured by the failure to use his true first name. He has indeed invited the use of the name "Mike" as his first name. He must have known that he was the party intended to be sued and against whom the judgment was rendered, because he appeared and submitted to examination in these proceedings. Justice does not lie between a scylla any charybdis of technicalities to be reached only by the most skillful navigators, and to permit any mistake or omission, not affecting the substantial rights of the judgment debtor, to destroy this judgment, would be in utter disregard of the beneficial purpose of the above-quoted provisions of the Code and against the modern conception of court procedure.

[5] Besides, the judgment debtor used two names, one of which was Mike, and he could be sued by either. *People ex rel. Aldhouse v. McCarthy*, 41 Misc. Rep. 430, 84 N. Y. Supp. 1062; *Simon v. Underwood*, 61 Misc. Rep. 390, 115 N. Y. Supp. 65.

The motion to dismiss the proceedings is denied, with ——— dollars costs, and the motion to punish the judgment debtor for contempt is held to February 18, 1914, at 10 a. m., at common council chambers in the city of Niagara Falls, to give the judgment debtor an opportunity to explain his failure to appear on the adjourned day.

Ordered accordingly.

(84 Misc. Rep. 101)

PEOPLE v. STANTON.

(Onelda County Court. February, 1914.)

CRIMINAL LAW (§ 173*)—MOTION TO DISMISS—GROUNDS—FORMER JEOPARDY—PLEA OF NOT GUILTY.

That defendant has pleaded not guilty to an indictment is not cause for dismissal under Const. art. 1, § 6, relative to former jeopardy, of a second indictment found against him for the same offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 289; Dec. Dig. § 173.*]

Thomas Stanton moves to dismiss an indictment found against him. Motion denied.

Lee & Dowling, of Utica, for the motion.

W. R. Lee, Asst. Dist. Atty., of Utica, opposed.

HAZARD, J. It is the contention of the defendant that, by reason of his plea of not guilty to a former indictment, he has been "put in jeopardy" thereunder; and that therefore this indictment must be set aside. He cites two cases claimed to support that theory. The first is *People v. Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630. The ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

act purport of that case is somewhat in doubt. The first headnote states that the decision is to the effect that in a case like this a grand jury has power pending the decision of a demurrer to an indictment found by it to find a second indictment against the same defendant, upon the same evidence, which second indictment will supersede the first indictment. The prevailing opinion as rendered by Judge McLaughlin, however, is *contra*, and is to the effect that:

"The grand jury had no jurisdiction to find the second indictment, and for that reason the motion to dismiss should have been granted." 71 App. Div. at page 124, 75 N. Y. Supp. at page 635.

Judge Laughlin seems to have concurred in the granting of a new trial, but he starts his concurring opinion with a statement that the "second indictment was regularly found and is valid"; in that respect apparently differing from Justice McLaughlin. Justice Patterson in a dissenting opinion holds that even the interposition of a demurrer does not prevent the finding of a second indictment. 71 App. Div. 137, 75 N. Y. Supp. 643. Even if, however, we may assume that the reasoning of Justice McLaughlin represents the majority decision in the case, it seems clear to me upon reflection that it is not, as claimed by the moving party here, an authority for the proposition which is here advanced. The case deals wholly with a demurrer, and is therefore to be differentiated from a plea of not guilty. The entire reasoning and argument of Justice McLaughlin is to that effect. He deals with the meaning, purport, and effect of chapters 3 and 4 of the Code of Criminal Procedure. This is made manifest by the reading of 71 App. Div. page 122, 75 N. Y. Supp. page 633, in which the effect of a motion to set aside an indictment, or of a demurrer, is considered at length. He says the sections comprising the second article named cover the entire subject of the practice where a defendant has been arrested under an indictment, "and has challenged its sufficiency by demurrer." He holds that:

"After the court has obtained the jurisdiction to determine this question, there is no provision in the law which permits the same or any future grand jury to deprive the court of the jurisdiction." And that "the defendant has obtained a vested right to the judgment of that tribunal, precisely as he would have if he had been put on trial upon a plea of not guilty."

It seems very clear to me that the Bissert Case, even assuming that the decision of Justice McLaughlin represents the law as decided by a majority of the court (which apparently is not the case), cannot either upon principle or as a precedent be extended to include a case like the one at bar, because, as previously stated, it only deals with cases arising under chapters 3 and 4 of the Code.

The other case cited in support of the motion is that of *People v. Rosenthal*, 197 N. Y. 394, 90 N. E. 991, 46 L. R. A. (N. S.) 31. There is nothing about that case which is authority in support of this motion, except possibly the language used on page 401 of 197 N. Y., page 994 of 90 N. E. (46 L. R. A. [N. S.] 31). The court said:

"No order to resubmit, however, was necessary, for the grand jury had jurisdiction to re-indict without one. The defendant was not put in jeopardy by

the first indictment, as he was not arraigned thereunder, nor did he demur or plead thereto."

The moving party here claims that the last sentence above quoted inferentially establishes as the dictum of the Court of Appeals that if the defendant had pleaded to the first indictment it would have amounted to his having been put in jeopardy thereunder. The decision is certainly not to that effect, nor do I think the language quoted can possibly be distorted to amount to an adjudication or even a statement by the Court of Appeals that a plea to an indictment amounts to putting a defendant in jeopardy thereunder.

I do not find any case which holds to that effect. By the so-called "Bill of Rights," section 6 of article 1 of the Constitution of the state of New York, it is provided that "no person shall be subject to be twice put in jeopardy for the same offense." The contention of the moving party here seems to amount to the proposition that a mere plea of not guilty to an indictment amounts to putting the defendant in jeopardy under it. I cannot agree with this contention. Cases have proceeded much further than a plea, and for some reason have not been completed, in which it has been held that the defendant was not "put in jeopardy." *People v. McCormack*, 68 Misc. Rep. 430, 433, 125 N. Y. Supp. 68; *People v. Smith*, 172 N. Y. 210, 64 N. E. 814; *Hartung v. People*, 26 N. Y. 167; *People v. Goodwin*, 18 Johns. 187, 9 Am. Dec. 203; *Canter v. People*, 1 Abb. Dec. 305; *People v. Cignarale*, 110 N. Y. 23, 17 N. E. 135.

The motion is therefore denied.

Motion denied.

GREENFIELD v. GREENFIELD.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

HUSBAND AND WIFE (§ 278*)—AGREEMENT FOR SEPARATION—VALIDITY.

An agreement in settlement of an action for separation, whereby the wife, in consideration of \$2,500 paid by her husband's mother, released him forever from all claims for support and any claims for alimony and counsel fees in any action theretofore or thereafter commenced, was not violative of Domestic Relations Law (Consol. Laws, c. 14) § 51, providing that a husband and wife cannot contract to relieve the husband from liability to support his wife, where it did not appear that the arrangement was not fair and adequate or that the release was procured by unfair means; and an order requiring the husband to pay alimony and counsel fees in a suit for separation thereafter commenced by the wife was unauthorized.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.*]

Appeal from Special Term, New York County.

Action for separation by Sarah A. Greenfield against George S. Greenfield. From an order granting motion for alimony and counsel fees, defendant appeals. Reversed, and motion denied.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

George M. Pinney, of New York City, for appellant.

George A. Hopkins, of New York City, for respondent.

DOWLING, J. Plaintiff and defendant were married in the city of New York, December 27, 1907. There is no issue of the marriage. On January 14, 1911, plaintiff commenced an action against defendant in the Supreme Court, New York County, for a separation on the ground of cruel and inhuman treatment of her by defendant, and conduct on his part rendering it unsafe and improper for her to live with him, and upon the further ground of his failure to support and provide for her. Defendant appeared and answered in that action. On March 30, 1911, a motion for alimony and counsel fee therein was denied. While it was pending, an agreement was reached under which plaintiff received the sum of \$2,500 from defendant's mother; he then being a patient in a sanitarium at Kingston, N. Y., suffering from the effects of his indulgence in drugs and other excesses. Plaintiff executed and delivered an instrument acknowledging the receipt of \$2,500 paid by defendant's mother, and in consideration thereof releasing and discharging her said husband from all claims and causes of action of every description, from every claim and right of dower, from every interest in her husband's personal estate, and further for the same consideration remising, releasing, and forever discharging her said husband "of and from any and all claim and right of support and maintenance by him during the rest of my life." The release recited that she had taken the advice of her attorney in the separation action then pending in relation to the execution of the release; that insurmountable differences had arisen and still existed between her husband and her-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 146 N.Y.S.—55

self, rendering it impossible for them to live together; and that he was utterly unable to make any provision for her support and was likely to continue in that condition indefinitely; as the result of which differences and inability to furnish support, the parties had not "lived together as husband and wife for more than a year last past." The plaintiff further agreed that the said sum was accepted and received by her "in full settlement of any claim for alimony and counsel fee in any action either for a divorce or for a separation heretofore begun or which I may hereafter bring against the said George Sidney Greenfield in any state of the United States or in any foreign country." After the execution of this release the separation action then pending was discontinued on consent.

The present action was commenced on May 23, 1913, and is for a separation, based on defendant's cruel and inhuman treatment and conduct on his part rendering it unsafe for her to live with him; the acts complained of all having occurred prior to the commencement of the former action, save an alleged refusal to converse with her in 1913. There are also allegations of his refusal to provide for and support plaintiff. The answer of the defendant sets up, among other things, the release before referred to. The present appeal is from an order granting alimony and counsel fees.

We are of opinion that the release executed by the plaintiff in 1911 is valid and binding, and constitutes a bar to any right on the part of plaintiff to demand or receive support from the defendant. It does not contravene the provision in section 51 (formerly 21) of the Domestic Relations Law that a husband and wife cannot contract to relieve the husband from his liability to support his wife. As was said by Judge Vann in *Winter v. Winter*, 191 N. Y. 462, 84 N. E. 382, 16 L. R. A. (N. S.) 710:

"The clause in question was not intended to change, but to preserve, the law as it previously existed and to prevent the broad powers committed to the wife by the fore part of the section to make any contract 'with any person, including her husband,' from opening the door so wide that she could release her husband from his liability without any adequate provision for her support being made by him. She does not relieve him of his obligation when she accepts his promise to perform it, and he does not forsake his duty when he agrees to discharge it to her satisfaction. She is the best judge of what she needs for her support, and the amount may be fixed and settled by an agreement made after actual separation without violating any principle of law or statute now in existence."

While in that case the agreement was to pay a stipulated sum weekly, the principle is the same, and the reasoning equally applies where the husband pays a gross sum which the wife, after having been duly advised, accepts in satisfaction of her claim for support, past and future, and where the parties have been actually living separate and apart for some time preceding the payment of the agreed sum. The validity of the payment of a fixed sum, instead of a weekly or monthly contribution, was recognized in *Dower v. Dower*, 36 Misc. Rep. 559, 73 N. Y. Supp. 1080. There is no proof that the arrangement made was not fair and adequate, nor is it sought to set aside the release for any reason. Upon the facts shown, the plaintiff has no right to alimony or

counsel fee from the defendant, and the motion therefore should have been denied.

The order appealed from will therefore be reversed, and the motion denied. All concur.

(160 App. Div. 859)

SHERMAN v. BROWN.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

1. BOUNDARIES (§ 14*)—DESCRIPTION IN DEED—LAND UNDER WATER.

Where a deed under which plaintiff claimed title described a division line in dispute as running along the westerly side of the pond and beginning at the southeast corner of the lot at a chestnut stump on the west side of the pond, thence up the said pond north $43\frac{1}{4}$ degrees, etc., which line ran along the westerly bank of the pond in places 30 feet or more from the water and in places nearer, plaintiff's record title did not extend to the thread of the pond.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 102-107; Dec. Dig. § 14.*]

2. BOUNDARIES (§ 48*)—POND—RIGHT OF OWNERSHIP—RECOGNITION.

Where part of the east line of plaintiff's land extended for a part of the distance along the bank of the upper portion of a pond some distance from the water, the acts of defendant's grantors, in extending the south line fence to and into the water to keep plaintiff's cattle off defendant's land to the south without being required to build the fence along the whole division line between plaintiff's land and the lands of defendant along the westerly bank of the pond, did not constitute recognition of plaintiff's ownership of the bank and shore of the pond opposite his land.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232-242; Dec. Dig. § 48.*]

Appeal from Trial Term, Columbia County.

Action by Frank Sherman against Ernest C. Brown. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, and WOODWARD, JJ.

Crandell & Graf, of Hudson, for appellant.

Charles E. Lydecker, of New York City, for respondent.

LYON, J. This action was brought to restrain defendant from trespassing upon land claimed by plaintiff to belong to him situated in the town of Copake, Columbia county; the plaintiff alleging that in June, 1912, the defendant entered upon plaintiff's lands and erected a fence which prevented plaintiff's cattle from obtaining water at Robinson Pond. The defense was that the fence erected by defendant was upon the division line between the properties of the plaintiff and defendant.

[1] The common source of title was John Swift Livingston, who in 1810 was the owner of a large tract of land through which ran Roeleff Jansen's Kill. This stream had been dammed where the road crossed it, and the water setting back upon the land known as the Unity Mill, or Griffin Farm, had created the pond. At the dam a saw and grist mill had been erected which is still being operated. In

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

October, 1810, Livingston caused his said lands to be surveyed by Augustus Treman and laid out into farms. The farm west of the northerly three-fourths of the pond was known as the "Marks Drom," and has for some years been owned by the plaintiff. The farm adjoining it on the south and east, which included the land covered by said pond, and a margin around the same, was known as the Unity Mill Farm, and has for some years been owned by the defendant. In 1821, John Swift Livingston mortgaged the Marks Drom, the Rachel Robinson Farm at the north end of the pond, and the Unity Mill Farm to one William Edgar, describing said farms by their metes and bounds in accordance with the Treman survey. In 1830, the Rachel Robinson Farm and Marks Drom were released from the lien of said mortgage by metes and bounds in accordance with the description contained in the mortgage, leaving the Unity Mill Farm still covered by the mortgage. In 1830, John Swift Livingston conveyed the Marks Drom to Rowland Sweet, who was the grandfather and the remote grantor of the plaintiff, describing the same by courses and distances in accordance with the Treman survey; the dividing line in dispute between the Marks Drom and the Unity Mill Farm running along the westerly side of Robinson Pond being described as "beginning at the southeast corner of said lot at a tall chestnut stump on the west side of the mill pond, thence up the said pond north forty-three and a quarter degrees, east two chains and ninety links, north nineteen degrees, east four chains and sixty links, north twenty-six degrees, four chains," etc., particularly stating the courses and distances of the division line between the lands now owned by the parties. Such line ran along the westerly bank of the pond in places 30 feet or more from the water and in places much nearer. In 1841, Rowland Sweet conveyed the Marks Drom to his son, Fyler D. Sweet, by metes and bounds practically identical with the conveyance to him so far as related to the division line between that farm and the Unity Mill Farm. In 1879, Fyler D. Sweet conveyed that farm to his daughter, Betsy Sherman, the mother of the plaintiff, by a general description of the lands bounding it easterly by the millpond, which description was followed in all subsequent conveyances of the Marks Drom. In 1833, John Swift Livingston conveyed to Isaiah and Isaac Griffin, who were the remote grantors of the defendant, the Unity Mill Farm, describing the division line between that farm and the Marks Drom as stated in the above-mentioned conveyance of that farm to Rowland Sweet. This description was followed as to this division line between the lands of the respective parties in deeds and mortgages until the year 1873, since which time the description has been general, describing the Unity Mill Farm as bounded by the lands of the adjoining owners. In 1909, the Unity Mill Farm was conveyed to the defendant by deed describing the westerly boundary as by lands of the plaintiff. It plainly seems to have been the intention of John Swift Livingston that the Unity Mill Farm should contain all the lands covered by the waters of the pond, including its banks, for the benefit of the mill and its privilege.

The evidence establishes that the fence erected by the defendant, of

which the plaintiff complains, was upon the line of the survey of 1810. It is the claim of the plaintiff that his land extends to the thread of the stream in the pond, and he bases such claim upon the general description in the deed to him and his predecessors in title, following Fyler D. Sweet, and upon adverse possession by inclosing and cultivating the land for fully 30 years. The court vacated the temporary injunction and denied the plaintiff the relief sought, and from the judgment entered thereon this appeal has been taken.

The trial justice found that a stone wall separated the land of the plaintiff on the south from the land of the defendant and is a division fence, which has existed for over 50 years, and that the easterly portion extends from the top of the hill into the water and has been kept and maintained by the owners of the Unity Mill Farm during all that time. Concededly, prior to June, 1912, no fence had ever been erected between the east line of the Marks Drom, as described in the survey of 1810, and the waters of the pond; but the same has remained open, and trees, brush, and vegetation have grown thereon, and the cattle on plaintiff's farm have pastured on some parts thereof, and watered at the pond. While some portions of said strip have been cultivated by the owners of the Marks Drom, the extent thereof, although probably not large, does not appear. At all times since the survey of 1810 the owner of the Unity Mill Farm has been in possession thereof, and the acts of the plaintiff and his predecessors in title have not been such as would give notice that they claimed to own the land.

[2] The act of the defendant's grantors in extending the fence on the south line of plaintiff's farm to and into the water was not a recognition of plaintiff's ownership of the bank and shores of the pond, but was for the purpose of keeping plaintiff's cattle off defendant's land without defendant being required to build a fence upon the whole division line between the lands of the plaintiff and defendant along the westerly bank of the pond.

The appellant complains of finding No. 16, to the effect that plaintiff waived the question of damages, and says the finding was not warranted. This is hardly the fact, as at the opening of the trial the counsel for the plaintiff stated, "Now the issue will be as to the title to this land and the right of Mr. Brown to build this fence," and later, "We concluded not to go over the question of damages, but to try the question of title." Also, the appellant claims that the court granted certain of plaintiff's requests to find, and thereby made findings inconsistent with those constituting the decision, referring to plaintiff's requests to find first, second, seventh, eighth, ninth, tenth, and eleventh. The inconsistency consists in applying the statements contained in requests to find 1 to 13, inclusive, to "the premises described in the complaint," stated in the first request to find. The complaint described plaintiff's premises as bounded east by the Robinson Millpond. Had these requests applied simply to the premises bounded east by the line of the Treman survey, or in terms by the lands of the defendant, as it was plainly intended by the trial justice that they should apply, each would have been entirely consistent with

the findings contained in the decision. The refusals to find plaintiff's requests 14 to 18 inclusive, 20, 24, 27, 35, and 36 are consistent with the decision and indicate that the trial justice intended that the requests to find 1 to 13 should apply to the land of plaintiff to the Treman line. The decision of the case by the trial court was right and should be affirmed, but with the statement that we disapprove of the findings of the trial court in response to plaintiff's requests to find No. 1 to 13, inclusive, so far as such findings may be held to apply to any lands east of the easterly line of the lands described in the said deed from John Swift Livingston to Rowland Sweet of date June 7, 1830, recorded in the office of the clerk of Columbia county in Book V of Deeds, p. 132. All concur.

(161 App. Div. 479)

UNITED STATES FIDELITY & GUARANTY CO. v. BOROUGH BANK OF BROOKLYN et al.

(Supreme Court, Appellate Division, Second Department. March 13, 1914.)

1. SUBROGATION (§ 33*)—PREFERENCE RIGHT OF STATE.

A subrogee of the state is entitled to assert the state's preference in the payment of a debt due it from an insolvent over other creditors without prior specific Mens.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 96-98; Dec. Dig. § 33.*]

2. COMMON LAW (§ 3*)—COMMON LAW OF NEUTRAL STATES.

There is no common law of the United States in the sense of a national customary law, distinct from the English common law as adopted by the several states each for itself, applied as its local law.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. §§ 4-8; Dec. Dig. § 3.*]

3. STATES (§ 110*)—PREFERENCE RIGHT OF STATE.

The state's common-law right of preference as a creditor is not so inherent or exclusive in the state as a sovereignty that it cannot be assigned.

[Ed. Note.—For other cases, see States, Cent. Dig. § 108; Dec. Dig. § 110.*]

4. SUBROGATION (§ 33*)—PREFERENCE RIGHT OF STATE.

Neither is it so inherent or exclusive that it cannot be a matter of subrogation.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 96-98; Dec. Dig. § 33.*]

5. INSOLVENCY (§ 118*)—PREFERENCE RIGHT AS CREDITOR—WAIVER.

A preference right as a creditor is not waived by filing a claim as a creditor and acceptance of a dividend thereon without complaint or protest.

[Ed. Note.—For other cases, see Insolvency, Cent. Dig. §§ 180, 186, 187, 190-192; Dec. Dig. § 118.*]

6. INSOLVENCY (§ 118*)—FILING CLAIM—"GENERAL CREDITOR."

Stating that a party filed a claim against an insolvent as "a general creditor" means merely that it filed its claim as a creditor, not that the claim affirmatively shows that it thus described itself or was thus denominated or thus described.

[Ed. Note.—For other cases, see Insolvency, Cent. Dig. §§ 180, 186, 187, 190-192; Dec. Dig. § 118.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3058, 3059.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. BANKS AND BANKING (§ 80*)—INSOLVENCY—CLAIM—CONSTRUCTION—“RIGHT, TITLE, AND INTEREST.”

An allegation in a claim against an insolvent bank that the claimant has by virtue of a demand become entitled to all the “right, title, and interest” of the people of the state to the money deposited therein, representing the canal funds of the state, indicated that it stood in the shoes of the state.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

8. WORDS AND PHRASES—“RIGHT.”

A “right” is said to be the legal consequence which attaches to certain facts; that which one person ought to have or receive from another, it being withheld from him, or not in his possession.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6220-6223; vol. 8, p. 7790.]

9. WORDS AND PHRASES—CONSTRUCTION—“RIGHT AND INTEREST.”

The words “right and interest” relate to the extent of the ownership of property, and an assignee using them undertakes to transfer whatever of value he owns or holds.

10. WORDS AND PHRASES—“RIGHTS.”

The word “rights” is generic, common; embracing whatever may be lawfully claimed.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6220-6223; vol. 8, p. 7790.]

Submission of controversy under Code Civ. Proc. §§ 1279-1281, by the United States Fidelity & Guaranty Company against the Borough Bank of Brooklyn and another. Judgment for plaintiff.

Submission of controversy pursuant to sections 1279-1281 of the Code of Civil Procedure. The parties agreed upon the following facts: The plaintiff was and still is a foreign corporation, duly authorized to transact business in the state of New York. The defendant Borough Bank of Brooklyn was and still is a domestic money corporation, being a banking corporation. George C. Van Tuyl, Jr., was, prior to the commencement of this action, duly appointed Superintendent of Banks of the State of New York, entered upon the discharge of his duties, and still continues in said office. On or about April 24, 1907, said Borough Bank of Brooklyn was duly designated as a depository for the receipt of canal funds pursuant to the provisions of law. On or about April 16, 1909, the United States Fidelity & Guaranty Company executed a bond to the state of New York for the proper security of funds deposited on account of the canal fund of the state of New York, and more particularly guaranteeing that said Borough Bank of Brooklyn would safely keep and well and faithfully account for and pay over all moneys which were then and should thereafter be on deposit in, or held by said bank, or that were due or should become due from said bank, or for which said bank in any way should become liable to the said state. On or about April 7, 1910, under the provisions of the Banking Law of the state of New York, the Superintendent of Banks of the State of New York took possession of the property and business of said defendant corporation, Borough Bank of Brooklyn, and has ever since retained such possession, and at the present time is engaged in the final liquidation of its affairs. On or about April 7, 1910, the state of New York had on deposit with the said Borough Bank \$51,814.79 belonging to the canal funds of the state of New York.

Thereafter, and on or about April 7, 1910, demand was duly made upon the United States Fidelity & Guaranty Company by the state of New York by reason of its said bond for the payment of the amount on deposit with the Borough Bank of Brooklyn at the time of the failure of said institution, to wit, the sum of \$50,000, with interest at the rate of 3 per cent. from July 1, 1909.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Thereafter and pursuant to said demand, and by reason of the execution of said bond, the plaintiff herein was compelled to and did on April 7, 1910, pay to the Treasurer of the State of New York the sum of \$51,814.79, representing the amount of the said deposit. Thereafter the state of New York duly executed and delivered to the United States Fidelity & Guaranty Company its assignment in writing wherein there was assigned to the plaintiff herein, by reason of the aforementioned payment, all and every claim, demand, and right of action which the people of the state of New York, or the Comptroller of the State of New York, or the Treasurer of the State of New York, or any of them, or the Commissioners of the Canal Fund, then had prior to said payment against the Borough Bank of Brooklyn, by reason of there being on deposit with said Borough Bank of Brooklyn the sum of \$51,814.79 belonging to said canal fund, and by reason of said Borough Bank of Brooklyn having failed to pay the same. The original of this assignment was duly filed with the Superintendent of Banks on April 20, 1910. On or about September 30, 1910, the Superintendent of Banks wrote to the attorney for the plaintiff herein that the assignment of the state moneys to the United States Fidelity & Guaranty Company had been placed on file in his office, and that the form of said assignment had been approved by the attorney for the Banking Department. The Superintendent of Banks in said communication requested the plaintiff herein to file with him a proof of claim.

Pursuant to such request, the plaintiff, on or about October 3, 1910, duly filed with the Special Deputy Superintendent of Banks in charge of the Borough Bank of Brooklyn a verified proof of claim, wherein it was alleged that the plaintiff herein had by virtue of the aforementioned payment become entitled to all the right, title, and interest of the people of the state of New York to the money deposited in said Borough Bank of Brooklyn representing the canal funds of the state of New York. On October 4, 1910, the Superintendent of Banks duly acknowledged receipt of said proof of claim, and thereafter, and on or about November 28, 1910, said Superintendent of Banks in further acknowledgment of said proof of claim set forth that the same had been duly approved as to form, and the amount verified. On or about October 2, 1911, plaintiff, without complaint or protest, received from the Deputy Superintendent of Banks in charge of said Borough Bank of Brooklyn a dividend of \$5,181.47, representing 10 per cent. of the aforementioned claim. At the time such dividend was received, a notice was attached thereto that read as follows:

"New York, N. Y., October 2, 1911.

"State of New York, Banking Department.

"The inclosed check represents a first dividend of 10% of your claim against the Borough Bank of Brooklyn.

"No receipt is necessary.

"Horace S. Andrews, Special Deputy Superintendent."

Thereafter and on or about January 30, 1913, the plaintiff wrote to the Superintendent of Banks as follows:

"On or about April 16th, 1909, the United States Fidelity and Guaranty Company executed a bond on behalf of the Borough Bank of Brooklyn, to the state of New York, conditioned as required by law for the proper security of funds deposited in said institution on account of the canal fund of the state of New York.

"On or about April 7th, 1910, the U. S. Fidelity and Guaranty Company, as surety, duly paid to the Treasurer of the State of New York the sum of \$51,814.79, which amount represented the sum on deposit in the Borough Bank of Brooklyn belonging to the canal fund of the state of New York at the time you took possession of said institution.

"At or about the date when such payment was made, the Treasurer of the State of New York, and the Comptroller of the State of New York duly assigned to the U. S. Fidelity and Guaranty Company all their right, title and interest of the state of New York to make claim or demand against the Borough Bank by reason of such deposit. The original of this assignment has already been filed with you, and a claim has been filed with you by reason of such payment having been made, and by reason of the U. S. Fidelity and Guar-

anty Company having become entitled to all the rights of the state of New York by virtue of such deposit.

"By reason of the aforesaid this company became entitled to every right, claim or demand of the people of the state of New York, or of the Commissioners of the Canal Fund against the Borough Bank of Brooklyn, which against the said Borough Bank they or anybody on their behalf had by virtue of such deposit.

"The claim so filed with you is, according to the law and the statutes of this state, entitled to a preference over the claims and demands of all other creditors of the said Borough Bank.

"We wish to call your attention to the foregoing in order that your action in regard to said claim may be governed accordingly.

"The United States Fidelity & Guaranty Company demands that you recognize its claim as a preferred claim, and that payment thereof be made out of the first available funds which come into your hands. Upon such recognition by you of such claim as a preferred claim, you may deduct the sum of \$5,181.14 heretofore paid."

No demand that the said claim should be a preferred claim had been made by the plaintiff before January 30, 1913, unless the filing of said assignment can be construed in law to constitute such a demand. After reciting the bond of the surety and payment of the debt, the assignment proceeds:

"Now therefore, in consideration of the said payment by the United States Fidelity & Guaranty Company of New York, N. Y., to the state of New York, as herein above stated, of the said sum of \$51,814.79, the receipt whereof is hereby duly acknowledged.

"We, Clark Williams, as Comptroller of the State of New York, and Thomas B. Dunn, as Treasurer of the State of New York, do hereby transfer, assign and set over to the said United States Fidelity & Guaranty Company, all and every claim, demand and right of action which the people of the state of New York, or we or either of us, or the Commissioners of the Canal Fund, has or had prior to said payment against the said Borough Bank of Brooklyn, arising out of said deposit of said moneys belonging to said fund with said bank and the failure of said bank to pay same."

Thereafter and on or about February 5, 1913, the said Superintendent of Banks notified the plaintiff herein in writing that he doubted the justice and validity of said claim for preference made by the plaintiff against the Borough Bank of Brooklyn, and that he therefore rejected the same. Prior to February 5, 1913, there had been no rejection by the said Superintendent of Banks of the claim of the plaintiff herein. No part of said claim of \$51,814.79 has been paid, except the sum of \$5,181.47, and there is now due and owing to the plaintiff herein the sum of \$46,633.32, with interest thereon from the 7th day of April, 1910. Liquidation of the said Borough Bank of Brooklyn by the Superintendent of Banks is still in progress, and the assets of the said Borough Bank of Brooklyn have not yet been distributed, and there are in the hands of the Superintendent of Banks assets applicable to the payment of claims amounting to more than the sum of \$45,000.

The controversy hereby submitted for decision is whether or not upon the foregoing facts the plaintiff is entitled to judgment declaring that it is entitled to the same priority against the assets which were of the Borough Bank of Brooklyn and which are now in the hands of the Superintendent of Banks which the state would have had, had the state attempted to collect said sum of \$51,814.79 which was paid as aforesaid by the plaintiff to the state under the circumstances hereinbefore stated. The plaintiff claims upon the foregoing facts that it is entitled to judgment establishing its right, both by reason of the assignment from the state and the law applicable to subrogation, that its claim have priority and is entitled to be allowed as a preferred claim and to be paid out of the assets in the hands of the defendant the Superintendent of Banks, before the payment of other and general claims. The defendants claim that the plaintiff is not entitled to priority and is entitled only to have its claim allowed as a general claim and to continue to receive dividends *pari passu* with the other general creditors.

Argued before JENKS, P. J., and BURR, THOMAS, STAPLETON, and PUTNAM, JJ.

H. Snowden Marshall, of New York City (James A. O'Gorman, Leonidas Dennis, and Isaac H. Levy, all of New York City, on the brief), for plaintiff.

Jeremiah T. Mahoney, of New York City (Warren C. Fielding, of New York City, on the brief), for defendants.

JENKS, P. J. [1] This submission presents the question whether the plaintiff as subrogee of the state is entitled to assert the preference of the state in payment of a debt due the state from an insolvent, over other depositors and creditors who have not prior specific liens. The preference of the state was determined in *Matter of Carnegie Trust Co.*, 206 N. Y. 390, 99 N. E. 1096, 46 L. R. A. (N. S.) 1260. The opinion in that case relieves me from discussion of that preference. I may note that this subject was examined also by many English judges in *Giles v. Grover*, 1 Clarke & Finn. 72. The equitable doctrine of subrogation contemplates full substitution. Thus in *Lidderdale v. Robinson*, 2 Brock. 159-168, Fed. Cas. No. 8,337, affirmed 12 Wheat. 594, 6 L. Ed. 740, Marshall, C. J., at circuit, says that the claim of the surety is clothed in equity with the legal garb with which the original contract is invested (cited and approved in *Pease v. Egan*, 131 N. Y. at page 272, 30 N. E. 102, and in *Hays v. Ward*, 4 Johns. Ch. 123, 8 Am. Dec. 554, Kent, C., says:

"It is equally a settled principle in the English chancery that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security, and to stand in the place of the creditor, and have his securities transferred to him, and to avail himself of those securities against the debtor. This right of the surety stands not upon contract, but upon the same principle of natural justice, upon which one surety is entitled to contribution from another."

See, too, *Townsend v. Whitney*, 75 N. Y. 425-432; *United States v. Ryder*, 110 U. S. 729-732, 4 Sup. Ct. 196, 28 L. Ed. 308; *Lumpkin v. Mills*, 4 Ga. at page 354; *Pomeroy's Equitable Remedies*, §§ 920, 924. I think that this right of preference should be afforded this subrogee, in conformity to this general rule, and not in derogation of that rule be withheld from it. This preference was inherent in the debt. The character of the debt is not affected by the circumstance that it must now be paid to the substitute of the state and not to the state itself. If the debt merely from this circumstance loses this attribute, then he who stands in the shoes of the state loses of the essence of the debt, and he who should in no way be affected by the fact to whom the debt is paid gains from the essence of the debt. There is no equity in such loss or in such gain. Practically adopting the question of *Johnson, J.*, in 12 Wheat., *supra*, I ask: What have the other creditors to complain of? See, too, *Lidderdale v. Robinson*, *supra*; *Mathews v. Aikin*, 1 N. Y. 595; *Lumpkin v. Mills*, *supra*; *Jackson v. Davis*, 15 App. D. C. 194-202. There are numerous decisions which recognize the application of this general principle. *King v. Bennett*, 1 Wightwick, 1; *Regina v. Salter*, 1 H. & N. 274; *Regina v. Robinson*, Id. 275; *Manisty v. Churchill*, 39 Ch. Div. 174; *United States v. Ryder*, *supra*; *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286; *Lidderdale v. Robinson*, *supra*; *Hayes v. Ward*, *supra*; *Sgobel v. Cappadonia*,

8 App. Div. 303, 40 N. Y. Supp. 946; *Hunter v. United States*, 5 Pet. 180, 8 L. Ed. 86; *Richeson v. Crawford*, 94 Ill. 165; *Stokes v. Little*, 65 Ill. App. 255; *Jackson v. Davis*, *supra*; *Lester v. Richardson*, 69 Ark. 198, 62 S. W. 62; *Robertson v. Trigg's Adm'r*, 32 Grat. (Va.) at page 86; *Turner v. Teague*, 73 Ala. 554; and *American Bonding Co. v. Reynolds* (D. C.) 203 Fed. 356—where practically the exact question in this case was decided.

I may note here that the defendant's effort to weaken the authority of *United States v. Ryder*, *supra*, by the statement that the court on page 734 of 110 U. S., page 196 of 4 Sup. Ct. (28 L. Ed. 308), limited the rule to certain specified cases, is met by pointing out that the court was not expressing a limitation but drawing the distinction between crown debtors in civil matters and in criminal bail; that the purview of the principle is as stated by the court on page 733 of 110 U. S., page 196 of 4 Sup. Ct. (28 L. Ed. 308); and that it seems to me that the subrogee in this case is within it.

[2] The contention that such right of the subrogee must rest upon statute, based upon the fact that there are such statutes in the procedure of the United States court, may be disposed of by reminder that:

"There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law." *Smith v. Alabama*, 124 U. S. at page 478, 8 Sup. Ct. 569, 31 L. Ed. 508, citing *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055.

[3, 4] The contention of the learned counsel for the defendant is that the state's common-law right of preference is so inherent and exclusive in the state as a sovereignty that it can be a matter neither of assignment nor of subrogation. But this contention mistakes, what Blackstone calls the "incidental," for the "direct prerogative of the king, as is apparent in the illustration given in Book 1, chapter 7, of the Commentaries (Cooley's [4th Ed.] top star paging 240), where it is said:

"Prerogatives are either direct or incidental. The direct are such positive substantial parts of the royal character and authority as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending ambassadors, of creating peers, and of making war or peace. But such prerogatives as are incidental bear always a relation to something else, distinct from the king's person; and are indeed only exceptions, in favour of the crown, to those general rules that are established for the rest of the community; such as, that no costs shall be recovered against the king; that the king can never be a joint tenant; and that his debt shall be preferred before a debt to any of his subjects. These, and an infinite number of other instances, will better be understood, when we come regularly to consider the rules themselves, to which these incidental prerogatives are exceptions. And therefore we will at present only dwell upon the king's substantive or direct prerogatives."

See, also, Holdsworth's History of English Law, vol. 3, pp. 350, 351.

[5] It is also contended that the plaintiff waived any right of preference by filing a claim as a general creditor and by acceptance of a dividend on said claim without complaint or protest. We have to deal with an implied waiver; that is, the defendants must establish (Gib-

son El. Co. v. Liverpool & L. & G. Ins. Co., 159 N. Y. at page 426, 54 N. E. 23) that such circumstances justify the inference of an intention to waive, or that from them a waiver followed as a legal result (Titus v. Glens Falls Ins. Co., 81 N. Y. 410-419; Kiernan v. Dutchess Co. Mut. Ins. Co., 150 N. Y. 190, 195, 44 N. E. 698). It appears that, after the plaintiff had filed with the State Superintendent of Banks an assignment to it of all and every claim, demand, and right of action which the people of the state, Comptroller, State Treasurer, or the Commissioners of the Canal Fund then had prior to the payment against the Borough Bank by reason of the deposit, the Deputy Superintendent of Banks in charge of the liquidation of said bank requested the plaintiff to file a proof of claim "on the regular forms which had been drawn up" by the departmental attorneys and which theretofore had been forwarded to the plaintiff, and that on October 3, 1910, the plaintiff did as it was asked.

[8] The learned counsel says that the plaintiff filed its claim as "a general creditor." By this expression he can but mean that it filed its claim as a creditor, not that the claim affirmatively shows that the plaintiff thus described itself or was thus denominated or thus described. Thus the plaintiff, upon invitation of the defendant, took a prescribed step towards the collection of its debt. Inherently that debt was entitled to preference in payment out of the fund. But the plaintiff was neither specifically required nor invited to assert the preference at that time, and its omission to do so in specific terms was not to my mind so inconsistent with a subsequent assertion of preference as to say that it was "clearly to be inferred" (Kiernan v. Dutchess Mut. Ins. Co., *supra*) that it waived such right.

[7] Moreover, the plaintiff alleged in the claim:

"That the plaintiff herein had by virtue of the aforementioned payment become entitled to all the right, title, and interest of the people of the state of New York to the money deposited in said Borough Bank of Brooklyn representing the canal funds of the state of New York."

So far, at least, as the question of intention is concerned, I think that the plaintiff thus indicated that it stood in the shoes of the state.

[8, 9] A right is said to be "the legal consequence which attaches to certain facts" (O. W. Holmes, Jr., *The Common Law*, 214, quoted in *White v. County*, 13 Or. 317, 10 Pac. 486, 57 Am. Rep. 20). The words "right and interest" relate to the extent of the ownership of property, and an assignee using them undertakes to transfer whatever of value he owned or held in the judgment assigned. *Scofield v. Moore*, 31 Iowa, at page 245. In *Black's Law Dictionary* it is said:

"That which one person ought to have or receive from another, it being withheld from him, or not in his possession. In this sense 'right' has the force of 'claim,' and is properly expressed by the Latin 'jus.'"

[10] The word "rights" is generic, common; embracing whatever may be lawfully claimed. *Lonas v. State*, 3 Heisk. (Tenn.) 306.

Not only did the plaintiff thus indicate its status, but that status also appeared both in the agreement of the defendant bank, filed with the claim, and in the assignment from the state to the plaintiff, theretofore filed with the Department of Banks.

The partial payment was made through a communication from the Special Deputy Superintendent of Banks, in which was inclosed a check representing a first dividend of 10 per cent., with the statement, "No receipt is necessary." I fail to find any clear intention of waiver of the right of preference inferable from the plaintiff's acceptance of the check "without complaint or protest." This was apparently a part payment from the fund, to which alone the plaintiff must look even with its right of preference. To accept a part payment of a claim out of a fund is, to my mind, not inconsistent with the subsequent assertion of a preference to payment out of that fund.

Nor do I perceive that from these two circumstances relied upon by the defendants a waiver of this right of preference followed as a legal result. It does not appear that the defendants were upon any reasonable belief misled by either of these circumstances to their detriment or disadvantage. As I have said, the preference was inherent in the debt itself; the very existence of the debt established its priority of payment out of the same fund. Therefore the plaintiff's omission, at the time it filed its claim, to assert specifically the preference, or the plaintiff's acceptance of the voluntary part payment without objection or protest, did not operate "as a trap to the other party," to use the words of Doe, J., in *Lyman v. Littleton*, 50 N. H. 42, 45. Decisions in point are *Hunt v. Smart*, 8 Tex. Civ. App. 425, 28 S. W. 63; *Re Ashland Steel Co.*, 168 Fed. 679, 94 C. C. A. 165; *In re Scott* (D. C.) 96 Fed. 607.

Since the writing of this opinion, my attention has been called to the decisions of this court in its first department in the cases of *United States Fidelity & Guaranty Co. v. Carnegie Trust Co.*, 146 N. Y. Supp. 801, and *United States Fidelity & Guaranty Co. v. Carnegie Trust Co. et al.*, 146 N. Y. Supp. 804. I now cite them in support of my conclusion upon the question of preference.

In fine, whatever the plaintiff did, either in filing its claim, in accepting the part payment, and in asserting its preference, were all consistent steps towards the collection of the debt out of this particular fund. There is, of course, no question but that the plaintiff did specifically assert its preference in formal fashion on January 13, 1910.

Finally, I think that the plaintiff is not entitled to interest. *People v. American Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200; *People v. Merchants' Trust Co.*, 116 App. Div. 41, 101 N. Y. Supp. 255.

There must be judgment for the plaintiff upon the submission in accord with this opinion. All concur.

(160 App. Div. 856)

PACKARD et al. v. NEW YORK, O. & W. RY. CO.

(Supreme Court, Appellate Division, Third Department. March 4, 1914.)

RAILROADS (§ 350*)—CROSSING ACCIDENTS—ACTIONS—QUESTIONS FOR JURY.

In an action for damages to an automobile which became stalled on a railroad crossing and was struck by a train, evidence held to make questions for the jury as to the negligence of the railroad company, and of the driver of the automobile.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. § 350.*]

Appeal from Trial Term, Chenango County.

Action by Joseph E. Packard and others against the New York, Ontario & Western Railway Company. From a judgment for plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, LYON, HOWARD, and WOODWARD, JJ.

Howard D. Newton, of Norwich, for appellant.

Hubert C. Stratton, of Norwich, for respondents.

LYON, J. The judgment from which this appeal has been taken was founded upon a verdict awarding damages for the practical destruction, by one of defendant's trains, of plaintiffs' automobile, which had become stalled on the East Main street crossing of defendant's railroad in the village of Norwich, N. Y., between 8 and 9 o'clock on the evening of July 6, 1912. East Main street ran east and west, crossing the defendant's three tracks at grade, and at right angles, and was one of the most traveled thoroughfares of the village. The issues involved were as to the negligence of the defendant, and the contributory negligence of the plaintiffs, and both were sharply contested upon the trial.

Upon the question of the negligence of the defendant, several witnesses testified on behalf of the plaintiffs that as plaintiffs' automobile approached and passed over the crossing it was traveling at the rate of eight or ten miles per hour, with its headlight burning; that the crossing gates were up, and there was no flagman upon the crossing; that the six occupants of the car were on the lookout both up and down the tracks for any signs of danger; that, although a long line of cars was standing north of the north sidewalk of the street, the rear car of which was a gondola loaded with coal, there was no light or brakeman upon the car; that no signal was given by whistle, bell, or otherwise indicating that the cars were about to be backed over the crossing; and that the automobile thereupon proceeded to cross the tracks and had crossed two of them, when it became stalled upon the third track and was struck by the backing gondola and shoved nearly three hundred feet down the track, and was practically ruined.

Upon the part of the defendant, several witnesses testified that near the southeast crossing gate was a sign with the letters two or three inches in height, giving notice that there was no flagman on duty at the crossing after 7:10 p. m.; that as plaintiffs' automobile was approach-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing, and while it was passing over the crossing, the conductor stood near the middle of the crossing waving his lantern as a warning both to the driver of a horse and wagon which had preceded the plaintiffs' car, and to the occupants of the automobile, of the danger of attempting to pass over the crossing; and that, after the automobile had become stalled, every effort was made to stop the cars; but that the downgrade and the weight of the train made it impossible.

Thus a clear issue of fact was presented for the determination of the jury as to the negligence of the defendant. Upon the question of contributory negligence, it appears from the testimony of plaintiffs' witnesses that, as plaintiffs' automobile reached the westerly track, a man suddenly stepped in front of the car and but a few feet distant therefrom, whereupon the driver, in order to meet the emergency, and in response to an outcry from one of the plaintiffs, who sat beside the driver, immediately applied the brakes with one foot, and taking the other foot from off the foot pedal or accelerator, by means of which alone gasoline was being supplied to the engine, placed his foot upon the clutch pedal, thereby disconnecting the engine from the transmission and stopping the car within two or three feet of the man, as one of the witnesses testified, but stalling the engine. The driver testified that prior to that time he had observed no indication that the train was about to be moved, but that then hearing the bumpers coming together he realized that the line of cars was being moved backwards. As his car was not supplied with a self-starter, he hurriedly changed the gears, and, turning the switch, ran to the front of the car, cranked the engine, returned to his seat in the car, and, although the engine was then in operation, the gondola had struck it so squarely that it could not be moved. It appears from the evidence that there were two methods of supplying the gasoline mixture to the engine, one by means of the hand throttle, located on the steering wheel, and the other by means of the foot throttle or accelerator, and that it was practical to use both methods in conjunction, and that, had both been in use upon this occasion, releasing the accelerator pedal would not have wholly cut off the supply of gasoline from the engine, and hence stalling the car would have been avoided, and that, as soon as the emergency had passed, the driver by releasing the brake and re-engaging the clutch could have moved the car from the track before the gondola reached it.

The defendant claims that, in view of this evidence, plaintiffs, as matter of law, were guilty of contributory negligence, and hence are precluded from a recovery herein. With this conclusion of defendant's counsel we cannot agree. The driver of the car who was apparently competent, having been licensed as required by law, and with 2½ years' experience in operating automobiles, was required, in practicing his occupation, to use the care of a reasonably prudent man, and we do not think it can be said that, under the circumstances, his failure to use both throttles in running his car constituted such negligence as matter of law as precluded recovery by the plaintiffs. The driver, in operating the car, had the right to rely upon the defendant exercising reasonable care, by giving necessary signals, to warn any person attempting to cross its tracks that the line of freight cars was

about to be backed down over the crossing. It can hardly be said that it was reasonably to be apprehended by a prudent man that the defendant would not exercise such degree of care in the conduct of its business as the law required, and that a necessity would arise for the immediate stoppage of his car upon the track. We think the question of contributory negligence was fairly one for determination by the jury. The questions as to the negligence of the defendant and the contributory negligence of plaintiffs were submitted in clear and impartial instructions by the trial court. There are no exceptions calling for a reversal of the judgment, and the damages awarded cannot be said to have been excessive.

We think, therefore, that the verdict of the jury should not be disturbed but that the judgment and order appealed from should be affirmed.

Judgment and order unanimously affirmed, with costs.

PEOPLE *ex rel.* SHENFIELD *v.* WALDO, Police Com'r.

(Supreme Court, Appellate Division, Second Department. April 3, 1914.)

MUNICIPAL CORPORATIONS (§ 185*)—POLICEMEN—REMOVAL—SUFFICIENCY OF CHARGE.

A specification of a charge of neglect of duty by a policeman, which alleged that, having been informed that certain property had been stolen or lost, and was now in the possession of another, he failed to take proper police action in the matter, does not show what constituted the neglect of duty, and is not sufficient to warrant a dismissal of the patrolman.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 492-509; Dec. Dig. § 185.*]

Certiorari by the People, on the relation of Leo Shenfield, against Rhinelander Waldo, as Police Commissioner of the City of New York, to review an order dismissing the relator from the police force. Order annulled, and relator reinstated.

Argued before JENKS, P. J., and BURR, CARR, RICH, and STAPLETON, JJ.

Jacob Rouss, of New York City, for relator.

James D. Bell, of Brooklyn (Frank Julian Price, of Brooklyn, on the brief), for respondent.

PER CURIAM. The relator, a patrolman in the police department of the city of New York, was dismissed from the uniformed force. The charge was "neglect of duty, conduct unbecoming an officer, and violation of the rules." There were three written specifications of these charges. After a hearing, the police commissioner determined that the relator was not guilty of the second and third specifications, but that he was guilty of the first, which reads:

"Said Patrolman Leo Shenfield, shield No. 1249, having been informed that the carcass of a hog, the property of Richard Webber, 120th street and Third avenue, had been lost or stolen from a wagon on the morning of September 6, 1912, on Central Park West, somewhere between Forty-Second street and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

North River and 120th street and Third avenue, and that the same was in the possession of one Herman Peters, No. 951 Columbus avenue, failed to take proper police action in the matter."

The commissioner determined, also, that the relator was guilty of the charge, except as to the words "conduct unbecoming an officer," which doubtless means he made a finding of neglect of duty and violation of the rules. No rule, of a violation of which there is any evidence, is returned in the record. The charge of neglect of duty remains as the sole basis of the order of dismissal. Of what constituted the neglect of duty we have not been advised, and we cannot conceive of any legal duty that the relator neglected to perform.

The determination should be annulled, with \$50 costs and disbursements, and the relator reinstated.

IN RE ZIEGLER.

(Supreme Court, Appellate Division, First Department. April 8, 1914.)

1. COURTS (§ 200½*)—JURISDICTION—SURROGATE'S COURT.

The Surrogate's Court is one of strictly limited statutory jurisdiction and has no general equity powers.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 476, 477; Dec. Dig. § 200½.*]

2. ADOPTION (§ 16*)—ABROGATION—COLLATERAL ATTACK.

Since proceedings for the abrogation of adoption are ministerial and not judicial in character, the surrogate's order of abrogation, if insufficient under the statute, may be attacked collaterally in any proceeding.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 27, 28; Dec. Dig. § 16.*]

3. ADOPTION (§ 16*)—ABROGATION—REVOCATION—JURISDICTION OF SURROGATE'S COURT.

The abrogation of an adoption by the surrogate can be revoked only by a judicial proceeding in a court of equity and not by a proceeding in the Surrogate's Court.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 27, 28; Dec. Dig. § 16.*]

Appeal from Surrogate's Court, New York County.

Petition by Florence Louise Ziegler, lately and usually known as Florence Louise Brandt, to set aside a certain proceeding for the abrogation of her adoption by William Ziegler and wife. From a decree (82 Misc. Rep. 346, 143 N. Y. Supp. 562) denying the application, petitioner appeals. Affirmed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Harry Mecartney, for appellant.

John M. Bowers, of New York City, for respondent.

SCOTT, J. The matters at issue and the questions of law involved are so fully and satisfactorily dealt with in the opinion of Mr. Surrogate Fowler (82 Misc. Rep. 346, 143 N. Y. Supp. 562), which we adopt, that any further discussion at the present time is unnecessary.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 146 N.Y.S.—56

[1-3] We entertain some doubt, however, whether the Surrogate's Court has jurisdiction to entertain the proceeding and to grant the relief desired. That court is one of strictly limited statutory jurisdiction and has no general equity powers. The proceedings, under the statute, for the abrogation of an act of adoption, consist of an agreement executed by the parties interested, and the consent of the surrogate. They are not judicial in their character, and the surrogate in giving his consent acts in his administrative and not in his judicial capacity; nor is the consent signed by him in any sense a decree or order of the Surrogate's Court. If the attempted act of abrogation is insufficient under the statute, it may be attacked even collaterally, in any proceeding, and, if for any reason it be deemed necessary that it be revoked in a judicial proceeding, only a court of equity would have jurisdiction so to revoke it.

For this reason as well as for those so well stated by Mr. Surrogate Fowler, the order appealed from must be affirmed, with costs. All concur.

PEOPLE v. RUBIN.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

APPEAL AND ERROR (§ 1170*)—AFFIDAVIT—HARMLESS ERROR.

Technical errors not affecting substantial rights will be disregarded on appeal under Code Cr. Proc. § 542.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.*]

Appeal from Trial Term, New York County.

Robert J. Rubin was convicted of arson in the second degree, and appeals. Affirmed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Robert H. Elder, of New York City, for appellant.

Robert S. Johnstone, of New York City, for the People.

DOWLING, J. A careful examination of the record herein convinces us of the defendant's guilt of the crime of which he was convicted, and that no other conclusion could properly have been arrived at by the jury. There was, in our opinion, sufficient corroboration of the testimony of the accomplice Stein by other evidence tending to connect the defendant with the commission of the crime, and satisfying the requirements of section 399, Code of Criminal Procedure. While we find some technical errors in the course of the trial presented for our consideration by exceptions properly taken, we do not believe that they affect the substantial rights of the defendant, and therefore we feel justified in disregarding them, pursuant to the provisions of section 542, Code of Criminal Procedure.

The judgment of conviction will therefore be affirmed. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

VILLANO v. NEW YORK TIMES CO.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

APPEAL AND ERROR (§ 1177*)—DISPOSITION OF CAUSE—REVERSAL—ORDERING NEW TRIAL.

In a negligence case where there is no competent evidence to support the findings of negligence and contributory negligence, the case will be reversed and a new trial ordered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. § 1177.*]

Appeal from Trial Term, New York County.

Action by Raffaele Villano, as administrator, against the New York Times Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

William A. Jones, Jr., of New York City, for appellant.

Rosario Maggio, of New York City, for respondent.

PER CURIAM. The verdict of the jury that the defendant was negligent and that plaintiff was free from contributory negligence was without competent evidence to support it.

It is also clear that the declarations of the deceased and Dunlap were incompetent, and were improperly received in evidence.

The judgment and order appealed from should be reversed, and a new trial ordered, with costs to appellant to abide event.

KINGSWAY CONST. CO. v. METROPOLITAN LIFE INS. CO.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

APPEAL AND ERROR (§ 74*)—DECISIONS APPEALABLE—DIRECTION OF VERDICT.

A ruling of the trial court upon the trial of an action before a jury denying defendant's motion for direction of verdict could be reviewed only on an appeal from the judgment rendered after the trial, under the express provisions of Code Civ. Proc. § 996, and not where there was no final judgment because of the disagreement of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 415, 417-425; Dec. Dig. § 74.*]

Appeal from Trial Term, New York County.

Action by the Kingsway Construction Company against the Metropolitan Life Insurance Company. From an order denying its motion for direction of verdict, defendant appeals. Appeal dismissed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Frederick C. Tanner, of New York City, for appellant.

George E. Joseph, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

INGRAHAM, P. J. This action was at law; the plaintiff demanding judgment for the sum of \$10,000 for a breach of a contract to make a loan to be secured by a mortgage on real property. The case came on for trial at Trial Term before the court and a jury. At the end of the testimony the defendant moved for the direction of a verdict, which motion the court reserved without deciding it and submitted the case to the jury ordering a sealed verdict on the following morning, April 9, 1913. When the court convened on the following morning, the jury was present, but, before the announcement was made as to their conclusion, the defendant asked that its motion for the direction of a verdict be disposed of by the court before the action of the jury was announced. The court said that he would reserve a determination of the motion until after the jury had reported, and in that counsel for both parties acquiesced. The jury then announced that they were unable to agree upon a verdict; the court took the motion under advisement and subsequently denied it, entering an order denying the motion, from which order the defendant appealed.

The first question presented is whether any provision of law justified the entry of an order upon such a motion, and whether, on the appeal from such order, any question is presented to the Appellate Division. The ruling of the court was one upon the trial of the action before a jury. If the jury had agreed upon a verdict and judgment had been entered thereon, on an appeal from that judgment this court could have reviewed any ruling of the court at Trial Term, and, if the defendant was entitled to have the jury directed to find a verdict in his favor which had been denied, the court could have reversed the judgment entered upon the verdict of the jury, and upon such a motion direct a verdict under section 1317 of the Code of Civil Procedure. The power of this court to act under that section is restricted to an appeal from a judgment. The jury having failed to agree upon a verdict, no judgment was entered, and there was therefore no appeal from the judgment before the court.

Section 994 of the Code of Civil Procedure provides how and when an exception may be taken after the close of the trial by the court and referee, and section 995 provides for the taking of an exception upon the trial by a jury. Section 996 provides that a ruling to which an exception is taken, as prescribed in the preceding sections of the article, can be reviewed only upon an appeal from the judgment rendered after the trial, except in a case where it is expressly prescribed by law that a motion for a new trial may be made thereupon, and these are the only provisions of law which justify a review of a ruling made upon a trial with or without a jury. An order may be entered upon the granting or refusal to grant an application to the court, and from such an order an appeal will lie if the order affects the substantial rights; but there was here no application to the court for an order, simply a ruling made during the trial of the action to which an exception could be taken, and such ruling could be reviewed only on an appeal from a judgment as a result of the trial upon which the ruling was made.

No case is cited which recognizes the practice adopted in this case, and it is contrary to the views expressed in *Brauer v. Oceanic Steam*

Navigation Co., 77 App. Div. 407, 79 N. Y. Supp. 299, and *Monaco v. Lange*, 146 App. Div. 18, 130 N. Y. Supp. 581.

As the question as to whether or not the court should direct a verdict for the defendant is not before us for decision, we express no opinion thereon.

It follows that the appeal must be dismissed, with \$10 costs and disbursements. All concur.

(84 Misc. Rep. 475)

In re KOLBEL.

(Supreme Court, Special Term, Erie County. March 4, 1914.)

ALIENS (§ 68*)—NATURALIZATION—PETITION—REQUISITES.

An alien who files his petition for naturalization must file therewith, as required by Naturalization Act (Act Cong. June 29, 1906, c. 3592, § 4, 34 Stat. 596 [U. S. Comp. St. Supp. 1911, p. 531]), a certificate from the Department of Commerce and Labor of his arrival in the United States, and the fact that his declaration is about to expire by the seven-year limitation does not authorize the court to disregard the statutory requirement.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

Petition by Alfred Heinrich Kolbel for naturalization. Denied.
C. A. Bernhard, of Pittsburgh, Pa., for the United States.

POUND, J. The above applicant for naturalization came to the United States September 25, 1906, from Germany.

On October 11, 1906, he made his declaration of intention to become a citizen of the United States, in this court, which declaration of intention bore on its face the following words:

"Invalid for all purposes seven years after the date hereof."

On October 10, 1913, he filed his petition for naturalization in this court, but did not file with said petition a certificate of his arrival in the United States as required by section 4 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 531), which reads, in part, as follows:

"At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States."

The case came on for hearing March 4, 1914. The government's representative objected to the admission of the applicant on the ground that he had not complied with the law in the filing of his petition. The government's representative then had in his possession a certificate of arrival from the department relating to this applicant, and offered to deliver it to the court for filing with the petition, if the court should hold, against the government's contention, that such certificate could then be filed with the petition as of the date the petition was actually

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

filed. In my opinion this would not be a sufficient compliance with the law. The law is plain in its terms that the certificate shall be filed "at the time of filing his petition." To hold otherwise, and allow him to file his petition on one day and the certificate of arrival on some subsequent day, would be one step in the direction of frittering away the provisions of a very wholesome and useful law.

In *U. S. v. Spohrer* (C. C.) 175 Fed. 440, the following language was used:

"An alien friend is offered, under certain conditions, the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not he takes nothing by his paper grant."

This language, from the *Spohrer* Case, is quoted at length, with approval, by the Supreme Court of the United States in the case of *Johannessen v. United States*, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066. See, also, the case of *In re Liberman* (D. C.) 193 Fed. 301.

The fact that the applicant's declaration was about to expire by reason of the seven-year limitation at the time he filed his petition is insufficient to move the court to disregard the conditions with respect to the certificate of arrival which Congress has taken the pains to stipulate. Aliens are on notice as to the requirements of the naturalization law, and if they neglect to take the necessary steps toward citizenship, including the procuring of a certificate of arrival, until the last minute, when it is too late, they must bear the consequences.

The petition must therefore be denied.

PEOPLE ex rel. WEISS v. PHILIP BERNSTEIN SICK & BENEFIT SOCIETY.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

1. JUDGMENT (§ 585*)—MERGER AND BAR—MATTERS CONCLUDED—IDENTITY OF SUBJECT-MATTER.

Where a member of a benefit society had been suspended from attending meetings but not otherwise deprived of his rights as member, the refusal of mandamus to compel his reinstatement from such suspension does not bar an application to compel his reinstatement from a subsequent complete expulsion from the society.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1064, 1067, 1073, 1084, 1085, 1092-1095, 1132; Dec. Dig. § 585.*]

2. BENEFICIAL ASSOCIATIONS (§ 12*)—EXPULSION OF MEMBERS—RESORT TO COURTS—CONDITION PRECEDENT.

A by-law giving a member of a benefit society the right to appeal to a meeting thereof from any decision of the society does not apply to an expulsion for nonpayment of dues which results without any formal action

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the society, and the pursuit of such remedy is not a condition precedent to mandamus to review the expulsion.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. § 21; Dec. Dig. § 12.*]

3. JUDGMENT (§ 565*)—MERGER AND BAR—DISMISSAL WITHOUT PREJUDICE.

Where the Trial Term, through an oversight, tried only a part of the issues of fact in mandamus proceedings, and the Special Term for that reason directed that the proceeding be dismissed without prejudice, the dismissal was not a bar to a subsequent application for the same relief.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1018; Dec. Dig. § 565.*]

4. MANDAMUS (§ 143*)—LACHES.

While the court, in exercising its discretion to grant mandamus to compel reinstatement in the public service, will not ordinarily grant it without four months, by analogy to the statutory limitation for certiorari, that rule does not apply to an application to compel the payment of money, in which case the right may be granted within the time limited for the commencement of an action to recover the money.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 282-285; Dec. Dig. § 143.*]

5. MANDAMUS (§ 160*)—APPLICATION—SUFFICIENCY.

An application for mandamus to compel reinstatement after expulsion from a benefit society for nonpayment of dues, which alleged that the dues were tendered before and when they became due but were refused because they were not accompanied by an additional sum for picnic tickets, which were not authorized by the constitution or the by-laws of the association, and that the applicant had no notice of a meeting at which such tickets were authorized and had never received any tickets, presents a *prima facie* case of illegal expulsion, even though the allegations are denied, and an alternative writ should issue.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 326-335; Dec. Dig. § 160.*]

Appeal from Special Term, New York County.

Application by the People, on the relation of Isidor Weiss, for mandamus against the Philip Bernstein Sick & Benefit Society. From an order granting an alternative writ, the defendant appeals. Affirmed. See, also, 145 N. Y. Supp. 1141.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Joseph P. Segal, of New York City, for appellant.

Benjamin Berger, of New York City, for respondent.

LAUGHLIN, J. The respondent is a domestic membership corporation, consisting of more than seven members, having been incorporated on or about the 12th day of November, 1893. The moving papers show that the relator has been a member of the society for more than nine years; that on the 8th day of July, 1912, he was expelled on the ground that he had failed to pay his dues; that, pursuant to the constitution and by-laws as they existed at the times in question, each member was required to pay quarterly dues of \$3, and the last day for the payment of his current dues was June 24, 1912, and the time when, by virtue of the constitution and by-laws, a member might be expelled for nonpayment of those dues was the 8th of July,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1912; that on or about the 20th day of May, 1912, he received a notice from the society calling for the payment of his said quarterly dues of \$3 and \$2 for "picnic tickets"; and that on or about that day he caused to be tendered to the financial secretary of the society, who was authorized by the constitution and by-laws to receive dues, the amount of his dues in cash, and again at the meeting of the society on the 8th day of July, 1912, before his expulsion, he caused the amount of his dues, together with 12 cents in addition for the cost of notice to him by registered mail, to be tendered to said secretary, and the tender was refused on the ground that the amount was insufficient and that he should have tendered \$2 more for picnic tickets; that there was no provision of the constitution or by-laws authorizing the assessment on members for picnic tickets; that he had no notice of any meeting of the society at which action was taken purporting to authorize the same, nor did he receive any picnic tickets for which the \$2 was charged; and that the members of the respondent society are entitled to financial aid in a fixed amount in case of illness; and that it pays a fixed endowment on the death of a member.

[1] It appears by the papers read in opposition to the motion that pursuant to charges of misconduct filed against the relator on the 13th day of November, 1911, he was suspended from attending meetings of the organization for the period of three years, but not otherwise deprived of the benefits of his membership in the organization; and that an application for a writ of mandamus to compel his reinstatement on account of such suspension was refused on the 6th day of May, 1912. Manifestly that is no bar to this proceeding, which is for restoration from the complete expulsion under which all his rights as a member would be forfeited. If he should succeed in this proceeding, his reinstatement would be subject to the suspension which is not sought to be reviewed.

[2] The claim is also made that he had a complete remedy within the society, which he did not invoke. This is based upon a by-law, which reads as follows:

"That when a member is against the decision of the society and desires to appeal he must so announce at the same meeting, and at the next meeting file a written appeal which the president shall cause to be read before the meeting, and if the majority are of the opinion that an injustice was done to the member, or that the decision is contrary to the constitution the matter shall be taken up de novo."

I am of opinion that that by-law is not applicable to an expulsion for nonpayment of dues, which under the constitution results from the nonpayment of such dues without a formal vote of the society.

[3] It is further claimed that this proceeding is barred by a former proceeding for a writ of mandamus for the same relief. The relator applied for a writ of mandamus on the 23d day of August, 1912, and an alternative writ was issued thereon October 8, 1912, and the respondent filed a return thereto. The matter came on for a hearing in Trial Term part 2, on the 3d day of February, 1913; and through an oversight only part of the issues of fact were tried. When application was made to the Special Term on the findings made on the trial before the court and jury, and it was brought to the attention of the

court that the issues of fact had not all been determined, the court, instead of ordering the proceeding back to the Trial Term as it might have done, and as we think would have been the better practice, directed that the proceeding be dismissed "without prejudice," and a formal order to that effect was entered on the 12th day of May, 1913. This proceeding was not instituted until the 14th day of October, 1913. The first proceeding was not decided upon the merits, and is no bar to the relief now sought.

[4] It is finally claimed that the relator is guilty of laches in not having promptly renewed his application after the termination of the former proceeding. In applications for reinstatement in the public service, where if the relief be granted the public will sustain a financial loss incident to the payment of salary for which no services were rendered, or for services for which compensation has been paid to another, the courts, having discretion to grant or refuse relief by mandamus, by analogy to the statutory rule of limitation with respect to instituting a certiorari proceeding, refuse to grant relief by mandamus after the lapse of four months, unless the delay has been satisfactorily explained. *People ex rel. Gaslight Co. v. Common Council*, 78 N. Y. 56; *People ex rel. Miller v. Justices, etc.*, 78 Hun, 334, 29 N. Y. Supp. 157; *People ex rel. Collins v. Ahern*, 120 App. Div. 95, 104 N. Y. Supp. 860; *People ex rel. McDonald v. Lantry*, 48 App. Div. 131, 62 N. Y. Supp. 630; *People ex rel. Young v. Collis*, 6 App. Div. 467, 39 N. Y. Supp. 698. But, where the application for a mandamus is to compel the payment of salary or money, this rule has not been strictly applied, but the writ may be granted if in the discretion of the court the facts justify the application within the time limited for the commencement of an action to recover the money. *People ex rel. Byrne v. French*, 12 Abb. N. C. 156; *People ex rel. Sheridan v. French*, 31 Hun, 617; *People ex rel. Millard v. Chapin*, 104 N. Y. 96, 10 N. E. 141; *People ex rel. Gaslight Co. v. Common Council*, supra.

[5] The relator presents a *prima facie* case of illegal removal for nonpayment of dues duly tendered. It appears presumptively that he was under no legal obligation to pay for the picnic tickets, and that he could not lawfully be assessed therefor or expelled for the nonpayment thereof, as for the nonpayment of an assessment. These matters having been put in issue but not conclusively met by the answering affidavit, a proper case is presented for an alternative writ.

It follows therefore that the order should be affirmed, with \$10 costs and disbursements. All concur.

In re STANTON.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

ATTORNEY AND CLIENT (§ 54*) — DISBARMENT PROCEEDINGS — INVESTIGATING CHARGE OF CRIME.

Under Judiciary Law (Laws 1909, c. 85 [Consol. Laws, c. 30]) § 88, subd. 2, as amended by Laws 1913, c. 720, authorizing the Appellate Division of the Supreme Court to disbar an attorney who is guilty of crime, his disbarment is not dependent on his conviction, as it is under subdivision 3, providing for the striking from the roll of attorneys of the name of an attorney convicted of felony; so that the bar association having presented to the Appellate Division a charge of perjury against an attorney, who has not been indicted, the referee to whom the matter is referred should take and report the testimony of respondent as well as of petitioner, with his opinion thereon.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 73; Dec. Dig. § 54.*]

In the matter of Willard G. Stanton, an attorney, on charges preferred by the bar association. Report of referee set aside, and case remitted to him.

See, also, 156 App. Div. 944, 141 N. Y. Supp. 1147.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Henry S. Hooker, of New York City, for petitioner.

J. Quintus Cohen, of New York City, for respondent.

PER CURIAM. The association of the bar of the city of New York presented charges that the respondent had committed perjury on the trial of an action in the Municipal Court of the City of New York, wherein he was the defendant, in the defense of that action. The respondent seems to have interposed an answer denying the charges. Whereupon this court referred the matter to one of the official referees "to take testimony in regard to the said charges and to report the same with his opinion thereon to this court." The matter came on before the official referee to whom it had been referred, and the petitioner submitted testimony to prove the charges. Thereupon the official referee, without calling on the respondent to submit any testimony on his part, filed his report, in which he said:

"It is conceded, however, that the perjury, if any, was not committed in his character as attorney, but as defendant litigant in a civil action. Should he be tried for that offense in this proceeding, in no sense a criminal proceeding, * * * he would not only lose the right of trial by jury, but might be convicted on evidence not conclusive beyond a reasonable doubt. In my judgment the respondent should not be burdened with this imputation in advance of his trial for the crime of which he is accused. Let him be tried for that felony, and conviction would ipso jure operate his disbarment. * * *

The learned official referee has misunderstood the duty that devolved upon him. The matter was referred to him to take the testimony. He has taken the testimony of the petitioner, and he does not report that on the testimony presented the charges have not been sustained. It does not appear from the record that criminal proceedings have been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

instituted, nor that the respondent has been indicted, nor did the respondent ask to have the proceedings suspended while criminal charges were investigated. By subdivision 2, § 88, Judiciary Law (chapter 35, Laws of 1909 [Consol. Laws, c. 30], as amended by chapter 720, Laws 1913):

"The Appellate Division of the Supreme Court in each department is authorized to censure, suspend from practice or remove from office any attorney and counselor at law admitted to practice as such who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice."

And by subdivision 3 of section 88:

"Whenever any attorney and counselor at law shall be convicted of a felony, there may be presented to the Appellate Division of the Supreme Court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be stricken from the roll of attorneys."

Under subdivision 2 of section 88, the disbarment of an attorney who has committed a crime would not be dependent upon his conviction for that offense as it is under subdivision 3, and when an attorney is charged with the commission of a crime it is the duty of the Appellate Division to investigate and, if the charge is proved, disbar him. The fact that he has not been indicted or convicted is not a defense in proceedings of this character, as then, no matter what crime an attorney had committed, if he was not prosecuted criminally, he could still remain a member of the bar. This court has no control over criminal prosecutions, but it is charged with the duty of preventing criminals from continuing members of the bar. While this court, when an attorney has been indicted, may suspend the proceedings until after the trial on the indictment, yet, when an attorney has not been indicted, the fact that he could be if the charge is true, is no reason why the court should not investigate the charge.

This court has referred the matter to the official referee to take testimony in regard to the charges against the respondent. He has taken the testimony of the petitioner, but apparently of his own motion has reported that the charges should be dismissed without giving the respondent an opportunity to present his testimony. He should have that opportunity.

The report is therefore set aside, and the case sent back to the official referee to take whatever testimony the respondent may offer, and then report back all the testimony with his opinion thereon to the court.

DORNHOEFER v. FARLEY, State Excise Com'r, et al.

(Supreme Court, Appellate Division, Second Department. March 27, 1914.)

1. INTOXICATING LIQUORS (§ 242*)—FORFEITURE OF LICENSE—CONVICTION.

The state may prescribe as a condition of the right to sell liquor that such right shall be forfeited by a conviction for the violation of the liquor tax law, even though sentence is suspended, and thereby the right of ap-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

peal be denied, since a person may sell liquor only under such conditions as the state may impose.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 356-361; Dec. Dig. § 242.*]

2. CONSTITUTIONAL LAW (§§ 250, 271*)—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAW—INTOXICATING LIQUORS—STATUTES—DIFFERENT REGULATIONS FOR DIFFERENT LOCALITIES—"CONVICTION."

Liquor Tax Law (Consol. Laws, c. 34) § 2, defines "conviction" to mean guilt resulting from a plea of guilty, the decision of a court or magistrate, or the verdict of a jury, regardless of the pronouncing of judgment or the suspension thereof, and no right of appeal from such conviction exists in greater New York if the sentence is suspended, but the liquor license may nevertheless be forfeited for such conviction. Code Cr. Proc. § 750, as amended by Laws 1907, c. 685, gives to liquor dealers outside of greater New York the right to appeal from a conviction where sentence is suspended. *Held*, that a liquor dealer in greater New York is not thereby deprived of his property without due process of law, or unjustly discriminated against, since it is permissible that liquor dealers may be subject to diverse regulations in different localities, and since the right of appeal is not a constitutional guaranty, but may be granted to one class of litigants and denied to another.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 711-713, 760; Dec. Dig. §§ 250, 271.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1584-1591.]

3. INTOXICATING LIQUORS (§ 19*)—CONSTITUTIONALITY OF STATUTE—DIFFERENT REGULATIONS FOR DIFFERENT LOCALITIES.

No rights of the liquor dealer preserved by the federal Constitution were thereby impaired.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 25; Dec. Dig. § 19.*]

Appeal from Special Term, Kings County.

Action by George Dornhoefer against William W. Farley, as State Commissioner of Excise, and another. From an order denying an injunction pending trial, the plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Marcus E. Joffe, of New York City, for appellant.

Charles R. O'Connor, of Hobart (Paul Kahan, of Brooklyn, on the brief), for respondents.

THOMAS, J. The appeal is from an order denying a motion to enjoin, pending trial, the commissioner of excise and his special deputy from enforcing the civil penalties entailed by the defendant's conviction in Special Sessions for selling beer on Sunday to policemen.

The appellant's argument is this: The defendant was found guilty; sentence was without his consent suspended; section 2 of the Liquor Tax Law (Consol. Laws, c. 34) defines conviction to mean guilt resulting from plea of guilty, the decision of a court or magistrate, or the verdict of a jury, "irrespective of the pronouncing of judgment or the suspension thereof"; the person so convicted cannot appeal to the Supreme Court (*People v. Flaherty*, 126 App. Div. 65, 110 N. Y. Supp.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

699); persons similarly situated outside greater New York under section 750 of the Code of Criminal Procedure, amended by chapter 685 of the Laws of 1907, can appeal, or within greater New York persons convicted and sentenced can appeal. Therefore, if the liquor certificate be seized pursuant to the present conviction, the defendant will be deprived of his property without due process of law and denied equal protection of the law. Such is appellant's contention.

[1] Consideration of simple principles disposes of the appeal. The defendant may sell liquor only under such conditions as the state may impose on his occupation. *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *People v. Meyers*, 95 N. Y. 223, 225. The condition imposed is that, if he be found guilty of violating the Liquor Tax Law in certain particulars, he shall, even if sentence be suspended, whereby appeal is denied, forfeit his right to sell liquor. This law within greater New York prevails with uniformity. So the appellant's right to sell liquor was among other things, conditioned upon forfeiture following conviction without appeal.

[2] The question, then, is whether the condition was beyond the power of the state. The license to sell liquor is subject to burdens cast upon it by the statute. *Matter of Livingston*, 24 App. Div. 51, 48 N. Y. Supp. 989. It has become a recognized status of the law that the several divisions of the state may be governed by widely diverse statutes relating to traffic in liquor. Such statutes have commonly placed limitations upon the city of New York that do not exist elsewhere. *Metropolitan Board of Excise v. Barrie*, supra. Indeed, in localities the right to sell liquor often is denied, if the voters of the community so direct, and the exercise of even the delegated power is valid. *Village of Gloversville v. Howell*, 70 N. Y. 287, 291. So a political division is, or may be made, a unit for the adaptation of special provisions and conditions. It seems a somewhat mild exercise of the police power to provide that in the city of New York the convicted holder of the license may escape punishment by suspension of sentence, but that in such case he may not appeal, although the right to appeal be extended to those in other municipalities. The right to appeal is not a constitutional guaranty (*People v. Rutherford*, 47 App. Div. 209, 62 N. Y. Supp. 224), and the denial of it to a class of litigants and the granting of it to other classes is a legislative prerogative.

It does not appear that the appellant at the time his sentence was suspended expressed disapproval of his escape from penalty. Had he been sentenced, he could have appealed; but the forfeiture would have resulted. Liquor Tax Law, § 36, subd. 2. It is unnecessary to consider the possibility of his staying, pending appeal, the enforcement of the forfeiture and a reversal of the judgment. That is entirely problematical. But the exact question is: Must an appeal lie in the city of New York, if it is given in other parts of the state, or otherwise the suspension fail to have the force of a conviction whereon the forfeiture of the license can be based? The history of the regulation of the liquor traffic compels a negative answer.

[3] It is hardly necessary to add that there is no impairment of any right preserved by the federal Constitution. *Beer Co. v. Massachusetts*,

97 U. S. 25, 33, 24 L. Ed. 989; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346.

The order should be affirmed, with \$10 costs and disbursements. All concur.

BOUKER CONTRACTING CO. v. NEALE et al.

(Supreme Court, Appellate Division, Second Department. April 3, 1914.)

JUDGMENT (§ 153*) — VACATION — WANT OF JURISDICTION — IRREGULARITY — STATUTES.

Code Civ. Proc. § 1282, provides that a motion to set aside a judgment for irregularity shall not be heard more than one year after the filing of the judgment roll. Section 420 provides that judgment may be taken without application to the court where the complaint sets forth one or more causes of action, each consisting of the breach of an express contract to pay money or an express or implied contract to pay money received or disbursed, and demands judgment for a sum of money only, and sections 1212 and 1213 provide for the clerk's entry of judgment in such actions for default in appearance or pleading, and that in other cases plaintiff must apply to the court. Pending an action upon a complaint embracing a cause of action on contract for money and one in tort arising out of the same transaction for damages and after appearance by defendants, plaintiff without defendants' knowledge or application to the court entered judgment for the amount claimed. *Held* that, as one cause of action was within the statute and one without it, judgment entered by the clerk was a nullity and would be vacated after the expiration of a year; the distinction being that error in a proceeding prescribed by the practice of the court is an irregularity, but that where the proceeding itself is unwarranted it is a nullity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 300-304; Dec. Dig. § 153.*]

Appeal from Special Term, Nassau County.

Action by the Bouker Contracting Company against Herbert H. Neale and another, etc. There was an order denying the defendants' motion to vacate judgment and they appeal. Reversed, and motion granted.

Argued before JENKS, P. J., and THOMAS, CARR, RICH, and STAPLETON, JJ.

William G. Cooke, of New York City, for appellants.

William H. Wurts, of New York City, for respondent.

STAPLETON, J. The order as amended denied the defendants' motion to vacate a judgment.

On the 28th day of May, 1909, the Bouker Contracting Company, the respondent herein, began an action against defendants-appellants by the service of a summons and verified complaint upon the defendant Hailey. The complaint embraced two causes of action—one in contract for \$330, and one in tort, arising out of the same transaction, for \$100. The contract was in connection with the hiring of a scow; the cause of action in tort alleged careless, negligent, and improper use of the scow. The prayer was for judgment in the sum of \$430, with interest and costs. Notice of appearance and demand was served

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on plaintiff's attorney on June 3 or 4, 1909. On June 19, 1909, the plaintiff, by its attorney, without the knowledge of the defendants, and without application to the court, entered judgment for \$466.95, damages and costs.

Defendants claim that they had no knowledge of the entry of this judgment until December 3, 1913. On December 4, 1913, they obtained an order to show cause why the judgment so entered should not be vacated. The motion to vacate was denied. The ground of the decision was that a year having expired since the filing of the judgment roll, and an irregularity simply being involved, the statute presented an insuperable barrier to the application. Section 1282, Code Civil Procedure.

The question arises whether the entry was such an irregularity as is contemplated in section 1282 of the Code, and therefore incurable after the expiration of a year from the filing of the judgment roll, or whether there was such lack of power on the part of the clerk as rendered the judgment absolutely void and unavailable for any purpose.

The distinction is given in 4 Wait's Practice (1st Ed.) 430:

"Where the proceeding adopted is that prescribed by the practice of the court, and the error is merely in the manner of conducting it, such an error is an irregularity and may be waived by the laches or subsequent acts of the opposite party; but where the proceeding itself is altogether unwarranted, totally dissimilar to that which the law authorizes, then the proceeding is a nullity and cannot be made regular by any act of either party."

The term "irregularity" is sometimes used in contradistinction to jurisdictional defects, which courts have no authority to authorize or approve.

Appellants place reliance on *Matter of Cartier v. Spooner*, 118 App. Div. 342, 103 N. Y. Supp. 505. In that case a referee had power to hear and report. He heard and determined and judgment was entered without confirmation and leave to enter. In determining the appeal the court said:

"It is insisted, however, that the appellant is too late in making her motion to set aside the judgment, in that she did not move within one year from its entry as prescribed by section 1282 of the Code. That section relates to the setting aside of judgments for irregularity, and provides that such motions shall not be made after the expiration of one year from the filing of the judgment roll. The entry of judgment herein was not an irregularity. It was a nullity because there was no authority for its entry."

The respondent relies on the authority of *C. E. Bank v. Blye*, 119 N. Y. 414, 23 N. E. 805. That was a case where, in an action for replevin, the jury awarded damages for the value and damages for detention in one sum, and the clerk, in entering judgment, divided that sum into two separate amounts. The court held that this was an irregularity merely, and that section 1282 applied.

I think the case at bar comes within the authority of *Matter of Cartier v. Spooner*, supra. Section 420 names the only cases where judgment may be entered without application to the court. It reads:

"Judgment may be taken without application to the court, where the complaint sets forth one or more causes of action, each consisting of the breach of an express contract to pay, absolutely or upon a contingency, a sum or sums

of money, fixed by the terms of the contract, or capable of being ascertained therefrom, by computation only; or an express or implied contract to pay money received or disbursed, or the value of property delivered, or of services rendered by, to, or for the use of, the defendant or a third person; and thereupon demands judgment for a sum of money only. This section includes a case, where the breach of the contract, set forth in the complaint, is only partial; or where the complaint shows that the amount of the plaintiff's demand has been reduced by payment, counterclaim, or other credit."

It will be noticed that, where more than one cause of action is set forth, each must be one of the causes of action enumerated in the section. This complaint set forth one cause within the specified class and one without it. The clerk was without power to act. Sections 1212 and 1213, Code Civil Procedure. His act was not an irregularity; it was a nullity. It was not a mere deviation from a method authoritatively prescribed; it was nude of authority. The judgment of the court was not pronounced by an officer authorized to pronounce it. It was baseless and void and should have been vacated.

Order reversed, with \$10 costs and disbursements, and motion granted, with costs. All concur.

FRIEDMAN v. BORCHARDT et al.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

1. TAXATION (§ 691*)—FORECLOSING TAX LIEN—EXPENSES FOR SEARCHING TITLE.

Expenditures made in searching and examining title cannot be taxed as costs in an action to foreclose a tax lien, if such searches were not official, or not made by an abstract or title insurance company; Code Civ. Proc. § 3256, only providing for taxing, as costs, disbursements in making official searches and searches by abstract companies, etc.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1368; Dec. Dig. § 691.*]

2. COSTS (§ 3*)—STATUTORY COSTS.

While statutory costs are a matter of right, authority for a claimed item of costs must be found in the statute.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5; Dec. Dig. § 3.*]

3. TAXATION (§ 691*)—FORECLOSURE OF TAX LIEN—ALLOWANCE FOR SETTLEMENT.

Under the substantially direct provisions of Code Civ. Proc. § 3252, made applicable to actions to foreclose a tax lien by Greater New York Charter (Laws 1901, c. 466) § 1035, as amended by Laws 1908, c. 490, a plaintiff in an action to foreclose a tax lien, which was settled before judgment, is only entitled to one-half of the percentages allowed by section 3252 upon the amount found due.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1368; Dec. Dig. § 691.*]

Appeal from Special Term, New York County.

Action to foreclose a tax lien by Louis Friedman against Samuel Borchardt and others. From so much of an order of discontinuance as appoints a referee to ascertain the amount to which plaintiff is en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

titled for expenses of searching and examining title, defendants appeal. Affirmed as modified.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Henry S. Mansfield and Merritt E. Haviland, both of New York City, for appellants.

Henry Franklin, of New York City, for respondent.

CLARKE, J. This action was brought to foreclose a tax lien on real property sold by the city of New York pursuant to the provisions of chapter 17 of the Greater New York Charter (chapter 466 of the Laws of 1901, as amended by chapter 490, Laws of 1908), providing for the taxation and sale of land in the city of New York for unpaid taxes.

The plaintiff purchased the tax lien sought to be foreclosed from the city at public auction; the aggregate amount of said tax lien so transferred being \$407.22. Section 1035 of the Greater New York Charter as amended, *supra*, providing for the foreclosure of a tax lien, provides, *inter alia*, as follows:

"Except as otherwise provided in this title an action to foreclose a tax lien shall be regulated by the provisions of the Code of Civil Procedure and by all other provisions of law, and rules of practice applicable to actions to foreclose mortgages on real property."

The defendants, before service of summons had been effected upon all of the defendants, offered to pay the proper amount due upon said lien and the proper amount of costs and disbursements to obtain a discontinuance of the action and a canceling of said lien. The plaintiff's attorney claimed as follows:

Principal	\$407 22
Costs	
For before trial.....	25 00
For service of summons.....	3 00
For filing lis pendens.....	50
For allowance on settlement.....	30 36
For search, unofficial and not made by a title company.....	75 00
For examination of title.....	125 00

\$666 08

The defendants objected to the \$200 for search and examination of title and to the allowance on settlement of \$30.36, claiming that under the act in a settlement of foreclosure, the amount involved being only \$407.22, plaintiff is only entitled to \$15.18.

The plaintiff's attorneys having refused to accede to the defendant's views, the defendants made a motion for an order of discontinuance upon payment of the amount of the lien and taxable costs.

Thereupon the court made an order that the case be discontinued upon the payment of the principal of said tax lien and the statutory costs and allowances to be taxed, and appointed a referee to ascertain the amount to which the plaintiff is entitled for the expense of searching and examining the title to the property sought to be foreclosed. From the latter part of the order the defendants appeal.

[1, 2] In our opinion the disbursements claimed for the search and for the examination of title cannot be taxed. Section 3256 of the Code of Civil Procedure provides what disbursements are to be included as necessary disbursements in a bill of costs. Official searches are there provided for, and those made by title insurance, abstract, or searching companies, organized and doing business under the laws of this state. There is no claim that the search here in question was official or made by such company. Statutory costs are a matter of right, but authority for an item claimed must be found in the statute. As certain kind of searches are specifically provided, no others are to be included; *expressio unius, exclusio alterius*.

[3] In reference to the claim of \$30.36 for "allowance on settlement," section 3252 of the Code of Civil Procedure provides:

"Where the action is brought to foreclose a mortgage upon real property, * * * the plaintiff, if a final judgment is rendered in his favor, and he recovers costs, is entitled to recover, in addition to the costs prescribed in the last section, the following percentages, to be estimated upon the amount found to be due: * * * Upon a sum, not exceeding two hundred dollars, ten per centum. Upon an additional sum, not exceeding four hundred dollars, five per centum. Upon an additional sum, not exceeding one thousand dollars, two per centum. Where such an action is settled before judgment, the plaintiff is entitled to a percentage upon the amount paid or secured upon the settlement, at one-half of those rates."

This action having been settled before judgment, plaintiff is only entitled to one-half of the amount claimed, to wit, \$15.18.

The order appealed from should be modified by providing that the action be discontinued upon the payment of the principal of said tax lien and the statutory costs and allowances amounting to \$43.68, and as so modified affirmed, with \$10 costs and disbursements to the appellants. All concur.

In re HOFFMAN'S ESTATE.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

TAXATION (§ 861*)—TRANSFER TAX—TRANSFERS TAXABLE.

Testator, who died before the enactment of the transfer tax law, left his property to his wife for life, with power of appointment among his children and descendants, and, in the event that she failed to exercise the power, the property was to go to his children absolutely. Two daughters survived the testator, but one of them died without issue prior to the death of her mother, who had exercised the power of appointment by dividing the property between the daughters, with a proviso that, if either should predecease her mother without issue, the surviving daughter should take all the remainder. The mother died after the enactment of Tax Law (Consol. Laws, c. 60) § 220, subsec. 6, which imposed a tax upon property taken by appointment. The daughter declined to accept anything under the appointment and elected to take under her father's will. Held, that the property so taken by her was not subject to the payment of the transfer tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1676; Dec. Dig. § 861.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

Appeal from Order of Surrogate, New York County.

Appeal by Mary G. Hoffman, individually and as executrix of the last will and testament of Mary Gracie Hoffman, deceased. From an order by a surrogate of the county of New York denying her appeal from an order assessing a transfer tax. Order reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

T. Ludlow Chrystie, of New York City (Walter Trimble, of New York City, on the brief), for appellant.

George Thoms, of New York City (Theodore Du Moulin, of New York City, on the brief), for respondent.

LAUGHLIN, J. The question presented by the appeal is whether the residuary estate of William B. Hoffman, deceased, who died in the year 1880, before the enactment of the collateral inheritance or transfer tax law, left by his will to his wife for life with a power of appointment in her to dispose of the remainder by last will and testament, is subject to a transfer tax owing to the fact that she exercised the power of appointment and attempted to dispose of such remainder by her last will and testament made on the 3d day of May, 1901, which took effect on her death on the 8th day of July, 1911, notwithstanding the fact that the appointee has formally elected not to take pursuant to the exercise of said power of appointment, but to take pursuant to the provisions of the will of the testator.

The testator left a widow and two daughters. He gave his residuary estate to his widow for life, and expressly authorized and empowered her "by last will and testament to give, dispose of, and divide the said estate and property to and among 'his' children and descendants, in such proportions and shares as in her judgment may seem best, regard being had to the independent property they may have respectively received." He then provided that on the death of his widow, in the event that she should not exercise this power of disposition, the residue and remainder should go to his "children absolutely"; and he further provided that, in the event "of the death of all 'his' children and descendants in the lifetime of" his wife, all his property should go to his "wife, her heirs and assigns forever." One of the daughters of the testator, who survived him, died in 1907, unmarried and without issue. The testator's widow, by her will, first gave and bequeathed and appointed to the appellant the sum of \$125,000 out of the remainder of the estate of the testator; and she then gave, devised, and bequeathed and appointed the rest, residue, and remainder of her own estate *and of the estate of the testator* to her two daughters, share and share alike, and to their descendants in the event of their death, or of the death of either of them leaving descendants, and, in the event that either daughter should predecease her mother without issue living at the time of the death of the mother, then the surviving daughter was to take all of the remainder.

It seems to be well settled that a devisee or legatee may refuse to take under a power of appointment. *Matter of Lansing*, 182 N. Y. 238, 74 N. E. 882; *Matter of Haggerty*, 128 App. Div. 479, 112 N. Y.

Supp. 1017, affirmed 194 N. Y. 550, 87 N. E. 1120. See, also, *Matter of Chapman*, 133 App. Div. 337, 117 N. Y. Supp. 679, appeal dismissed 196 N. Y. 561, 90 N. E. 1157; s. c., 138 App. Div. 923, 123 N. Y. Supp. 1110, affirming order of surrogate on authority of 133 App. Div. 337, 117 N. Y. Supp. 679, affirmed 199 N. Y. 562, 93 N. E. 1118. The formal election executed by the appellant and delivered to the appraiser indicates that she supposed that she could decline to take under the exercise of the power of appointment by her mother and take directly the entire residuary estate under the will of her father. Of course the appellant might, unconditionally and unequivocally, have declined to accept anything by virtue of the exercise of the power of appointment (*Matter of Lansing*, supra, 182 N. Y. at page 245, 74 N. E. 882; *Matter of Haggerty*, supra); and if she had done so that would have been decisive of the point presented, for the only theory on which it is claimed that said residuary estate is taxable in this proceeding is that it passed by the exercise of the power of appointment (see *Matter of Delano*, 176 N. Y. 486, 68 N. E. 871, 64 L. R. A. 279; subdivision 6, § 220, Tax Law). I am of opinion, however, that her declination to take under the power of appointment should not be deemed an irrevocable election not in any event to take any estate or interest in said residuary estate, but merely an election to take said estate under the will of her father, if she may lawfully do so, and may thereby take the same estate as she would take under the power of appointment, and, if not, then she intends to take under the power of appointment in so far as she must, to enable her to take the entire estate. Counsel for the appellant argues that in no view of the case is more than one-half of the residuary estate subject to the tax, for his client would take at least one-half the estate under her father's will, and that, since she had no children, her mother could not have so exercised the power of appointment as to take that away from her, and that therefore, in no event, does she depend upon the exercise of the power of appointment for more than the one-half of the estate which may have vested in her sister subject to the exercise of the power of appointment. The learned surrogate was of opinion that appellant would take only an undivided one-half interest in the residuary estate under the will of her father, and that, inasmuch as she would take the entire residuary estate under the power of appointment, it was all subject to the transfer tax. Under existing precedents, if the interest which the appellant would take by virtue of the power of appointment exercised by her mother is precisely the same as the interest which she would have taken under the will of her father, if such power had not been exercised, then it would not be subject to a transfer tax, for it is deemed to have been vested under her father's will, subject to being divested by the exercise of the power of appointment disposing of it, not in precisely the same way, but only if appointed to go differently; and, if appointed to go in exactly the same way as without the exercise of the power of appointment, then such exercise is deemed ineffective, and in any event may be repudiated, and an election may be made by the beneficiary to take under the will and not under the power of appointment. *Matter of Ripley*, 122

App. Div. 419, 106 N. Y. Supp. 844, affirmed 192 N. Y. 536, 84 N. E. 1120; Matter of Backhouse, 110 App. Div. 737, 96 N. Y. Supp. 466, affirmed 185 N. Y. 544, 77 N. E. 1181; Matter of Haggerty, *supra*; Matter of Haight, 152 App. Div. 228, 136 N. Y. Supp. 557; Matter of Lansing, *supra*; Matter of Chapman, *supra*. Construed literally, the devise to her by her father was made only in the event that her mother did not exercise the power of appointment; but it seems it is to receive the same construction as if the devise was first to the daughter and subject to be defeated only by the exercise of the power of appointment lawfully appointing that it, or some part of it, should go otherwise. Matter of Haggerty, *supra*.

I am of opinion that appellant would take under the will of her father, the entire residuary estate the same as under the exercise of the power of appointment. It is perfectly plain that the testator intended that, if one daughter predeceased her mother without issue, the surviving daughter should take the entire estate, for the devise and bequest to *his children* is on the decease of his wife, and he expressly provided that, if both of his children should predecease his wife without leaving descendants, then the wife and her heirs and assigns should take the entire remainder. It would be a most unreasonable construction, I think, to hold that, regardless of her surviving her mother or leaving issue, one-half of the estate is vested absolutely in *each* daughter, *provided* only one of them survive their mother, but that it was subject to be divested as to both in the event that both predeceased their mother and left no issue. He has plainly said that he did not intend that either should take if they both died without issue during the lifetime of their mother. If he intended that one dying, leaving her mother surviving, should take an undivided one-half of the residuary estate, provided the other daughter survived her mother, in which event the mother would receive no part of the remainder, it is manifest that he would have made the same provision in the event that both predeceased their mother. This was, I think, intended to be a devise and bequest to his surviving daughters *as a class*, and, although the testator had two children when he made the will, he intended that the child surviving the death of his widow should take the entire remainder, provided the other child previously died without issue and the widow did not exercise the power of appointment. Since, therefore, the appellant takes, not through the exercise of the power of appointment, which would render this remainder taxable (subdivision 6, § 220, Tax Law), but under her father's will, by which the estate became vested in her before the enactment of the law taxing such transfers, the remainder of the residuary estate is not subject to the transfer tax. If the repudiation of the appointment were absolute and irrevocable, regardless of whether it resulted in appellant's taking a lesser estate, then perhaps the only question we would have to decide would be whether such repudiation was effective, for manifestly, if no estate was transferred under the exercise of the power of appointment by the appellant's mother, no transfer tax could be imposed in this proceeding which is to appraise the property transferred by the mother's will only (subdi-

vision 6, § 220, Tax Law); but, as has been seen, that is not what the appellant intended by her election to take under the will rather than through the appointment.

It follows that the order should be reversed, with \$10 costs and disbursements, and the supplemental report of the appraiser annulled and the pro forma order thereon reversed, and the original report of the appraiser and the pro forma order thereon should be affirmed, with costs.

INGRAHAM, P. J. I concur in the reversal of the order of the surrogate upon the ground that the appellant did unconditionally and unequivocally decline to accept anything by virtue of the exercise of the power of appointment contained in the will of Mary G. Hoffman, and that therefore the property which passed under the will of William B. Hoffman was not taxable.

The order should be reversed, with \$10 costs and disbursements, and the supplemental report of the appraiser annulled and the pro forma order thereon reversed, and the original report of the appraiser and the pro forma order thereon should be affirmed, with costs.

McLAUGHLIN, SCOTT, and HOTCHKISS, JJ., concur.



TAX LIEN CO. OF NEW YORK v. SCHULTZE et al.

.(Supreme Court, Appellate Division, First Department. April 3, 1914.)

TAXATION (§ 685*)—FORECLOSURE OF LIEN—RELIEF FROM BID—MARKETABLE TITLE.

It was error to grant a motion of the purchaser at the sale on foreclosure of a tax lien, to be relieved from his bid on the ground that the title was not marketable because the premises were affected by easements of light, air, and access, where every owner of such an easement was made a party to the foreclosure proceedings; such owners being bound by the judgment and their interest being vested in the purchaser by the conveyance, under the express provisions of Charter of City of New York, § 1039 (Laws 1908, c. 490).

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1375, 1376; Dec. Dig. § 685.*]

Scott, J., dissenting.

Appeal from Special Term, New York County.

Action by the Tax Lien Company of New York against Catherine E. Schultze and others to foreclose a tax lien. From an order granting a motion of Welsey E. Barker, purchaser at the foreclosure sale, to be relieved of his bid, plaintiff appeals. Reversed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

August Weymann, of New York City, for appellant.

Edward Hiehling, for respondents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HOTCHKISS, J. The action was to foreclose a tax lien. The respondent was the purchaser at the sale. Having refused to take title, he made a motion to be relieved of his bid, and plaintiff moved for an order directing the purchaser to complete. The purchaser's motion to be relieved was granted, and plaintiff's cross-motion was denied.

The premises in question consist of what would be the northerly half of the bed of East 132d street where the same widened and extended between Willis avenue and Brown Place. The title was rejected on the ground that the premises were affected by easements of light, air, and access which were not cut off by the foreclosure. On the motion, an affidavit was read in behalf of the purchaser in which it was stated:

"Upon the said examination of title, it appeared that there might be easements of light, air, and access, and rights of way over said tax lot in favor of the owners and incumbrances of the various parcels of land abutting upon the said tax lot and upon the neighboring streets and avenues. The following is a list of the various owners and incumbrances of land fronting on East 132d street and Willis avenue, together with their sources of title."

The record shows that each owner or incumbrancer enumerated in the list as stated in the affidavit was a party to the action and either defaulted or appeared but did not defend. It is clear that the mere suggestion that there may be a possibility of outstanding interests unaffected by the judgment is insufficient to show a cloud on the title. *Goodwin v. Crooke*, 58 App. Div. 464, 69 N. Y. Supp. 578. *Jackson v. Smith*, 153 App. Div. 724, 138 N. Y. Supp. 654, is not in point. In that case, it was held that the easements of certain defendants were not affected by the sale because they had not been subjected to the assessments on which the tax in question had been laid. No such question is in this case, which involves one of parties only. Every owner of an easement which the record discloses as having an interest was made a party, and hence was bound by the judgment, and whatever estate or interest they had in the property affected thereby will, by the conveyance to be made thereunder, be vested in the purchaser. Charter, § 1039 (Laws 1908, c. 490).

The order relieving the purchaser of his bid should be reversed, with \$10 costs and disbursements, and the order denying the motion of the plaintiff directing the purchaser to complete his purchase should likewise be reversed, and an order entered directing the purchaser so to complete.

INGRAHAM, P. J. I concur with my Brother HOTCHKISS. The question here presented is whether the deed of the referee in pursuance of a judgment of foreclosure of this lien will convey a marketable title to the property sold under the direction of a judgment of this court.

This action was brought under the provisions of the charter of the city of New York (sections 1035-1039), as amended by chapter 490 of the Laws of 1908, as amended by chapter 65 of the Laws of 1911. The lien foreclosed in this action was a lien upon the specific real property described in the complaint and in the notice of sale which the

purchaser executed. There is no question but that a valid lien was created by the tax which was imposed upon the property, and that the plaintiff acquired that lien by virtue of a transfer from the municipal authorities as provided for by the sections of the charter referred to. The action to foreclose that lien was commenced and prosecuted as provided for in these sections of the charter, and the judgment was in all respects a valid judgment foreclosing the lien. Under that judgment the referee proceeded to sell the property described in the complaint which was subject to the lien. The objection of the purchaser to the title is that the property may be subject to an easement, but so far as appears from the record every person owning or claiming an easement in the property was a party to the action and was either served or appeared. Undoubtedly if either of these defendants had appeared in the action and claimed that the property upon which the lien existed was subject to an easement in favor of the defendant thus appearing, and the court had by judgment attempted to sell the property free and clear of those liens, that judgment would have been erroneous and would have been reversed on appeal. That was our decision in the case of *Jackson v. Smith*, 153 App. Div. 724, 138 N. Y. Supp. 654, relied upon by my Brother SCOTT in his opinion. That case did not decide or attempt to decide what would be the effect of a sale under the judgment in that case, and the very fact that we modified the judgment by directing that the sale be subject to the easement would show that, if there had been a sale under that judgment without such modification, the defendants would have been barred from claiming any easement upon the property conveyed by the referee. But in this case neither of the defendants whom it is claimed now might have an easement appeared or defended the action or made any claim to any interest in the property. The judgment was entered in an action to which all these owners of these so-called easements were parties, and a conveyance by the referee will convey to the purchaser all the interest of all the parties to the action whether by easement, or as owners of the fee, or any other right or title to the property under the express provisions of section 1039 of the Charter. That section provides that every conveyance upon a sale pursuant to a final judgment in an action to foreclose a tax lien "shall transfer to and vest in the purchaser all the right, title, interest and estate in and claim upon the real property affected by such judgment, of the plaintiff, each defendant upon whom the summons is served, each person claiming from, through or under such a defendant by title accruing after the filing of the notice of pendency of the action." It seems to me that under this express provision of the charter the question whether any of these defendants had or had not an easement in the property or any right to it which would be affected by the conveyance were bound to appear in the foreclosure action and assert their claim so that the sale could be made subject to any right or easement therein; and, having failed to assert their claim in that action, a deed by the referee in pursuance of a judgment would vest in the purchaser full title to the property free and clear of any lien or interest of any of the defendants.

I therefore concur in the reversal of the order appealed from, and the motion requiring the purchaser to complete his purchase should be granted.

CLARKE and DOWLING, JJ., concur.

SCOTT, J. (dissenting). The property affected by the tax, the lien for which is the subject of this foreclosure action, was described in the terms of sale as:

"Borough of the Bronx—Section 9 Block 2277, lot 50. Location, East 132nd street, between Willis Avenue and Brown Place."

It was not stated to be subject to any lien or incumbrance except certain taxes. Attached to the terms of the sale was a diagram showing a plot of land 820 feet in length, and 30 feet in width, bounded on the west by Willis avenue, on the east by Brown Place, and on the south by East 132d street. There was nothing whatever to indicate what, upon examination, proved to be the fact, that the plot thus described was in fact a part of the bed of 132d street. The purchaser, upon discovering this fact, refused to complete the sale, and now seeks to be relieved of his bid upon the ground that the premises upon which he bid are incumbered with private easements of light, air, and access in favor of the property abutting upon 132d street which were not covered by the tax lien and consequently were not cut off by the foreclosure of that lien. That the purchaser has good ground for his objection does not seem to be an open question in this court. In *Jackson v. Smith*, 153 App. Div. 724, 138 N. Y. Supp. 654, it was distinctly and unanimously held that the foreclosure of a tax lien and the sale of premises, pursuant to section 1035 et seq. of the Greater New York Charter, does not extinguish private easements of light, air, and access of adjoining owners over the land sold, because the easements appurtenant to the adjoining property are not covered by or included in the assessment of the bed of the street, and are therefore not subjected to the tax lien. Hence to sell or extinguish them under a foreclosure of the tax lien would be to take the property of the abutting owner without due process of law. Not only is this decision the latest word of this court upon the subject, but its reasoning is so satisfactory that it commands our respect.

It is not, as I consider, an answer to the purchaser's objection to the title that some, and perhaps all, of the owners of property possessing these private easements, were made parties to the action. Even so their easements will not be cut off unless they were subject to the tax. *Jackson v. Smith*, supra; *Blenis v. Utica Knitting Co.*, 73 Misc. Rep. 61, 130 N. Y. Supp. 740; *Id.*, 149 App. Div. 936, 134 N. Y. Supp. 1126. As was said by the Court of Appeals in *Smith v. Mayor*, etc., 68 N. Y. 552, 557:

"One who purchases land at a tax sale must take all the easements and incidents attached or pertaining to the land."

It is quite certain that nothing more can pass under a tax sale than what was included in the assessment and subjected to the lien,

and the rule is perfectly well settled that the assessment of the servient estate must exclude the easements, and the assessment of the dominant estate must include them. *Jackson v. Smith*, supra, and cases cited. Consequently, the assessment of the street did not cover the easements appurtenant to the adjoining property; they were not subject to the lien of the tax, and they were not extinguished by the foreclosure of that lien. By the failure to properly describe the property in the terms of sale, the purchaser was led to bid a very substantial sum for property of only apparently nominal value. It would be highly unjust to hold him to his purchase or to decide summarily upon an application of this character that the property is free from cloud.

The order should be affirmed, with \$10 costs and disbursements.

In re SMITH.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

1. ATTORNEY AND CLIENT (§ 44*)—MISCONDUCT TOWARD CLIENT—MISAPPROPRIATION OF FUNDS.

An attorney who, after agreeing to accept as his fee 30 per cent. of the amount of the judgment secured and all costs, and, after collecting the judgment, tendered to his client, to be accepted in full satisfaction of all claims against the attorney an amount less than one-half of the original judgment, which amount he arrived at by considering all the interest as costs, although the clerk had refused to tax it as such and he had taken no steps to correct such ruling, and then figured the 30 per cent. on the total amount collected, including the amount deducted for himself, and also deducted the amount of certain disbursements, some of which had been taxed as costs and repaid, and thereafter testified to an interview with the client in which he stated that the latter agreed to pay him the interest, which interview the referee found never to have occurred, was guilty of professional misconduct.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

2. ATTORNEY AND CLIENT (§ 44*)—PROCEEDINGS AGAINST ATTORNEY—PUNISHMENT—SUSPENSION.

An attorney guilty of such misconduct will be suspended for two years and until the further order of the court, with leave to apply for reinstatement at the end of that time upon a showing that he has actually abstained from practice and otherwise properly conducted himself.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 56, 62; Dec. Dig. § 44.*]

Charges by the Association of the Bar of the City of New York against George V. Smith for professional misconduct as an attorney at law. Upon report of the official referee, respondent suspended from practice for two years and until further order of the court.

See, also, 155 App. Div. 945, 141 N. Y. Supp. 1146.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Robert W. Bernard, of New York City, for petitioner.

Edward J. Dryer, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

INGRAHAM, P. J. [1] On September 15, 1906, one Herman Schradin was killed as the result of an accident, and the respondent was consulted by his brother William Schradin in relation to a recovery of damages caused by the death of his brother. Thereupon a written retainer was executed by which the claimant agreed that:

"My said attorney shall keep, have and retain out of any money received by him in the prosecution of my claim 80 per cent. thereof as compensation for his services and in addition thereto all costs that may be legally taxed in any action brought by him in any court to enforce my said claim."

As a result of this retainer, the respondent commenced an action on behalf of his client against the New York Central & Hudson River Railroad Company, and after a trial the plaintiff in that action obtained a verdict for \$3,500. On February 16, 1907, judgment was entered for the sum of \$3,720.38, the costs and disbursements as taxed being \$132.88, and interest on the verdict, being \$87.50, was added to the verdict. When the respondent presented the bill of costs to the clerk, he sought to have this interest taxed as costs; but the clerk refused, and the costs were taxed at \$132.88. The defendant appealed to this court, and the judgment was affirmed. The defendant then appealed to the Court of Appeals, and the judgment was again affirmed. The defendant then obtained a writ of error to the Supreme Court of the United States, where the judgment was again affirmed. On June 3, 1911, after the judgment had been affirmed by the Supreme Court of the United States, execution was issued against the New York Central & Hudson River Railroad Company for the sum of \$5,028.71, and that amount was paid to the respondent on behalf of his client. Having received that sum, the respondent inclosed a check to his client for the sum of \$1,727.65, with the statement that it was "in full for amount due estate out of \$5,028.71 received by attorney." When the respondent refused to pay any additional amount, the client retained another attorney, and a proceeding was instituted in the Supreme Court against the respondent which resulted in an order directing the respondent to pay over to the client the additional sum of \$1,254.88, and with that order he subsequently complied.

This proceeding was subsequently commenced charging the respondent with professional misconduct in refusing to pay this money to the client. The charges were referred to the official referee, who has reported the charges proved and that the respondent was guilty of professional misconduct. The report of the official referee contains a statement of the facts. Having seen the witnesses and heard their testimony, he has reported that, so far as there was a dispute between the attorney and his client, the client was to be believed. It is sufficient to say that the evidence satisfies us that the official referee was right, and we approve his report.

The amount which the respondent finally succeeded in collecting was made up of the verdict of \$3,500, the costs of the respondent as taxed, with interest, \$504, and the balance, \$1,024.71, was interest on the original verdict down to the date of payment. In accounting to his client, the respondent retained all but \$1,727.65, which sum he offered to pay his client, if his client would receive it as payment in full

of all money due the estate out of the sum of \$5,028.71 recovered. He adopted a somewhat novel method of arriving at this amount. He took the total amount received, \$5,028.71, and deducted the amount of the verdict, \$3,500, and that left a balance of \$1,528.71. This he called his costs, to which he claimed he was entitled under his retainer. The total amount that respondent was entitled to as the taxed costs was \$504. Having thus deducted what he claimed was his "costs," from the amount that he received, he then had to determine upon what amount he should reckon the 30 per cent. Not content with having taken everything as costs except the verdict of \$3,500, he deducted 30 per cent. from the total amount received, thus deducting 30 per cent. on the costs which were his, and on the interest which was not his. Thus, out of a verdict of \$3,500 obtained by his client, out of which respondent was to receive 30 per cent. as compensation for his services in conducting the litigation, he offered to his client less than one-half, upon condition that his client would accept that sum in full. Then, quite characteristic of this whole transaction, the respondent made an additional claim for "cash advanced by me for certain expenses necessary to carry on suit" amounting to the sum of \$263.95, and that amount he deducted from the balance of the verdict which he was willing to allow to his client. That amount he succeeded in getting the Special Term to allow him; but further investigation showed that, of this sum of \$263.95, the sum of \$113 had already been included in the costs and disbursements as taxed and which was paid by the New York Central & Hudson River Railroad Company to the respondent when the amount of the judgment was collected. The respondent still retains the sum of \$113 which clearly belongs to his client.

To attempt to sustain this claim, the respondent has sworn to an interview with his client after the judgment was affirmed by the Court of Appeals, in which he told his client that the interest belonged to him as his costs, and that the client assented thereto. The client denies that any such conversation ever took place, and further testifies that the only conversation with reference to the interest took place after the affirmance by the Supreme Court of the United States when the client inquired about the interest. This conversation seems also to have been presented as a defense to the Special Term, when the claim was before the court. The Special Term evidently refused to believe the statement, and the official referee has taken the same position, and has reported that no such conversation ever took place. The respondent also claimed before the official referee, and still claims before this court, that he really believed that the interest on the verdict recovered was as matter of law part of the costs and that under his retainer the interest should be included in the term costs. But, although the clerk had refused to allow the interest to be taxed as costs, he made no attempt to review the action of the clerk. He makes the further claim here that, at the time he made this offer of payment, he knew the client was going to make objection to any settlement he might offer, and so he was justified in making his extreme claim, and that, as the claim to the accrued interest in this case involved such a serious question, he had a right to have the claim passed

on by the court. That comes with rather bad grace from an attorney who, when judgment was affirmed, sent to the client a part of the amount recovered, without any statement that there was any question as to the amount he was entitled to deduct therefrom, and attempted to exact from the client an agreement that the amount received was "in full for amount due estate" out of the amount received by the attorney, and thus preclude the client from bringing the question before the court.

It is quite clear that he had no such expectation. He sent the money to the client in the hope that he would accept the amount and waive any other claim, although he now admits that he considered it doubtful whether the client would assent to his claim that the sum of \$1,-024.71 interest was included in costs to which the respondent was entitled under the retainer. But the claim that this respondent seriously believed that interest on a judgment after it had been entered, and which had been collected not as costs but as part of the judgment, could be included within the term costs is on its face absurd. That he endeavored to induce the clerk to tax the interest as costs shows that he then endeavored to get such a taxation as would be a basis for a claim that he was entitled to it. "Costs" are defined by the Code of Civil Procedure, and only such as are therein specified are entitled to be termed costs or included in a bill of costs. The interest on the verdict from the date of its rendition is included in the judgment, and is not collected as costs on any taxation or on any order of an appellate court affirming it. Certainly no man with the elementary education of a lawyer would believe for a moment that interest on a judgment when it is collected was anything but part of the original recovery or had any relation to costs or disbursements in an action. What this respondent really sought to do was to retain this interest under his retainer or alleged agreement with his client, and to support that claim he manufactured an interview with his client, which the client denies and the official referee expressly finds he never had.

We thus have it proved that the attorney, having undertaken the prosecution of an action for a specific fee, which was fixed in a written retainer, when he collected the judgment, retained a large portion of it to which he was not entitled, and sent the balance to his client under such circumstances that, if the client accepted the money, he would be estopped from afterwards questioning the amount the attorney retained; and, after that device failed, he manufactured an interview with his client which he failed to prove. That the official referee upon these facts should find the respondent guilty of professional misconduct as an attorney most certainly follows.

[2] The serious question presented is the extent of the discipline that should be inflicted. Contracts as to the attorneys' compensation between attorneys and clients are now made lawful by statute, and, although the courts have been seriously concerned with the abuses that constantly flow from allowing such contracts to be made, the conditions existing at the present time seem to make it necessary that such contracts should be made legal and enforced. It is the duty of the courts, however, to minimize as much as possible the dangers and

disadvantages resulting from the enforcement of such contracts, and to hold the attorney to the strictest good faith in his relations to his client based upon such contracts. Here the respondent undertook the prosecution of this case under a written retainer which was perfectly plain upon its face. The attorney and client at the beginning fixed the fee which the attorney was to receive, and any attempt by subterfuge or deceit to obtain a greater sum than that which the parties agreed should be fixed for the services to be rendered should be promptly and summarily dealt with by the courts.

It seems to me there has been a gross abuse by the attorney in his relations with his client, a gross attempt to impose upon his client, and both in the proceedings before the Supreme Court and in this proceeding an attempt to inject an agreement with his client which was never made. We cannot overlook such professional misconduct. But under all the circumstances, instead of imposing the extreme penalty of disbarment, we will suspend this respondent from practice for two years, and until the further order of the court, with leave to the respondent to apply for reinstatement at the expiration of such period upon showing that he has actually abstained from practice and has otherwise properly conducted himself. All concur.

BEUGGER v. ASHLEY et al.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

1. PLEDGES (§ 33*)—SUIT TO REDEEM—RELIEF IN EQUITY.

Where the pledgees of contracts to purchase "Brewer's grains," without foreclosing the lien or giving notice to the pledgor, transferred same to a corporation in return for corporate stock, and where the amount of the debts secured by the pledge was in dispute, the pledgor was entitled to sue them in equity for an accounting, especially where they were attorneys for the pledgor, and in view of the fact that the contracts would expire and that the manner in which they had dealt with the contracts made it impossible to return them to the pledgor.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 89, 92; Dec. Dig. § 33.*]

2. LIMITATION OF ACTIONS (§ 100*)—COMMENCEMENT OF PERIOD—EQUITABLE ACTION.

The ten years' statute of limitations will not commence to run against an equitable action against pledgees for an accounting in respect to a sale of the pledged property without foreclosure or notice, until the pledgor learns of such sale.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

3. LIMITATION OF ACTIONS (§ 197*)—PERIOD—PROOF.

Evidence merely that a wrongful transfer of pledged property was made "some time in February, 1899," was insufficient to show that an equitable action based thereon and begun February 11, 1909, was barred by the ten years' statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 722-726; Dec. Dig. § 197.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. LIMITATION OF ACTIONS (§ 195*)—AFFIRMATIVE DEFENSE—BURDEN OF PROOF.

The statute of limitations, being an affirmative defense, must be proved by the party invoking it.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 711-716; Dec. Dig. § 195.*]

Appeal from Special Term, New York County.

Action by Johannes A. Beugger against Clarence D. Ashley and others. From an adverse judgment, plaintiff appeals. Reversed and rendered.

See, also, 140 App. Div. 934, 126 N. Y. Supp. 1122; 146 App. Div. 934, 131 N. Y. Supp. 1106.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

Norman B. Beecher, of New York City, for appellant.

Walter H. Pollak, of New York City, for respondents.

SCOTT, J. The plaintiff, in the years 1898 and 1899, was a member of the firm of Wreckshagen, Buegger & Herzog, composed of himself and the defendant Max Wreckshagen. It was organized for the purpose of buying and shipping what are described as "brewer's grains." To carry on this business it made time contracts with different brewers to take the grain resulting from the operation of their breweries. Plaintiff lived in Switzerland, and had contributed all the capital used and invested by the firm. Wreckshagen was the resident partner who ran the business here. He contributed no capital, but used liberally, for his personal purposes as well as for the firm's business, the money contributed by plaintiff.

The defendants Ashley, Emley, and Rubino were a firm of attorneys in the city of New York who were retained by plaintiff's firm under a general retainer. The defendant Ashley had become a member of the firm in May, 1898, and personally took no part in the transactions which have given rise to this action, and apparently knew nothing about the transactions until some time after they had taken place.

In May, 1898, plaintiff had visited this country, and it was then contemplated to turn the business of the firm of Wreckshagen, Buegger & Herzog over to a corporation, and a corporation by the same name was actually incorporated, although no transfer was made until later.

In December, 1898, the firm of Wreckshagen, Buegger & Herzog found itself in financial difficulties. It was threatened with a judgment for more than it could readily pay, and there were other claims against it which it was apprehended might be put in suit. It then held some 16 contracts with brewers which were thought to be of value, and these constituted substantially all of its valuable assets.

On December 29, 1898, plaintiff's firm, by Wreckshagen, who concededly had full authority, executed two assignments to the defendants Ashley, Emley, and Rubino, covering the outstanding brewer's contracts then held by plaintiff's firm. Only one of these contracts

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was produced upon the trial, but it is conceded that they were in identical form except that in one the consideration was stated as \$2,400 and in the other as \$1,000. After executing these assignments, which were absolute in form, Wreckshagen, in behalf of his firm, assigned to the corporation above mentioned all of the remaining assets of his firm, and in January, 1899, the corporation appears to have made a third assignment to Ashley, Emley, and Rubino of certain other brewers' contracts which had not been fully completed at the time of the assignments in December.

[1] There is a serious controversy between the parties as to the purpose for which these assignments were made. The trial court has found, in accordance with the contention of the defendants respondents, that, at the time the assignments were made, the firm of Wreckshagen, Buegger & Herzog were indebted to Ashley, Emley, and Rubino in the sum of \$2,400 for money loaned, and the further sum of \$1,000 for professional services, and "that the said last-mentioned assignments were executed and delivered by the said Wreckshagen, Buegger, and Herzog in payment of the said loan of \$2,400 and of the said indebtedness of \$1,000 for legal services, subject, however, to an agreement that the said Wreckshagen, Buegger & Herzog, or their assigns, should have the right to a transfer of said contracts on payment to the said Ashley, Emley, and Rubino of the said \$2,400, with interest from October 31, 1898, and of the said \$1,000, with interest from December 29, 1898. Both assignments were absolute in form."

There is evidence to support this finding, and we therefore accept and adopt it; the legal effect of the finding above quoted being, as we construe it, and as the evidence requires that it should be construed, that the contracts were assigned to Ashley, Emley, and Rubino and held by them as security for the payment of the two items of indebtedness mentioned in the finding.

Early in February, 1899, the financial clouds which hung over Wreckshagen, Buegger & Herzog began to darken, and Wreckshagen became apprehensive that unpleasant proceedings might be taken against him personally, and thereupon, with the knowledge, if not at the suggestion of Rubino, he made a hasty departure for Europe. A few days after Wreckshagen's departure, plaintiff in Switzerland received two cablegrams. The first was unsigned and read:

"The firm is bankrupt, Max gone."

The second was signed "Rubino," and read:

"Send at earliest opportunity all shares endorsed in blank. You will be held responsible if you return."

The defendant Rubino denies that he sent or caused to be sent either of these cablegrams, and the mystery as to who did send them appears to be unsolved. It is not, however, of importance in our view of the case. The significant fact is that plaintiff, assuming, very naturally, that they had been sent by Rubino, at once cabled to the latter's firm asking for full particulars, and received no reply. After vainly waiting for information until July, plaintiff came to this coun-

try and retained a lawyer to inquire into the transactions and to protect his interests. It then appeared that some time in the month of February, 1899, the defendants Emley and Rubino had organized a corporation in the state of New Jersey under the name of the American Products Company, to which they and the defendant Ashley had transferred the sixteen brewers' contracts assigned by plaintiff's firm in exchange for \$45,000 of the stock of said American Products Company issued to the defendants Emley and Rubino. No notice appears to have been given of this transfer to either plaintiff or Wreckshagen, nor does it appear that plaintiff had any knowledge of the transfer of the contracts to the American Products Company until he came to this country and instituted an investigation in the early summer of 1899. A conference of all the interested parties was held in August of that year, which resulted in a written proposition to plaintiff that, if he would pay the defendants respondents some \$8,600 in cash, they would cause to be issued to him a minority interest in the stock of the American Products Company. This upon consideration he declined, and nothing further was done between the parties until this action was instituted.

We have then this state of facts presented upon the respondents' own showing. A business firm hopelessly insolvent and anticipating with good reason an entry of a judgment and the institution of other legal proceedings against it is induced by its attorneys to assign to them, as security for an alleged indebtedness of \$3,400, all of its valuable assets consisting of contracts with numerous brewers. No steps are taken to foreclose the lien, but, without notice to either of the members of the assignor firm, the attorneys transfer all of these assets to a corporation formed by them in return for stock of the corporation issued to them. The situation thus presented is not unlike that which was considered in *Treadwell v. Clark*, 190 N. Y. 51, 82 N. E. 505, except that in that case the defendant and plaintiff had dealt at arm's length, and there was no question of the trust and confidence which exists between a client and his attorney. In that case stock had been pledged and had come into the defendant's hands under circumstances which preserved the plaintiff's right to redeem. As to the plaintiff's right to sue in equity, the Court of Appeals said:

"His (plaintiff's) right to maintain an equitable action is questioned, and it is argued that his remedy was at law, by a possessory action, or by an action at law for conversion. * * * The plaintiff's right to the stock had never been foreclosed, or divested, by any proceedings on the part of Bennett (the original pledgee), who held the title to it as pledgee. It is true that, as a general rule, an action in equity will not lie to redeem property pledged for a debt; but this case falls within a recognized exception to the rule. An equitable action is proper where special grounds appear."

In the principal case special grounds do appear. In the first place the amount of the indebtedness for which the assets were assigned as security is in dispute, and the evidence concerning it upon the trial was far from convincing. Such a dispute was one of the special grounds specified in *Treadwell v. Clark*. In the second place, the assets themselves were contracts which, in the nature of things, ran

out in time, and the pledgee had so dealt with them as to make it impossible to return them to the pledgor. The respondents' act in transferring them to a corporation was in the nature of a conversion, but the plaintiff is not therefore limited to an action at law for damages which would not only be inadequate but would throw on plaintiff the burden of proof which, under all the circumstances, should be borne by the respondents. The plaintiff's right to come into equity for an accounting is not to be doubted.

[2] It is urged, however, that whatever cause of action plaintiff has ever had is barred by the statute of limitations. Clearly the only limitation applicable was the ten-year statute, which applies to an equitable action (*Gilmore v. Ham*, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 554), and that statute did not begin to run until plaintiff learned that the respondents had assumed to dispose of the contracts without notice of foreclosure (*Treadwell v. Clark*, supra), and this was not until some time after February, 1899.

[3] Indeed, if it were to be held, as respondents insist that it should be, that the statute began to run when the contracts were assigned to the American Products Company, still the defense of the statute of limitations would not be made out. The nearest that respondents come to fixing the date of that assignment is that it was "some time in February, 1899," which may have been the very last day of the month. This action was begun, as to these respondents, on February 11, 1909.

[4] The statute of limitations is an affirmative defense to be proved by the party invoking it, and respondents do not show that the action was not commenced within ten years after the date of the assignment to the American Products Company. In no aspect of the case, therefore, has the defense of the statute of limitations been sustained. The trial justice has found as a fact that "the defendants Ashley, Emley, and Rubino have not derived large profits or any profits from the exploitation of the said corporation assigned to them as aforesaid." If this finding means that there is nothing for which the respondents should account, it is in our opinion unsupported by the evidence and is reversed. The finding that "the plaintiff Johannes Alexander Buegger had knowledge of all the aforesaid transactions in February, 1899," is also unsupported by the evidence and is reversed. The fifteenth finding that the assignment of the corporation to the American Products Company was made with the knowledge and consent of Wreckshagen, Buegger & Herzog is directly contrary to the evidence and is also reversed. Striking these findings of facts from the decision leaves a proper case for the entry of an interlocutory decree requiring the respondents to account.

Since we have adopted the respondents' own version of the transactions, and consequently the one most favorable to them which the circumstances will permit, there is no necessity for ordering a new trial, but a decree can be entered at once in accordance with the foregoing opinion. At the time of the settlement of that decree, any further question as to findings to be reversed, modified, or found will be passed upon.

The judgment appealed from will consequently be reversed, and a judgment entered in accordance with this opinion, with costs and disbursements to plaintiff in this court and the court below. All concur.

STANTON v. JACOB KAISER IMPROVEMENT CO. et al.

(Supreme Court, Appellate Division, Second Department. April 3, 1914.)

1. MORTGAGES (§ 270*)—ASSIGNMENT—SUFFICIENCY OF EVIDENCE.

In a suit to foreclose a mortgage, evidence held to support a finding that an alleged assignment of the mortgage by plaintiff was a forgery, even assuming that the certified copy of the record of the assignment was equivalent to the production of the original and that, had the original been produced, the commissioner of deeds would have identified her signature to the acknowledgment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 608, 609; Dec. Dig. § 270.*]

2. MORTGAGES (§ 264*)—ASSIGNMENT—EFFECT.

An assignee of a mortgage who took the assignment in reliance on the record of prior assignment was not protected by the recording act, where the prior assignment was a forgery.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 665; Dec. Dig. § 264.*]

Appeal from Special Term, Kings County.

Action by Annie E. Stainton against the Jacob Kaiser Improvement Company and others to foreclose a mortgage. From an interlocutory judgment in favor of plaintiff, the defendant Jennie V. Kennedy appeals. Affirmed.

Argued before JENKS, P. J., and CARR, RICH, STAPLETON, and PUTNAM, JJ.

George B. Hayes, of New York City (Henry Siegrist, of New York City, on the brief), for appellant.

John H. Rogan, of New York City, for respondents.

CARR, J. The defendant Jennie V. Kennedy appeals from a judgment of foreclosure and sale entered in favor of the plaintiff, and which likewise canceled and set aside certain instruments of alleged assignment affecting the mortgage involved therein. This action grew out of the behavior of one George F. Stainton, whose acts have been the subject of so much recent litigation in this court, and who, at the time of the trial of this case, was confined in Raymond Street Jail, awaiting trial on a charge of forgery. This action was brought to foreclose a mortgage made and executed by the Jacob Kaiser Improvement Company to Jacob Kaiser on the 15th day of January, 1910, given to secure payment of the sum of \$3,000 and interest. The plaintiff claims title to the mortgage under an assignment made and executed on the 17th day of January, 1910, by the said Jacob Kaiser in favor of herself, which assignment was recorded in the office of the register of the county of Kings on January 17, 1910. The defendant appellant Kennedy appeared, and affirmatively set up in her

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

answer that she was the lawful owner and holder of the mortgage in question by virtue of the following assignments: One duly executed and acknowledged on the 20th day of January, 1910, by the plaintiff in favor of George F. Stainton, and recorded in the office of the register of the county of Kings on June 24, 1910; one dated the 27th day of June, 1910, from George F. Stainton to one Herman Rosenthal, recorded in the office of the register of the county of Kings on the 9th day of July, 1910, and one dated the 7th day of July, 1910, from the said Herman Rosenthal to the defendant appellant, recorded in the office of the register of the county of Kings on the 20th day of September, 1910.

[1] The testimony, briefly summarized, is as follows: The plaintiff was the aunt of George F. Stainton, who was a lawyer and who had in his possession, in the middle of January, 1910, \$3,500 of the plaintiff's money. This money was the proceeds of the sale of some property under a judgment of foreclosure in which the aunt was the plaintiff. That foreclosure action had been conducted by the said George F. Stainton on behalf of the plaintiff, and he retained the moneys with her consent until he had a chance to put it out again in a good mortgage. She directed her nephew to purchase the mortgage now in question, from Kaiser. The money was paid over to Kaiser for an assignment of the mortgage, she saw it paid, and she got the balance (\$500) in check and cash. The assignment was signed by Kaiser in her presence, but she never saw it afterwards. It was to be put on record, and she left it with her nephew for that purpose. She asked for it, but she never saw it afterwards. He had everything concerned with it, the assignment and the mortgage, everything. Her nephew made a check to her for the amount of the mortgage, and she indorsed it over to Kaiser. She did not know that the mortgage had been assigned out of her until a year afterwards, and she never received anything on account of interest. It was offered to her, but she would not have anything to do with it after it had been assigned. It was assigned to two other people without her consent, and she did not see any assignment. She was interested in the Kaiser Improvement Company. George F. Stainton represented the Kaiser Improvement Company, and he represented Jacob Kaiser, and he represented the plaintiff, and he drew the check in the presence of the plaintiff and handed it over to Jacob Kaiser. She testified that she did not know what was the amount of the check for the balance, whether it was \$375, but she asked for cash, \$125. She carried the check for the balance around in her pocket for a week, and she then gave it to her niece (who was the wife of George F. Stainton) to "put in bank and deposit it." The niece gave the plaintiff the money afterwards, when she put the check through her bank. The plaintiff did not have a bank account at the time of this transaction. She could not remember seeing any one take Kaiser's acknowledgment to the assignment.

The defendant appellant put in evidence a certified copy of the record of the alleged assignment from the plaintiff to George F. Stainton. She never had the original assignment, but through her

husband she had possession of the bond and mortgage and produced them on the trial. Her husband attended to the transaction.

Alfred J. Baker, an attorney at law, called on behalf of the defendant, testified that he had searched the records in the register's office of Kings county on behalf of the defendant when the mortgage had been offered for sale by Rosenthal to her husband, and that he saw the assignment from Annie E. Stainton to George F. Stainton on file in the register's office, but it had not yet been recorded. He requested the register's office to send the assignment to him. He likewise made an effort to get it from Mr. Stainton. Stainton promised to send it to him.

John Kennedy, called on behalf of the defendant, testified that he was her husband, and that he knew one Herman Rosenthal, who came into his office in June, 1910, and wanted to know if he would buy a mortgage. Rosenthal came back the next day, and brought assignments of the mortgage to him; that is, an assignment from George F. Stainton to Rosenthal. He (Kennedy) asked Mr. Baker to look them over, and he asked Mr. Rosenthal what he wanted for the mortgage or the assignment. "He said, 'I will take \$2,750.' I said, 'No, sir; I think the mortgage runs too long, and I will give you \$2,500.'" They agreed on \$2,500. Baker told Kennedy that the assignment from Annie E. Stainton to George F. Stainton was on file in the register's office. He gave Rosenthal a check, but it was subject to an investigation. This check was admitted in evidence. The transaction was closed on July 7th. The Title Guarantee & Trust Company paid the interest to him. The \$2,500 paid to Rosenthal was paid for the bond and mortgage in question, and for nothing else. He asked Rosenthal if he was the owner of the mortgage, and he said, "Yes," and he asked him how he got it, and he said he bought it from a man by the name of Stainton. He gave it to Mr. Baker to investigate and make a search. He did his own appraising. He sent a man to Brooklyn to investigate the Kaiser Realty Company, who brought back a report about the company; that they bore a poor reputation, but the property was all right. It never entered his mind that there might be another assignment. The assignment from Rosenthal was made two months before he (Kennedy) recorded it.

Charles R. Gaiser, called on behalf of the defendant, testified that he was formerly the owner of the premises affected by the mortgage in question, and that Annie E. Stainton never demanded any interest from him. Kennedy had demanded the payment of interest from him.

James E. Kelly, called on behalf of the defendant, testified that he was acquainted with George F. Stainton and had represented him in some litigation concerning his father's estate. The assignment in question was never recorded at his request, and that he had no knowledge of such an assignment. The materiality of this testimony was an alleged indorsement on the disputed instrument that it was to be returned to Mr. Kelly.

Estelle Gertrude Stainton, called on behalf of the defendant, testified that she was the wife of George F. Stainton, and that she was a com-

missioner of deeds during the summer of 1909 and all of 1910. (Her name is attached to the acknowledgment as commissioner of deeds to the assignment in controversy.) She would attend at her husband's office three times a week and assist him as a commissioner of deeds. The office of the Kaiser Realty Company was in the same office as George F. Stainton, and she admitted her signature as commissioner of deeds was attached to the bond of the Kaiser Improvement Company to Jacob Kaiser. She did not remember the transaction because she signed so many papers. She did not remember anything about it. She had a great many of these transactions, and she became a commissioner for the accommodation of the Kaiser Realty Company and her husband's family. She had taken acknowledgments of Annie E. Stainton as well as other members of the family, and the company. She was a commissioner of deeds on the 20th day of January, 1910, but could not remember if she was in her husband's office on that day, and did not remember whether she took any acknowledgments during the month of January, 1910, of Annie E. Stainton. She would not swear either way. She did not recollect an assignment of the mortgage by Annie E. Stainton to George F. Stainton, and did not remember taking the acknowledgment. She did not remember the plaintiff giving her a check for \$375 at about that time. She admitted her signatures to the acknowledgments on the bond and mortgage in question. She did not remember the name of George C. Crane, who was the subscribing witness to the assignment in question.

The plaintiff, called in rebuttal, testified that she never executed the assignment in question or made any transfer of the mortgage to her nephew, and never authorized anybody else to do so. The judgment roll in the action of Annie E. Stainton v. Henry Kahrs, to foreclose a mortgage for \$3,500, was received in evidence, and the referee's report of sale in that action, showing that the amount due to the plaintiff for principal and interest, amounting to the sum of \$3,710.31, was paid to George F. Stainton, the plaintiff's attorney. The balance of this amount, after investing the \$3,000 in the assignment of the bond and mortgage in question, was paid to the plaintiff in check and cash. Her nephew collected the interest at all times for her on the mortgage which had been foreclosed, and sent it to her. She had the bond and mortgage which was foreclosed in her possession.

The court at Special Term wrote a brief memorandum which sets forth the court's impression as to the facts.

The appellant complains on this appeal that the court at Special Term erred in not accepting the certificate of acknowledgment annexed to the assignment in question, as sufficient to justify a finding by it that the defendant was the lawful owner and holder of the bond and mortgage in question, and that the probative force of such certificate of acknowledgment was not overcome by the uncorroborated testimony of the plaintiff. In support of this contention, she cites the case of Albany County Sav. Bank v. McCarty, 149 N. Y. 71, 43 N. E. 427, and the authorities therein cited.

We had a quite similar question here a few years ago in *Nahe v. Bauer*, 141 App. Div. 115, 125 N. Y. Supp. 592, in which the weight

to be given to a certificate of acknowledgment was considered (opinion by Thomas, J.). There, as here, the question of a forgery was involved. We reversed the judgment in that case, on the ground that the testimony overcame the prima facie presumption of the acknowledgment. In the Albany Savings Bank Case, 149 N. Y. 71, 43 N. E. 427, the existence of a certificate of acknowledgment was held to raise an issue of fact even though execution of the instrument and the making of the acknowledgment was disputed by other evidence. In that case, however, the original instrument and acknowledgment were produced in the court, and the notary gave some evidence in support of his certificate. Here the original instrument and acknowledgment are not produced. The commissioner of deeds whose name appears on the record of the instrument cannot say whether or not she ever took such acknowledgment. She has no recollection of the circumstances one way or other. Assuming that the certified copy of the disputed and apparently lost assignment is equivalent to a production of the original instrument, and that the commissioner of deeds would have identified her signature to the acknowledgment—which is going a great way, further than I would like to go—yet there would remain a question of fact for the trial court which I am satisfied it decided correctly on all the proofs before it.

[2] If the alleged assignment to George F. Stainton from the plaintiff was a forgery, then the Recording Act was of no protection to the defendant appellant. *Marden v. Dorthy*, 160 N. Y. 39, 54 N. E. 726, 46 L. R. A. 694; *Caccioppoli v. Lemmo*, 152 App. Div. 650, 137 N. Y. Supp. 643.

I recommend that the judgment be affirmed, with costs. All concur.

(84 Misc. Rep. 201)

PEOPLE ex rel. SIMONS et al. v. DOWLING et al.

SAME v. BARKER et al.

(Supreme Court, Special Term, Onondaga County. February, 1914.)

1. HIGHWAYS (§ 77*)—PROCEEDINGS TO CLOSE—FILING AND RECORDING PAPERS.

Under the express provisions of Highway Law (Consol. Laws, c. 25) § 191, all papers in a proceeding by town officers to close highways, consisting of the application, consent of the town board, release from damages, and order of the town superintendent, must be recorded as well as filed in the town clerk's office; it being insufficient to record only the release and file the other papers.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 263-276; Dec. Dig. § 77.*]

2. CERTIORARI (§ 40*)—TIME OF TAKING PROCEEDINGS—PROCEEDINGS TO CLOSE HIGHWAYS.

The four months within which a writ of certiorari may be applied for under Code Civ. Proc. § 2125, begins to run, where the object of the writ is to review proceedings closing a town highway, from the time the filing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and recording of all papers in the highway proceedings is completed pursuant to Highway Law, § 191.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 58; Dec. Dig. § 40.*]

8. RECORDS (§ 6*)—"RECORD"—ESSENTIALS.

A "record" of a written instrument, the object of which is not only perpetuity but publicity, implies an actual transcription by the proper officer, and not a mere leaving of the paper with him for record.

[Ed. Note.—For other cases, see *Records*, Cent. Dig. § 7; Dec. Dig. § 6.* For other definitions, see *Words and Phrases*, vol. 7, pp. 6008-6014; vol. 8, p. 7781.]

4. CERTIORARI (§ 41*)—TIME OF TAKING PROCEEDINGS—LACHES.

A mere delay of 11 months, in applying for a writ of certiorari to review proceedings closing a town highway, will not require denial of the writ on the ground of laches.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 59; Dec. Dig. § 41.*]

Two writs of certiorari to review proceedings closing certain highways, both by the People of the State of New York, on the relation of George G. Simons and another—one against Walter J. Dowling and others, individually and as members of the town board of the Town of Redfield, and another, the other against Albert S. Barker and others, individually and as members of the town board of the Town of Orwell, and another. Motions to quash writs denied.

Strebel, Corey, Tubbs & Beals, of Buffalo, and Henry D. Coville, of Central Square, for the motion.

Davies, Johnson & Wilkinson, of Camden, opposed.

ANDREWS, J. The object of these writs is to review proceedings of the town officers of Orwell and Redfield, Oswego county, N. Y., in closing certain highways in said towns.

Section 2125 of the Code of Civil Procedure provides that, subject to certain limitations not material here:

"A writ of certiorari to review a determination must be granted and served, within four calendar months after the determination to be reviewed becomes final and binding, upon the relator, or the person whom he represents, either in law or in fact."

[1] Section 191 of the Highway Law provides that a town superintendent of highways may—

"upon written application and with the written consent of the town board, make an order laying out or altering a highway, or discontinuing a highway, which has become useless since it was laid out, upon filing and recording in the town clerk's office, with such application, consent and order, a release from all damages from the owners of lands taken or affected thereby. * * * An order of the town superintendent, as herein provided, shall be final."

[2] The papers to be filed and recorded with the town clerk are the release and application, consent and order. It is not enough to file the three latter papers and record the former. The four months within which the writ of certiorari may be applied for begins to run from the time such filing and recording is completed.

[3] In the cases at bar these papers were not recorded. They were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

left with the town clerks, and were retained by them; such originals constituting, as they claim, the record. But this is not so. More than mere filing is required. A record implies an actual transcription by the official. The object is not only to give the instrument perpetuity but publicity.

Nor does leaving the papers with the clerks for record comply with the statute. There must be an actual record before the order becomes final.

An examination of the case and exceptions in *People ex rel. Dinsmore v. Vandewater*, 83 App. Div. 54-60, 82 N. Y. Supp. 627, will show that these precise questions were raised and decided in the Second Department. In the Court of Appeals (176 N. Y. 500, 68 N. E. 876) there was a reversal for other reasons. But though these questions were there also discussed upon the brief, no criticism was made in that court as to the conclusion of the court below.

Therefore the fact that these orders were made and filed on November 30, 1912, and that this proceeding was not begun until October 18, 1913, constitutes no ground for quashing the writ.

[4] Nor can I hold that the writ should be quashed because of any alleged laches on the part of the relator. At the time the orders were filed, or within a few days thereafter, the relator knew of the action which had been taken. But the mere delay of 11 months of an application for the writ has never, so far as I know, been held sufficient to justify its denial.

It may well be, however, that such a delay, coupled with such acts as would lead the defendant to believe that any adverse claims were abandoned, or even a failure to act if it led to such belief, and the fact that the defendant in reliance upon such action or nonaction had expended money or had put itself in a position which it would not have otherwise assumed, and which would cause loss to it if the writ were granted, would be sufficient to lead the court to refuse action. But in this case there seems to be no such condition of affairs. The relator at the time the orders of the town superintendents were given asserted what he claimed to be his rights. He claimed then, and has always claimed, to be the owner of land affected by the proposed action with regard to the highways in question, and the defendants did whatever was done by them knowing all the facts, not relying on any supposed waiver or consent on the part of the plaintiff, but assuming that the Salmon River Power Company had the legal title to the lands to which the plaintiff laid claim.

The question as to whether the plaintiff is the actual owner of the land claimed by him, and as to the effect of the deed executed by him, may be more properly considered after the return to the writ of certiorari has been made.

The motions to quash the two writs are hereby denied, with \$10 costs in each case.

The time to make returns thereto is extended until 20 days after the filing of the orders denying the motions to quash the writs.

Ordered accordingly.

In re NARGANES.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

1. CONTRACTS (§ 45*)—DELIVERY—EVIDENCE.

The possession by an executor of an instrument, two years after he became executor, signed by testator, and which acknowledged testator's indebtedness to the executor in a certain sum, was not evidence that testator had ever delivered the instrument to the executor, and hence it could not be made the basis of a contract between testator and the executor, which would support a claim against the estate.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 169, 191, 205, 213, 214; Dec. Dig. § 45.*]

2. ACCOUNT STATED (§ 4*)—RECITAL OF INDEBTEDNESS.

An instrument reciting that the signer acknowledges himself to be indebted to the person named therein in a certain sum, which amount the signer promised to pay from the proceeds to be obtained from properties in the signer's name in a certain parish, is not enforceable as an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 14, 15; Dec. Dig. § 4.*]

3. EVIDENCE (§ 215*)—ADMISSIONS.

An instrument in an executor's possession, signed by testator and acknowledging an indebtedness to the executor in a certain sum, which testator therein agrees to pay from the proceeds of certain properties, may be used by the executor as an admission by testator that he had received the sum stated from the executor, even though it cannot be made the basis of a contract between them for want of a showing of delivery.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 754-759; Dec. Dig. § 215.*]

4. CONTRACTS (§§ 15, 42*)—EXECUTION—DELIVERY.

A written statement that the signer of a paper intended to pay a certain sum out of the proceeds of certain land was not a binding contract if it was not delivered to the payee named therein and assented to by him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 61-66, 207-214; Dec. Dig. §§ 15, 42.*]

Appeal from Surrogate's Court, New York County.

Petition by Ricardo Narganes for the establishment of a claim in his favor against the estate of Cristobal N. Madan, deceased, of which petitioner is executor. From a decree of the surrogate disallowing the claim, claimant appeals. Affirmed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT DOWLING, and HOTCHKISS, JJ.

Carroll G. Walter, of New York City, for appellant.

Linsly Johnson, of New York City, for respondent.

INGRAHAM, P. J. The testator died in the island of Cuba on the 12th day of January, 1904, a resident of the state of New York, leaving a last will and testament which was duly admitted to probate on March 13, 1911, and by which he appointed the petitioner his executor, and on the 4th of May, 1911, letters testamentary were issued to the petitioner. On June 13, 1911, the executor, Ricardo Narganes, instituted a proceeding, under section 2719 of the Code of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Civil Procedure, to recover from the estate of his testator a claim amounting to \$3,330 and interest. To prove this claim the petitioner presented an instrument which was proved to be in the handwriting of the testator and was dated June 2, 1897. That instrument admitted a loan by the petitioner to the testator on July 15, 1895, of \$1,060, cash for letter of credit, \$300, cash loaned on March 24th, \$40, check for payment in Louisiana, \$250, and interest on these amounts at 10 per cent. and this account was followed by this statement:

"I acknowledge to be indebted to Mr. Ricardo Narganes in the sum of one thousand nine hundred and twenty-two dollars which amount I promise to pay him from the proceeds to be obtained from the properties which appear to be in my name in the parish of Livingston, state of La.

"New York, June 2, 1897.

"[Signed]

Cristobal N. Madan."

The only evidence as to the custody of this instrument appears in the testimony of the petitioner's attorney. He testified that he received this instrument from the petitioner personally in February or March, 1913.

[1] The petitioner being the executor of the testator, his possession of the instrument two years after the letters were issued to him was not evidence that the petitioner had the instrument in his possession prior to the date of the death of the testator, or that the testator had ever delivered it to him, so that it could be the basis of a contract between the testator and the petitioner.

[2] The surrogate was clearly right in the conclusion that this instrument could not be enforced as an account stated, or as a promise to pay a sum of money named by the testator to the petitioner. From all that appears, the petitioner might have found this paper among the papers of the testator after letters testamentary were issued to him. The fact that such an instrument was found with the testator's papers after his death would negative the claim that there was any promise or agreement by the testator to pay any sum of money to the petitioner. Nor was there any evidence that the sum of money which the testator there acknowledged himself indebted to the petitioner had not been paid.

[3] The plaintiff claims, however, that it can be used as an admission made by the testator in his own handwriting that the petitioner had advanced to the testator the various sums therein specified on the dates named, and I am inclined to think that it had probative force as such an admission, and therefore there was evidence before the surrogate, which was uncontradicted, that the petitioner had advanced to the testator the various sums therein specified. The instrument, however, is dated June 2, 1897, and the testator died January 12, 1904. Six years had therefore elapsed between the date of the admission and the date of the testator's death, and the claim was barred by the statute of limitations, unless there was an enforceable promise to pay from the proceeds to be obtained from the properties in the state of Louisiana; but, if this instrument cannot be used as evidence of a promise because of the lack of evidence of its delivery to the petitioner, this provision as to the payment cannot have the

upon this direction but upon the words of absolute gift following. See *Matter of Hedger's Estate*, 9 N. Y. Supp. 347, affirming 6 N. Y. Supp. 769. As the law favors the vesting of estates, this general direction is insufficient to bring the present case within the decisions cited above. It would seem by the weight of authority that the corpus of the estate was absolutely vested by the will, the time of taking possession and enjoyment being postponed. *Matter of Hedger's Estate*, *supra*.

In the *Baer Case*, upon which the defendant Foster strongly predicates her claim of intestacy, the testatrix devised her residuary estate to her executors in trust for the use of her daughter Emeline during her life, and provided that upon her death the remainder should go to her issue, if she had any. In the event of the daughter dying without issue, the income, rents, and profits were to be applied to the use of a second daughter, should she survive Emeline, during her life, and upon her death the estate was to be divided equally among "the children and lawful heirs of my brother Harmon Hendricks, deceased, to share and share alike per stirpes." Ten children of the deceased, Harmon Hendricks, were living at the time of the death of the testatrix, but they all died before Emeline, the first life tenant. Some left wills under which any interest they might have in the estate would pass. In arriving at the conclusion that these wills conveyed to their beneficiaries no interest in the estate in question, the court was influenced by two facts, neither of which is to be found in the present will: First, that the only words of gift to the children were to be found in a direction to distribute; second, that the said gift was to take effect only in the event of Emeline's death without issue, Emeline at the time of the death of the testatrix being a young, unmarried girl. There was plainly no vesting of the remainders in the children when the testatrix died, for their interests were entirely dependent upon the death of Emeline without issue, and therefore, as they predeceased Emeline, they had no devisable interest in the estate. When the testator, Chase, died, the remaindermen were persons in being who had an immediate right to the possession of the property on the determination of the life estate of Adaline A. Bucklin, and they therefore took vested remainders within the meaning of the statute. *Real Prop. Law (Consol. Laws, c. 50) § 40*. As Judge Woodruff said in *Moore v. Littel*, 41 N. Y. 66:

"If you can point to a man, woman, or child who, if the life estate should now cease, would, *eo instanti et ipso facto*, have an immediate right of possession, then the remainder is vested."

An application of this practical test to the present case results in the inevitable conclusion that the remainders vested at the death of the testator. I do not believe that the words "or if she be not then surviving, to her descendants," following the gifts to the remaindermen, affect the vesting; they create a condition subsequent by which the remainders may be defeated, but not a condition precedent on which the vesting depends. *Moore v. Littel*, *supra*; *Doscher v. Wyck-off*, 132 App. Div. 139, 142, 116 N. Y. Supp. 389. It, therefore, follows that Mrs. Clark, Mrs. Lincoln, and Ellen D. Lincoln took vested remainders on the death of the testator. It also follows that Franklin Chase Clark and Ellen D. Lincoln, as descendants of Mrs. Clark and

Mrs. Lincoln, had a contingent interest in the remainder of the respective parent, dependent upon the descendant surviving said parent. When Mrs. Clark and Mrs. Lincoln died, these remainders immediately vested in the descendants, and, as the will contains no words of divestiture concerning them, the subsequent death of Ellen D. Lincoln during the life tenancy did not affect such vesting.

[3] The sole remaining question is the effect of the death of Ellen D. Lincoln, before the life tenant and without descendants, upon the gift to her as original remainderman. The testator failed to make provision for this occurrence, and the question must therefore be determined from the interpretation to be placed upon the words "or if she be not then surviving, to her descendants." After careful consideration I am constrained to hold that the testator merely intended that, in the event of the death of a remainderman leaving issue during the life tenancy, the interest of one so dying should vest in her issue. In *Doscher v. Wyckoff*, supra, the testator gave all his property to his executors in trust for the use of his wife so long as she remained his widow, and further provided:

"On the death or remarriage of my wife I give all my property * * * in equal portions to my children then living and the issue of such as may have died," etc.

In construing this will Burr, J., said:

"The testator's son, Abraham Vandever Wyckoff, took a vested estate in remainder subject to be defeated by his death during the lifetime of his mother. * * * His death before his mother, leaving issue, was a contingency upon which such remainder might vest in his issue, but it was not an event upon which the vesting in him depended."

Such a construction seems also to have been favored in the earlier cases. In *Smither v. Willock*, 9 Ves. Jr. 233, there was a bequest to the testator's wife for life, and after her death the estate was to be divided between his brothers and sisters in equal shares, but in case of the death of any in the life of the wife, the share of him, etc., so dying was to be divided between his, etc., children. One of the brothers died during the lifetime of the widow without ever having had a child. The master of the rolls held the share of the deceased brother to be vested subject to be divested only in the event of his death in the life of the testator's widow, leaving issue, and consequently, that event not having happened, his representative was entitled.

In conclusion, I am of the opinion that by his will the deceased, Chase, validly disposed of all his property; that on his death the remainders vested in Mrs. Clark, Mrs. Lincoln, and Ellen D. Lincoln; that on the death of Mrs. Clark and Mrs. Lincoln their interests passed under the will to their descendants, and, lastly, that the death of Ellen D. Lincoln, without issue and before the life tenant, did not affect the vesting of her one-third interest in the estate as original remainderman, nor the one-third interest which passed to her on the death of her mother. It, therefore, follows that she died seised of a devisable interest in two-thirds of the residuary estate of Edward E.

Chase, deceased, and that the beneficiaries under her will are entitled to an equitable division and distribution thereof by the trustees according to the provisions of said will.

Judgment accordingly.

FOSS v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

1. APPEAL AND ERROR (§ 281*)—PRESENTING QUESTIONS IN LOWER COURT—MOTION FOR NEW TRIAL.

Where there was no motion for a new trial, an appeal presents questions of law only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1650-1661, 3024, 3281; Dec. Dig. § 281.*]

2. BROKERS (§ 65*)—COMPENSATION—COMMISSION FROM ADVERSE PARTY.

An agreement by a real estate broker to endeavor to procure certain tracts of land for an intending purchaser at the lowest price possible without disclosing the name of the purchaser, but to secure his commission from the vendors, the purchaser agreeing only not to purchase through any one else, is not contrary to public policy, if the vendors are given to understand that, while they were to pay the commission, the broker was representing the purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 48-50; Dec. Dig. § 65.*]

3. BROKERS (§ 88*)—ACTIONS—SUFFICIENCY OF EVIDENCE—GOOD FAITH.

In an action against the purchaser for breach of its agreement not to purchase through another, evidence *held* not to show, as a matter of law, that the broker did not endeavor in good faith to induce the owners to offer the property at the lowest price at which they would sell.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

4. APPEAL AND ERROR (§ 927*)—TAKING CASE FROM JURY—WEIGHT OF EVIDENCE.

In determining whether a complaint should be dismissed or verdict directed for the defendant for lack of evidence, the testimony of the plaintiff must be taken to be true, and he is entitled to the most favorable inference to be drawn from all the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

5. BROKERS (§ 9*)—REPRESENTATION BY OFFICERS—CONTRACT.

An agreement by the president of a corporation with a real estate broker that, so long as he remained the head of the company, it would not purchase certain tracts of land through any one but the broker is not binding upon the company after the resignation of the president, although he remained a member of the board of directors and of the committee in charge of the purchase of that property.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 10; Dec. Dig. § 9.*]

6. BROKERS (§ 41*)—CONTRACTS BY OFFICERS—RATIFICATION.

The fact that, after the resignation of the president, the company purchased one of the tracts through the broker for which he collected a commission from the vendors, and continued negotiations through him for a time for the other tracts, was not a ratification of the agreement of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

former president or a new agreement by implication on the part of the company not to purchase through another.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 41; Dec. Dig. § 41.*]

Ingraham, P. J., and McLaughlin, J., dissenting in part.

Appeal from Trial Term, New York County.

Action by Archibald C. Foss against the New York Central & Hudson River Railroad Company. Judgment for the plaintiff, and defendant appeals. Reversed, and complaint dismissed.

See, also, 144 N. Y. Supp. 1116.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Austen G. Fox, of New York City, for appellant.

Grant C. Fox, of New York City (Stanley Holcomb Molleson, of New York City, on the brief), for respondent.

LAUGHLIN, J. The plaintiff is a real estate broker, and he brought this action, not to recover commissions, but to recover damages for a breach of a parol contract alleged to have been made between him and the defendant in 1906, by which he claims that the defendant, through William H. Newman, who was then its president, employed him to endeavor to negotiate the purchase of seven parcels of real estate, known as the "King Estate," at Weekawken, N. J., on terms satisfactory to the defendant; he, however, to receive no commissions from defendant, and it agreeing with him "that in the event it purchased said property, and in the event it purchased any of said parcels thereof, it would purchase the same through him" as its broker, so that "he might obtain commission from the owners of said property and of said parcels on the sales thereof." The plaintiff alleges that he negotiated for the defendant the purchase of three of said parcels, and received commissions thereon from the owners; and that he subsequently endeavored to negotiate the purchase for it of the remaining four parcels, and obtained an agreement from the owners that they would pay him the usual commissions "on each and every sale of said parcels in which plaintiff should be the broker for the purchaser at said sale or sales"; and that he was "ready, willing, and able and offered to the defendant to do and did do all things necessary as its broker to negotiate the purchase of said parcels for the defendant on terms satisfactory to it," but that the defendant purchased said four parcels, in violation of its agreement with him, and to his damage in the sum of \$25,000, being the amount of the commissions he would have received had the purchase been made through him.

At the close of the plaintiff's case, counsel for defendant moved for the dismissal of the complaint on the grounds, among others: (1) That plaintiff had not proved the cause of action alleged or any cause of action; (2) that the agreement, as testified to by the plaintiff, was that the defendant would not purchase the property through any one but plaintiff as broker so long as Mr. Newman remained "head of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

company," and that Mr. Newman ceased to be president and head of the company long prior to the purchases of the last four parcels; (3) that it was not a violation of the agreement, which plaintiff testified Newman made with him, for the defendant to purchase the property direct from the owners, as it did, without employing or paying a commission to any other broker, and especially so since one of the owners refused to negotiate a sale through the plaintiff; (4) that the contract is void as against public policy on the ground that the plaintiff led the owners to believe that he was acting solely for their interests in endeavoring to procure the highest prices obtainable for their lands, and at the same time was assuring the defendant that he was endeavoring to procure the property for it at as low a price as possible, and did not disclose "to either party that he was professing to the other to be acting in the interests solely of the latter." The motion was denied, and an exception duly taken. Defendant thereupon rested without offering any evidence, and moved for a direction of a verdict, on which motion the court reserved decision and submitted the case to the jury.

[1] There was no motion for a new trial, and therefore the appeal presents questions of law only.

[2, 3] The first point urged by the learned counsel for the appellant is that the contract, as shown, violated the legal and moral duty of the plaintiff as a broker representing the owners, and therefore contravenes public policy and is void and unenforceable. It is not contended that the mere making of an agreement by the plaintiff with the owners to receive commissions from them in the event of a sale of their lands through him violated his contract with defendant. It was from the outset understood between the plaintiff and the defendant's president that plaintiff was to receive no compensation from the defendant but was to be at liberty to obtain commissions from the owners, which is the only manner contemplated for his receiving compensation for his services.

It is quite apparent that, in such circumstances, it was the duty of the plaintiff to act in entire good faith with the defendant. He accepted employment from it before he obtained any agreement from the property owners, either for a sale of their property or for the payment of commissions. It was also his duty to endeavor to obtain for the defendant an offer for the sale of the property at the lowest price at which the owners were willing to sell. The questions of good faith were submitted to the jury, and, if questions of fact, the verdict is now conclusive.

The trial was in 1913, nearly eight years after the negotiations involved in this action commenced, and plaintiff had very little recollection independent from the contents of the correspondence had at the time. The property in question is water front property and is situated immediately to the south of the defendant's West Shore Railroad Terminal at Weekawken. Plaintiff discovered that it was for sale and the price one of the interested parties was asking, and he conceived the idea that the defendant might be interested in purchasing it. Accordingly on the 7th of September, 1905, he wrote the president of the defendant, apparently without authority from the owners of

the property, stating that he was offering the property for sale, and that he had been informed that the owners had offered it for sale at \$1,000 per front foot, and saying that, if Newman would make him an offer, he would be pleased to submit it to the owners and to endeavor to get them together, and closing as follows:

"I shall be pleased to assist you in securing this property at as low a price as possible if you wish to purchase it."

Having received no reply to that letter, he wrote Mr. J. P. Morgan on September 23, 1905, drawing his attention to the property, and asking if he would not consider forming a company to develop the property if none of the companies in which he was interested desired to purchase it. This letter was forwarded to Newman, and by letter under date of September 26, 1905, he invited the plaintiff to call. Plaintiff called pursuant to the invitation and was informed that Newman would be interested in purchasing the property, but "wanted the very lowest price that could be gotten on it," and plaintiff promised to see the various owners "and try to get a very low price."

The plaintiff, after his first interview with Newman, but before the contract in suit was made with the defendant, called upon several of the most influential of the property owners and endeavored to induce them to fix a selling price for their lands; but this they would not do, and suggested that he present an offer from his client. He reported the result of his interviews to Newman, who, pursuant to authority conferred upon him by the executive committee of defendants' board of directors subsequently, authorized him to make an offer on each of the seven parcels conditioned upon all being sold, and he presented that offer to the several owners by letters under date of February 23 or 24, 1906. Plaintiff had agreed with Newman not to disclose to the owner who was desirous of purchasing the property, lest they might ask higher prices; and he faithfully kept that agreement.

I am of opinion that plaintiff had a right to make the agreement both with defendant and with the property owners, provided he did not deceive the owners into thinking that he was representing them. I see no objection to a broker, representing one desirous of purchasing property, going to the owner and saying:

"I know some one who may purchase your property if you will offer it at a reasonable figure, and I am representing him, but I shall not proceed with the negotiations unless you agree to pay for my services, which are to be rendered to the purchaser from whom I am to receive no compensation."

That is in effect what the plaintiff did in this case. The property owners knew from the outset that the plaintiff was representing some one who desired to purchase their property, but who did not wish his identity known, and throughout the correspondence the purchaser is referred to, both by the plaintiff and by the owners and their representatives, as the client of the plaintiff.

A considerable part of the negotiations for the sale of the property was carried on with plaintiff by one James Gore King. King was interested in one of the parcels as trustee, in another as stockholder, officer, and director of the corporate owner, and in three other parcels

as attorney. He testified that in the year 1906, without specifying the date, he had a conversation with the plaintiff with respect to commissions, and agreed for the owners that, if the plaintiff succeeded in selling seven "or possibly six" of the plots at prices for which the owners were willing to sell, "he should receive from the owners a commission of $2\frac{1}{2}$ per cent. to be paid if and when the deed should be delivered and not otherwise," and that he was authorized to make that agreement. King, who represented the owners of five of the parcels, replied on March 26, 1906, by letter to the proposition submitted by plaintiff on February 24th, making a counter proposition, and stating that he understood the owners of the other two parcels were making independent offers. That letter closes as follows:

"With regard to the commission to be paid to you as broker, if the sale is consummated, while we regard two and one-half per cent. ($2\frac{1}{2}\%$) as too high, considering the great value of this property, yet the owners of each plot are willing to pay at that rate upon the proportion of the price received by them for their respective plots provided the sale is made at the figure I have mentioned, and provided further, that no commission shall be paid or payable in respect of any given plot unless and until the deed of that plot is delivered and the entire purchase price thereof paid. This is to be regarded as one of the conditions of the above offer."

The other owners also agreed to pay like commissions. There was no agreement on the part of plaintiff to do anything for the owners, and he was not vested by them with any discretion. They fixed their selling prices and made their own propositions to him to be presented to his client. On March 30, 1906, he communicated with Newman by letter the substance of the propositions he received from the owners, stating that the owners represented by King would take less than the amount of their offer. After that the plaintiff had further negotiations with the owners with a view to getting their lowest prices, and he communicated by letter, under date of April 4, 1906, to Newman the result of his efforts. According to the plaintiff's testimony, which is uncontroverted, he fully and truthfully informed Newman with respect to his negotiations with the owners. After further negotiations Newman authorized plaintiff to increase the offer to \$850 per front foot, and he submitted that proposition to the owners about the middle of April. The owners did not accept this offer, and on April 30th plaintiff wrote King, pursuant to authority from Newman, making a slight increase in the offer and urging the owners at once to fix the lowest price that they would take, and stating that, on the understanding that he would receive a commission of $2\frac{1}{2}$ per cent. from the owners, he would continue to endeavor to make a sale. This offer was met by a counter proposition from King on behalf of all of the owners to sell the entire tract as an entirety for \$2,183,930. That offer was rejected by Newman as being \$183,930 too high. The plaintiff then endeavored to have the owners reduce their selling price. About this time it appears that there was no prospect of an immediate agreement, and plaintiff became solicitous with respect to the commissions he expected to receive if the deal went through, and he had an interview with Newman, to which he testified as follows:

"I asked Mr. Newman what he could do to protect me, as I was doing everything I could to purchase this property for the New York Central Railroad Company and to keep the identity of the purchaser secret, and he told me that, so long as he was the head of the company, the property would not be bought for the New York Central through anybody but me, to give me an opportunity to make my commission, as I could not tell the sellers who the buyer was, and if anybody later submitted it to them I would have lost my commission."

That is the agreement on which this action is based. On May 31, 1906, King wrote the plaintiff suggesting that, if he could get his client to renew the former offer and would throw off some of his commissions, the owners might sell. The plaintiff forwarded this letter with a letter of his own, under date of June 2d, to Newman, and also asked Newman if defendant would not pay part of the commissions, and was informed that the defendant never did and could not pay commissions. Subsequently King wrote plaintiff:

"If you can secure your commission in whole or in part from the buyer, you are welcome to it."

About this time, King, not knowing that defendant was the plaintiff's client, called on Newman with a view to interesting the defendant in this property, and made the same offer which Newman had previously refused; but he received no encouragement. Plaintiff continued negotiations with the owners, but in June, 1906, he was informed by Newman that, on account of the condition of the money market, the company would not take the matter up again until fall. Nothing of importance transpired thereafter until the middle of March, 1907, when one of the interested parties reopened negotiations by a renewed offer. Plaintiff took this up with Newman and made a counter proposition, with the result that on April 17, 1907, the owners of this parcel conveyed to the Guaranty Trust Company, and on June 14, 1907, the latter company executed a declaration of trust showing that it held the title to the New York State Realty & Terminal Company, a subsidiary company of the defendant. On that sale plaintiff received his commissions from the vendor. At Newman's suggestion the plaintiff then resumed negotiations with a view to a further purchase, and a second parcel was purchased and title taken in the name of the plaintiff on September 5, 1907, and, after giving back a purchase-money mortgage and a bond for \$400,000, he deeded to the Guaranty Trust Company, which again executed a declaration of trust to the New York State Realty & Terminal Company, and the latter company executed an agreement to save plaintiff harmless from liability on his bond. In that instance plaintiff received his commission from the vendor pursuant to a formal agreement in writing, which had been prepared by one of the attorneys for defendant.

Plaintiff continued his endeavors to obtain an offer from the owners of the other parcels which would be acceptable to the defendant. On the last day of February, 1909, William C. Brown became president of the defendant; Newman having resigned. Newman, however, remained a director and a member of an executive committee of the board of directors. At a meeting of the board of directors

held on the 3d day of March, 1909, Brown drew the board's attention to the advisability of purchasing a third parcel and to the price at which it could be secured, and the matter was referred to him with power. That parcel was subsequently purchased pursuant to the authority thus conferred. In that instance plaintiff agreed to purchase in his own name and made a contract with the owner on March 22, 1909, but on the same day he assigned the contract to the Guaranty Trust Company, and the property was deeded to that company as before, and plaintiff received his commission from the vendor.

On November 10, 1909, plaintiff wrote Brown in effect that it was an advantageous time to purchase the other parcels; but on the 13th of the same month Brown wrote him that the company would not care to consider acquiring the property at that time. At a meeting of the board of directors of the defendant held on March 1, 1910, Brown reported in effect that, in acquiring a right of way for railroad purposes across the lots in question, it had covenanted with the owners to these lots to keep open a road for their use, and that the owners were now demanding that the obligation be complied with; and he evidently deemed it advisable, in the circumstances, to purchase the remaining parcels, although they were not immediately needed for railroad purposes. A resolution was adopted referring the matter to a committee of three, consisting of the president, Newman, and Mr. Harris, one of counsel for defendant, with power to recommend the purchase of the four remaining lots to the board of directors of said terminal company. It appears that King called on Harris in November, 1909, with respect to this right of way; and Harris asked whether King could sell "these properties"; and King replied that he thought he could get the owners to sell the four remaining parcels for \$1,000,000, provided there were no deductions for broker's commission, and that, if the sale were made through him, he would charge no commission for bringing it about. On the 8th day of March, 1910, plaintiff had a conversation with Newman, and the latter suggested that plaintiff obtain prices on any or all of the remaining plots and take the matter up with Brown. Plaintiff having been informed on that day that borings were being made on one of the parcels, and that an option on it had been asked and refused, wrote Brown drawing attention thereto and stating the then status of the other parcels, and asking to be informed "what you wish to do about these different plots." Plaintiff, following this letter, called at Brown's office and was informed by the latter's secretary that the matter was in the hands of Harris; and plaintiff arranged for and had an interview with Harris about the 15th or 16th of March. Harris informed plaintiff that the company had been negotiating with King for some three weeks for the purchase of the property, and asked plaintiff why he thought he should be the broker; and plaintiff said:

"I told him that I considered that I was the broker in the matter, as I had been looking out for the interests of the company, and had tried to get it to the lowest possible price, and had not disclosed the identity of the buyer, and had done everything I could to get it for the company at the very lowest possible amount, and—oh, I also told him that Mr. King was not a disinterested party, as he was the trustee for one of the owners, and held a position of

attorney for some of the others, so that in dealing with him he would be dealing with a representative really of the owners, instead of dealing with a broker who was disinterested and who was working for his—for the interests of the company."

Harris agreed to let plaintiff know his decision as to whether or not he would recognize plaintiff as the broker, and telephoned him shortly thereafter that he had decided to close the purchase of the property through King.

It does not appear that the plaintiff informed either Brown or Harris of the agreement he had made with Newman, or that he asserted to any of them that he would claim that he was continuing to work under that agreement after Newman ceased to be president, or would maintain that the company could not purchase the property directly from the owners or through another broker on account of Newman's agreement.

[4] On the question as to whether the complaint should have been dismissed or a verdict directed for the defendant, the testimony of the plaintiff must be accepted as true, and he is entitled to the most favorable inference to be drawn from all the evidence. It may be that there was a question of fact for the jury as to whether the plaintiff acted in good faith in the performance of his agreement with the defendant, for in one view of some of his letters it would seem that he was intending to give the owners the impression that he could get his client to purchase the property without their reducing the figures at which they had offered it. I think, however, that it cannot be said, as matter of law, that the contract upon which he sues was void as against public policy, or that he did not endeavor in good faith to induce the owners to offer the property at the lowest price at which they would sell.

[5] I fail to see, however, how the recovery can be sustained in view of the fact that the only agreement upon which plaintiff claims the right to recover is the agreement made by Newman that so long as he remained head of the company the property would not be purchased through anybody but the plaintiff. At most that was an agreement not to purchase through another broker, and as a matter of fact the property was not purchased through another broker. If the agreement be taken literally and the purchase had been made while Newman remained president, it is doubtful whether plaintiff would have been entitled to recover. Newman doubtless had authority to make certain agreements that would survive his presidency of the company; but this agreement was expressly limited to the period of his presidency. There is not force in the suggestion that he was the head of the company after he ceased to be president merely because he remained a member of the board of directors and of the executive committee, and was a member of the special committee having authority to purchase the property in question. It appears that individually he had no special authority, and that the matter was in the hands of Messrs. Brown and Harris.

[6] The fact that one parcel was purchased through the plaintiff, so that he received commissions from the vendor after Brown became president, was not a recognition of Newman's agreement. The com-

pany neither paid nor agreed to pay plaintiff any commissions. The continuance of negotiations with him to the extent stated, after Brown became president, was neither a continuance of Newman's agreement that the company would not purchase the property through any one else, nor a new agreement by implication to that effect. I am of opinion, therefore, that the plaintiff failed to establish a cause of action, and that his complaint should have been dismissed.

It follows that the judgment and order should be reversed, with costs, and the complaint dismissed, with costs on the motion made at the close of the plaintiff's case.

CLARKE and SCOTT, JJ., concur.

INGRAHAM, P. J. (dissenting in part). I concur in the reversal of this judgment and dismissal of the complaint on the ground stated by my Brother LAUGHLIN, but I do not concur with him in his conclusion that a broker engaged in a negotiation for the sale of real property can receive a commission from the seller and at the same time contract with the purchaser to receive an advantage from him without disclosing such contract to the seller. A broker approaching the owner of real estate with an offer to purchase the property and making an agreement with the owner of the property that he shall receive a commission from the owner for his services in selling the property assumes towards the seller a position in which the utmost good faith is required on his part. The very fact that he undertakes to act in that capacity imposes this obligation upon him, and whether he gives up the name of the customer or not, if he is to receive his commission from the seller, he cannot place himself in a position antagonistic to the seller's interest and procure any advantage from the purchaser without disclosing the true condition of the seller. The plaintiff here assumed from the beginning of the negotiation that he was to get his commission from the seller. The fact that he represented the purchaser in his endeavors to procure the property at as small a price as possible justified him in going to the owners of the property and making an offer and endeavoring to get the property at as low a price as possible; and, if he had acted openly with the owners and stated that he represented the purchaser, there would have been no objection to the transaction. But that he never did. He went to the owners of the property with the offer and demanded a commission if he carried out the transaction. To that the owners agreed. He thereby became bound to state to the owners, who were to pay him for the services, that he rendered his relation to the persons who had made the offer, and that he was acting for them in procuring the property at as small a price as possible and could not be depended on to represent the owners in the transaction, and to show the utmost good faith. And it seems to me that, if he had completed the sale, the owners could have refused to pay him any commission upon the ground that, having brought an offer to them and asked them for a commission for services that he rendered to them in making a sale, he was all that time acting against their interests and was endeavoring, not to induce the purchaser to

pay more, but to induce the seller to take less. This seems to me to be a distinct violation of his duty to the sellers, as laid down in *Dickinson v. Tysen*, 209 N. Y. 395, 103 N. Y. Supp. 703. Certainly if he could not have recovered the commission as against the seller he suffered no damage because the defendant did not make the final offer to him which resulted in the purchase of the property.

McLAUGHLIN, J., concurs.

FEINSOT et al. v. BURSTEIN.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

DAMAGES (§ 81*)—LIQUIDATED DAMAGES AND PENALTIES—LEASE.

Where, under a lease of a tenement house, the lessees deposited \$2,000 as security, the lease providing that in case of any breach the deposit should be retained "as liquidated damages," or, if the lessees were dispossessed by summary proceedings as provided therein, the landlord could retain it "as liquidated damages and not a penalty," and the lessees were afterwards dispossessed for nonpayment of \$325, a part of a month's rent, the deposit was a penalty, its purpose being to secure the performance of the covenants, and not liquidated damages, regardless of its designation as such by the parties, since, the damages being easily ascertainable and the deposit being so disproportionate to the actual damages, the parties must have intended it as a penalty; hence the landlord could not retain the deposit but could only recover his actual damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 177; Dec. Dig. § 81.*]

Ingraham, P. J., and Scott, J., dissenting.

Appeal from Appellate Term, First Department.

Action by Morris Feinsot and another against Maurice J. Burstein. From a judgment of the Appellate Term (82 Misc. Rep. 429, 143 N. Y. Supp. 1040) reversing the judgment of the trial court dismissing the complaint, defendant appeals. Affirmed.

See, also, 144 N. Y. Supp. 1115.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles Bernstein (Gerald B. Rosenheim, of New York City, of counsel, and Louis J. Vorhaus, of New York City, on the brief), for appellant.

Herman B. Goodstein, of New York City, for respondents.

CLARKE, J. The action was to recover a deposit of \$2,000 made by the plaintiffs upon a lease, less the amount due when they were dispossessed. The lease was for a tenement house on Orchard street for a term of four years, commencing on February 1, 1911, at a yearly rental of \$12,000, payable in monthly installments of \$1,000 each, to be paid \$500 on the 5th and \$500 on the 10th of each month in advance. The lease provided that:

"In case any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the party

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the first part to re-enter the said premises or in her option to commence summary proceedings to recover possession, * * * and in the event of such re-entry, or the commencement of such summary proceedings, this lease shall be at an end."

The parties of the second part covenanted to make all inside and outside repairs and to keep the same in good condition except the outside structural repairs as brick walls and sidewalks, and, in the event of their failure to make said repairs, the landlord had the right to make the same and to add the costs thereof to the monthly rent due for the month subsequent to said repairs. They covenanted to comply with all orders of the fire underwriters and to comply with the orders and requirements of the tenement house and other bureaus of the city government. The lease provided as follows:

"The said parties of the second part have deposited with the party of the first part the sum of two thousand (\$2,000.00) dollars, * * * as security for the faithful performance of all the covenants and conditions of this lease, on the part of the parties of the second part, and in case of any breach thereof by said parties of the second part, the said amount of money shall be held and retained by the said party of the first part as liquidated damages for said breach. And the parties further agree that in the event that the said parties of the second part shall be dispossessed on summary proceedings brought to recover possession of said premises and to remove them therefrom, that the said party of the first part shall, nevertheless, have the right to retain the said sum of \$2,000 as liquidated damages, and not as a penalty."

The lease further provided for the payment by the party of the first part of interest at the rate of 3 per cent. on said \$2,000 to be deducted annually from the rent to be paid; "the said party of the first part, upon the termination of this lease, at the end of the term aforesaid, shall return the said deposit of two thousand (\$2,000) dollars to the parties of the second part, heirs or assigns."

The plaintiffs went into, and remained in, possession for a year. On the 13th of February, 1912, summary dispossession proceedings were instituted against them solely for the nonpayment of \$325, part of the rent for the month of February, and they were removed. Plaintiffs brought this action to recover the amount of the deposit, and it was tried before the court and a jury. The defendant raised the issue that the plaintiffs had broken their covenant to make repairs; that when possession was retaken the premises were badly out of repair; and that he had spent \$1,600 for repairs. The plaintiffs controverted this, testifying that the premises were in much better condition when they left than when they took possession, and submitted bills showing they had expended \$1,200 in repairs. The jury resolved this question of fact in favor of the plaintiffs, and returned a verdict for them for \$1,784.37, which was the amount of the deposit, \$2,000, less the rent due, \$325 and interest on the balance of \$1,675, viz., \$109.37. Thereafter the trial court dismissed the complaint. The Appellate Term unanimously reversed the judgment and reinstated the verdict.

By the verdict of the jury the breach of the covenant to repair is out of the case. There remains, therefore, only the breach of the covenant to pay rent. That is \$325, a portion due for one month. Upon this breach, are the plaintiffs to be held to have forfeited the amount of their deposit? An examination of the lease discloses that the tenants

obligated themselves to but one general covenant, to wit, the payment of the rent reserved. It is true they were obliged to make all inside and outside repairs; to comply with all orders of the board of fire underwriters, all city ordinances and requirements affecting the property; to pay excess croton water charges; and to pay plate glass insurance. But the possible damages flowing from the breach of any of these requirements were not only easily ascertainable, but the lease lays down an exclusive method of ascertainment. It specifically provides that the damages after ascertainment shall be added to the rent of the ensuing month and become payable by the tenants as increased rent. The verdict establishes no breach except to pay rent.

In *Chaude v. Shepard*, 122 N. Y. 397, 25 N. E. 358, the court said:

"It may be observed that the primary purpose of the deposit was security for the performance by the plaintiff of his covenants in that instrument. Those covenants were to pay the rent and the charges assessed for croton water, and to make repairs during the term. The only default at the time of his removal, by means of the summary proceedings taken by the defendant, was in the nonpayment of one month's rent. * * * The damages resulting from the termination of the tenancy, by reason of the plaintiff's failure to perform the covenants, were neither indefinite nor uncertain in character. His relation of tenant could be terminated before the end of the term only by the act or consent of the defendant; and, when he accomplished it and took possession of the premises, the damages with which the plaintiff was chargeable were those only which resulted from breach of the covenants, prior to entry of the defendant, upon the termination by the latter of such tenancy. * * * In view of the intention of the parties as derived from the entire provision in respect to this deposit, there was nothing within their contemplation in its purpose, in the event of the premature termination of their relation given by the lease, other than such damages as should result from the default of the plaintiff. * * * And, as the only default of the plaintiff was in the nonpayment of one month's rent, he was entitled to recover the excess over that of the amount so deposited."

In *Caesar v. Robinson*, 71 App. Div. 180, 75 N. Y. Supp. 544, the lease provided for a deposit of \$1,000 "as security for the faithful performance of this agreement on their part, and, in case of any breach thereof by said tenants, said amount shall be paid and retained by said landlords as liquidated damages for said breach; but, in case the actual damages suffered by said landlords through such breach shall be greater than said sum of \$1,000, then said sum shall be applied on account of such damage, and said tenants be still liable for the balance thereof." This court, although divided, held, in a forcible opinion by Mr. Justice Hatch, that the provision was for liquidated damages, and the landlord was entitled to retain the deposit. But in 174 N. Y. 492, 67 N. E. 58, the Court of Appeals unanimously reversed, saying:

"The circumstance that the deposit is described in the lease as liquidated damages for a breach of the agreement is not at all conclusive. * * * Whether it is that or a penalty depends upon the nature of the transaction and the intention of the parties. * * * A provision in a contract such as that now under consideration will be treated as liquidated damages only in those cases where, from the nature of the transaction, the actual damages consequent upon a breach of the contract are incapable of accurate measurement, or where the sum specified in the instrument is not out of all proportion to any damages which could possibly arise from a breach. * * * The only breach of the lease which the defendants assert as a ground for retaining the deposit is the omission of the tenants to pay the \$45 of the monthly rent. * * * There is no inherent difficulty in measuring the legal damages which

the landlord sustained in a case where the tenant omits to pay the rent, and is for that reason dispossessed. The rule of damages in such cases is quite well settled. It is not claimed in this case that the landlord sustained any other damages beyond the loss of the rent, and that was allowed at the trial and deducted from the deposit. In the absence of anything in the record to the contrary, the presumption is that the landlord resumed the possession of the demised premises or relet them for the same or a larger rental, and, if so, it is difficult to see why he should be entitled to have the leased premises and the deposit at the same time. He was not bound to take possession, but could have exhausted the deposit by applying it upon the arrears of rent from time to time as it fell due. * * * This is therefore a case where the damages sustained by reason of the breach of the lease in the failure to pay the stipulated rent could have been easily ascertained, and, when ascertained, it is out of all proportion to the deposit retained under the claim that it was liquidated damages. * * * The entry of the landlord under the warrant issued upon the judgment in the proceedings to dispossess the tenants for failure to pay the \$45 canceled the lease and annulled the relation of landlord and tenant. When the landlord elected to assert that right, he waived all claim to the deposit, except so far as it was necessary to apply it in payment of rent then due or accrued."

Feyer v. Reiss, 154 App. Div. 272, 138 N. Y. Supp. 964, is distinguishable in these important particulars:

First. The lease in that case was clear and definite as to the character of the deposit.

"It being expressly understood and agreed that, if the lessees surrender the said premises or are dispossessed therefrom prior to the expiration of this lease in 1914, then and in that event the said \$800, together with any subsequent installments which shall be paid by the lessees as hereinbefore provided, shall belong to the lessor as liquidated and stipulated damages, and the parties hereto agree to stipulate such deposit as liquidated damages because they cannot ascertain the exact amount of damage which the lessor would sustain in the event of any breach or violation hereunder."

Secondly. The jury rendered a verdict against the plaintiff, thus resolving the facts adversely to the tenants, and the judgment of dismissal was upon that verdict and not against it as in the case at bar.

And, thirdly. The court there found no excessive disproportion between the deposit and the possible damages.

It seems to me that in the case at bar the authorities and the verdict of the jury settle the controversy in favor of the respondent. To use the language of the Court of Appeals in the Caesar Case, *supra*:

"I am unable to distinguish this case in principle from those in which this court has passed upon provisions of a similar character in leases or agreements between landlord and tenant. *Chaudé v. Shepard*, *supra*; *Scott v. Montells*, 109 N. Y. 1 [15 N. E. 729]. In these cases it was held that the deposit was intended as security for the performance of the covenants of the lease and not as liquidated damages."

The determination of the Appellate Term should be affirmed, with costs to the respondent.

McLAUGHLIN and LAUGHLIN, JJ., concur.

INGRAHAM, P. J. (dissenting). Sarah Roth executed and delivered to the plaintiffs a lease of certain property known as Nos. 85-87 Orchard street, in the city of New York, for a term of four years, commencing on the 1st day of February, 1911, at the yearly rental of

\$12,000, payable in equal monthly installments of \$1,000 each in advance. The lease provided that if any rent should be due and unpaid, or if default should be made in any of the covenants contained in the lease, then it should be lawful for the landlord to re-enter on the premises and commence summary proceedings to recover possession thereof, and that in the event of such re-entry, or the commencement of such summary proceedings, the lease should be at an end. The tenants further covenanted that they would make all inside and outside repairs in and about said premises and keep the same in good condition during the continuance of the lease, except the outside structural repairs which were to be made by the landlord. The tenants further covenanted that, in the event of their failure to make such repairs, the landlord would have the right to make the same and to add the costs thereof to the monthly rent due. The parties of the second part further covenanted that they would not use or occupy said premises, or permit the same to be used or occupied for business or purposes deemed extra-hazardous on account of fire, and the tenants further agreed to comply with all orders, edicts, and specifications of the New York board of fire underwriters, and that they would not sublet any part of the premises to such tenants or business that might increase the then insurance rate; that, should such rate be increased, such increase should be borne by the tenants; that in the event that a water meter for the entire house should be placed in said premises, or should the present water meter supplying the stores show an increase of the use of the water over the previous year, then the tenants covenanted and agreed to pay annually the difference in excess between the amount of the water tax or rent, as fixed and paid for the previous year, and the amount required to be paid by reason of such waste of water in said premises. The tenant further agreed to execute and comply with all the rules, ordinances, regulations, orders, and requirements of the tenement house department and the department of health, and all other departments and bureaus of the city of New York regarding the use and repairs of said premises, and with all the ordinances, statutes, and laws in force regulating the use of said premises pertaining to the use and repairs of said premises. It was further agreed that if the landlord should enter into a contract for the sale of the premises, upon the payment to the tenants of the sum of \$250 the lease should come to an end and be null and canceled upon the further payment and return by the landlord to the tenant of the \$2,000 security thereafter provided for. It was further agreed that the tenants had deposited with the landlord the sum of \$2,000 "as security for the faithful performance of all the covenants and conditions of this lease, on the part of the parties of the second part, and, in case of any breach thereof by said parties of the second part, the said amount of money shall be held and retained by the said party of the first part as liquidated damages for such breach"; and the parties further agreed that in the event that the tenants should be dispossessed, on summary proceedings brought to recover possession of said premises and to remove them therefrom, the landlord should nevertheless have the right to retain the said sum of \$2,000 as liquidated damages, and not as a penalty. By a separate agreement, in consideration of the sum of \$1, the defendant guaranteed the performance of

the lease on the part of the landlord. The tenants remained in possession of the premises and paid the rent reserved until the 13th of February, 1912, when the tenants failed to pay a portion of the rent reserved for the month of February, and the landlord instituted summary proceedings to recover the possession of the premises, and in these proceedings he obtained a final order under which the landlord resumed possession of the premises on the 19th of February, 1912. The tenants remained in possession of the premises and paid the rent for one year, when they defaulted. Because of such default by the tenant, the landlord dispossessed the tenants and resumed possession of the premises. The tenants then commenced this action to recover from the defendant, who had guaranteed the performance of the lease by the landlord, the sum of \$2,000 deposited under the terms of the lease.

The defendant set up as a defense and counterclaim that, on resuming possession of the premises, he found that the tenants had failed to comply with the covenant to make repairs; that the landlord did make such repairs at a cost of \$1,600. Upon the trial the court submitted the question to the jury as to whether the property, at the time the landlord took possession, was in good condition, and if the jury found that the premises were not in good condition, less reasonable wear and tear, as they should have been, then the value of the repairs should be deducted from the balance of the deposit of security that was made at the time the lease was entered into; and the court directed the jury to deduct from the \$2,000 the amount of the repairs that the landlord was required to make. The jury returned a verdict in favor of the plaintiffs for \$1,784.37. The court, before submitting the case to the jury, having reserved the question whether or not it would direct a verdict for the defendant under the lease, set aside the verdict and dismissed the complaint, and from the judgment entered thereon the plaintiffs appealed to the Appellate Term, who reversed the judgment in favor of the defendant, reinstated the verdict, and directed judgment thereon, and from that determination of the Appellate Term the defendant appeals to this court.

The direct question presented is whether, under the provisions of the lease to which attention has been called, the defendant was entitled to retain the \$2,000 as liquidated damages upon the failure of the tenants to comply with the terms and conditions of the lease, as a result of which the landlord instituted summary proceedings and regained possession of the property, and the lease was terminated in consequence thereof. By the lease the tenants assumed various obligations as to repairs, compliance with the ordinances of the municipal departments, and the payment of additional Croton water rates, in addition to the obligation to pay the rent. The amount of the deposit was the amount that would be payable for two months' rent of the premises, and it might well be that if, in consequence of a violation of the tenants' obligation to pay the rent reserved, it would be necessary to dispossess the tenants, the loss to the landlord by the termination of the lease at the middle of the month, or at a time when a new lessee of the premises could not be obtained, would largely exceed the amount of the deposit, and in addition the incidental loss to the landlord by reason of the failure of the tenants to make repairs or observe the

other obligations that they had assumed under the lease. Certainly the parties had a right to provide by their express agreement that a reasonable sum should be assumed to pay the damages which the landlord would sustain in consequence of a termination of the lease because of a refusal of the tenants to comply with their obligations to avoid the difficulty of proving that amount of damage which they had sustained. The difficulty in determining whether or not premises of this kind were maintained in good condition and repair by a tenant during the term of the lease is exemplified in this case. The defendant proved without contradiction that, when they took possession of the premises, they were compelled to make repairs costing over \$1,600, but, because of the difficulty of proving that these repairs were made necessary by a failure of the defendant to keep the premises in good condition, the jury disallowed any claim of the defendant for making these repairs. There was also a loss of rent which seems to have been established, and for which the jury made some allowance by their verdict; and it seems to me that this illustrates the propriety and necessity in a lease of such premises of a provision for the payment of liquidated damages for a breach of the covenants of the lease. By this lease the tenants certainly expressed, as clearly as it was possible, that this deposit of \$2,000 should be received and held by the landlord as liquidated damages to be retained by the defendant as full satisfaction thereof in the event that the tenants, by their failure to comply with the covenants contained in the lease, should render summary proceedings to obtain possession of the premises necessary. The lease expressly provides for the deposit of this sum of \$2,000 as security for the faithful performance of all the covenants and conditions of the lease on the part of the tenant, and, in case of any breach of the agreement by the tenant, the said amount of money should be held and retained by the party of the second part; and then it further expressed the agreement between the parties that, if the tenants should be dispossessed on summary proceedings brought to recover possession of said premises and to remove them therefrom, the party of the first part shall nevertheless have the right to retain said sum of \$2,000 as liquidated damages, and not as a penalty. The parties thus, by their express covenant, contemplated the possibility of this condition that subsequently developed. Under this provision the \$2,000 was not to be held as security for anything, but was to be absolutely retained by the landlord if, by reason of a violation of the covenant of the lease by the tenant, the landlord should regain possession of the premises by summary proceedings for that purpose. Now this condition actually existed. The tenant failed to pay the rent reserved; summary proceedings were instituted by the landlord; and he regained possession of the premises in the middle of the month, and then was required to spend upwards of \$1,600 to place the premises in repair. He failed to satisfy the jury that these repairs were made necessary by the failure of the tenant to keep the premises in good order and condition, but it seems to me that this provision was inserted in the lease for the very purpose of avoiding the necessity of the landlord having to prove that the repairs to be made were caused by the fault of the tenant in not

performing any of the obligations that they assumed. The tenants by their covenant agreed that, if they were dispossessed, the landlord should retain this sum of \$2,000 as his damages for their violating the provisions of the lease which made the summary proceedings necessary. Much has been written as to when a provision for liquidated damages shall be construed as liquidated damages and not as a penalty, and the authorities are not entirely consistent; but I think that, under the rule that is established in this state, the question as to whether such a provision shall be construed as liquidated damages depends upon the intention of the parties, as expressed in the instrument itself, and from the conditions that existed. Thus, as the Court of Appeals said in *Little et al. v. Banks*, 85 N. Y. 258, in speaking of the embarrassment experienced where contracts contained severe and inequitable provisions in an effort to reconcile the principles of justice with the well-settled rule that every person has the right to make such a contract as he chooses, and that the courts are bound to enforce it:

"The difficulty referred to has led to the adoption of the rule that, in the construction of such a provision, the actual intention of the parties, so far as it can reasonably and fairly be ascertained from the language of the contract, and from the nature of the surrounding circumstances, is to be considered. * * * This intention cannot be entirely determined by the use of the word 'penalty,' or of the words 'liquidated damages.' Nor is the word 'forfeit' conclusive * * * as to such intention. It must be arrived at in view of the circumstances of each particular case."

This rule has been adhered to in the subsequent cases that have discussed the question.

In *Caesar v. Robinson*, 174 N. Y. 492, 67 N. E. 58, it is again stated that:

"The circumstances that the deposit is described in the lease as liquidated damages for a breach of the agreement is not at all conclusive. The character of the deposit, whether liquidated damages or a penalty, depends upon the intention of the parties, as disclosed by the situation and by the terms of the instrument. The deposit is not necessarily to be regarded as liquidated damages, although it is expressly so stated in the instrument. Whether it is that or a penalty depends upon the nature of the transaction and the intention of the parties. This has been frequently held in the case of an ordinary lease, and where the amount was largely out of proportion to the damages suffered by the breach of the lease. * * * Where the language of such a provision specifying the amount of damages to be paid in case of a breach of the contract is clear and explicit to that effect, the amount is to be deemed liquidated damages, when the actual damages contemplated at the time the agreement was made are in their nature uncertain and unascertainable with exactness and may be dependent upon extrinsic considerations and circumstances, and the amount is not on the face of the contract out of all proportion to the probable loss."

In the case of *Mosler Safe Co. v. Maiden Lane S. D. Co.*, 199 N. Y. 479, 93 N. E. 81, 37 L. R. A. (N. S.) 363, the question arose under a building contract by which the plaintiff, the contractor, agreed to pay the sum of \$25 per day to the owner "as liquidated damages for each day's delay in the completion of said work." The question was whether or not the owner was entitled to offset this sum of \$25 per day for each day's delay in completing the contract. The question submitted to the jury was whether the delay was the fault of the contractor or

the owner, and the jury found that it was not the fault of the contractor. In discussing the question of liquidated damages for a penalty, the court said:

"Parties to contracts have the right to insert any stipulation that may be agreed to, provided that they be neither unconscionable nor contrary to public policy. No rule of law forbids them from agreeing between themselves with respect to the anticipatory damages, which shall be occasioned by the failure to complete the contract within the time specified. When they have done so, their declaration, in the event anticipated, that the sum fixed is a liquidation of the damages, or a penalty, is not conclusive, and its interpretation is for the court, having regard to the nature of the contract and the circumstances. It may be observed, generally, that whenever the damages flowing from the breach of a contract can be easily established, or the damages fixed are plainly disproportionate to the injury, the stipulated sum will be treated as a penalty. Where, however, the damages resulting from the breach would be uncertain or difficult, if not incapable of ascertainment, then the agreement of the parties liquidating them, in anticipation, will be enforced"—

citing with approval what was said in *Ward v. Hudson River Building Co.*, 125 N. Y. 230, 26 N. E. 256, that:

"Where parties have stipulated for a payment in liquidation of damages, which are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, on the face of the contract, out of all proportion to the probable loss, it will be treated as liquidated damages."

A late decision of the Supreme Court of the United States (*United States v. Bethlehem Steel Co.*, 205 U. S. 105, 27 Sup. Ct. 450, 50 L. Ed. 731) contains the statement that the courts have become more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained; the court saying:

"The question always is: What did the parties intend by the language used? When such intention is ascertained, it is ordinarily the duty of the court to carry it out."

In the case of *Peabody v. Richard Realty Co.*, 69 Misc. Rep. 582, 125 N. Y. Supp. 349, Mr. Justice Marcus, in a careful opinion reviewing many of the authorities, said:

"The condition herein is not for payment of money. There is no condition in the bond to pay the rentals. The condition is to pay liquidated damages in case of dispossession or breach of any covenant that would justify dispossession. It cannot, therefore, be said that damages are easily ascertainable on a money basis of monthly rentals, because the effect of measuring damages on a basis of rentals would not carry out the intention of the bond."

And in that case it was held that it was the intent of the parties that the sum named should be paid as liquidated damages and not as a penalty. This case appears to have been affirmed by the Appellate Division (145 App. Div. 903, 129 N. Y. Supp. 1139) and by the Court of Appeals (207 N. Y. 642, 100 N. E. 1131).

The last case to which our attention has been called is the case of *Feyer v. Reiss*, 154 App. Div. 272, 138 N. Y. Supp. 964. There the Presiding Justice in the Second Department discusses the authorities

which are cited here in construing a covenant not unlike the one in this case, except it did not contain the express provision that, in the event the tenants were dispossessed the exact amount of this deposit should be retained by the landlord as the damages occasioned by the act of the tenant in making the dispossession imperative. I cannot do better than to quote what he said:

"The 'situation' disclosed that the premises consisted of eight brick tenement houses, seven houses eight families each and one four families; that the lease was for three years at an annual rental of nearly \$8,000; that the lease required the lessees to make all repairs inside and out and to surrender the premises in good condition, save ordinary wear and tear; and that the amount of the deposit was equal to two months' rent. Thus the lessor was assured of a rental for his tenement property for three years, freed from the care of renting the premises, which housed 60 different tenants, and relieved from the expense of keeping the premises in repair. The rent was not payable in advance, but in semimonthly installments. For aught that appears, there was the possibility that the premises might be cast upon the lessor's hands at any time out of repair and without the assurance that they would be then remunerative by actual tenancies. 'The terms of the instrument' disclose that the intention of the parties was that this deposit was for liquidated damages. We have not only the formal expression 'liquidated damages,' but the affirmative provision in amplification and explanation that the parties have agreed that the deposit is liquidated damages 'because they cannot ascertain the exact amount of damage which the lessor would sustain in the event of any breach or violation hereunder.' I find no excessive disproportion between the deposit and the possible damages, 'apparent on the face of the contract,' to quote the language of White, J., in *Sun Printing & Publishing Association v. Moore*, 183 U. S. 642 [22 Sup. Ct. 240, 46 L. Ed. 366]."

It seems to me that the result of these authorities justified the trial court in dismissing the complaint. Here the parties agreed that this sum of \$2,000 would be held and retained by the party of the first part as liquidated damages for said breach; and then it was further agreed:

"In the event that the said parties of the second part shall be dispossessed, on summary proceedings brought to recover possession of said premises and to remove them therefrom, that the said party of the first part shall nevertheless have the right to retain the said sum of \$2,000 as liquidated damages, and not as a penalty."

Thus, by the express terms of the contract, upon the happening of the contingency that the lessors would resort to dispossess proceedings to recover possession of the property in consequence of the tenants not complying with their obligation, this sum of money, which amounted to two months' rent, should be retained as the damages which the parties had agreed upon would be caused by a termination of the lease. This sum certainly was not disproportionate to the amount of damages which might reasonably be expected to flow from such a violation by the tenant of the covenant to pay the rent and keep the property in repair, and to perform the other obligations which they assumed by the lease. The parties were of full age, with ability to contract. The clause of the lease in question anticipates the possibility of a termination of the lease by dispossess proceedings. There is nothing unconscionable in such an agreement. The question solely was whether a payment made by the tenant to the landlord should or should not be recovered back at the termination of the lease. The deposit was made, not as security for the rent, but as security for the faithful perform-

ance of all the covenants and conditions of the lease on the part of the tenants. The lease also expressly provides that this sum of \$2,000 should be repaid to the tenants if the landlord sold the property and so terminated the term demised; and the lease further provides that the landlord was to pay 3 per cent. interest upon the \$2,000; and, upon the tenants well and faithfully keeping and performing all the covenants and conditions of the lease, the tenants, upon the termination of the lease at the end of the term, should be entitled to a return of said deposit of \$2,000. These are the only provisions for the return of the deposit, and we have, then, the express understanding, to which attention has been called, that, if the tenants are dispossessed, the landlord should have the right to retain the said sum of \$2,000 as liquidated damages. Thus it seems to me that the parties have expressed their intention as clearly as it should be expressed, and this case is one in which the agreement of the parties should be enforced.

I therefore think that the determination of the Appellate Term should be reversed, and the judgment entered in the City Court affirmed, with costs to the appellant in all courts.

SCOTT, J., concurs.

ALTMAN v. BUNGAY CO. OF NEW YORK et al.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

1. PLEADING (§ 121*)—FORECLOSURE OF LIEN—DENIAL—FRIVOLOUS DENIAL.

A denial of knowledge or information sufficient to form a belief, as to allegations of the complaint in an action to foreclose a tax lien, that the purchaser at the sale duly assigned the transfer of the tax lien and all moneys due thereunder to plaintiff, was not frivolous, and not objectionable as raising no issue on the ground that the matters attempted to be denied were of public record.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 245-248; Dec. Dig. § 121.*]

2. PAYMENT (§ 65*)—ISSUE.

While, as a rule, payment is an affirmative defense, where a cause of action for the recovery of a distinct sum is based upon nonpayment, the burden of pleading and proving nonpayment is upon plaintiff, so that the fact of nonpayment is put in issue by a denial.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 162-175, 196, 197, 199-201; Dec. Dig. § 65.*]

3. MUNICIPAL CORPORATIONS (§ 980*)—FORECLOSURE OF LIEN—PLEADING.

Greater New York Charter (Laws 1901, c. 466, as amended by Laws 1908, c. 490) § 1032, provides that the aggregate amount of each tax lien transferred pursuant to this title shall be due in three years from the date of the sale, and until such amount is fully paid, the holder of the transfer of tax lien shall be entitled to receive interest, and at his option the aggregate amount shall become due after default in payment of interest for 30 days, or after default for six months after the delivery of transfer of tax lien in the payment of any taxes, etc., which become a lien on the day of the date mentioned in the advertisement of the sale, as stated therein, of the tax lien transferred by such transfer of tax lien, and section 1035 (amended by Laws 1908, c. 490, and Laws 1911, c. 65) provides that, if the amount of any tax lien which was transferred by a transfer of tax lien shall not be paid when, under its terms, the amount

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is due, the holder of the lien may maintain an action to foreclose it. *Held*, that if three years had not elapsed since the date of sale when an action was commenced to foreclose a tax lien, plaintiff must allege that the date of payment had been accelerated for one of the statutory reasons, specifying the particular reason, and an allegation that defendants have failed to pay the taxes due on the property, as required by chapter 17, was insufficient, it being necessary to allege the date specified in the advertisement of sale as the date when the tax was transferred to plaintiff that on or after that date taxes as specified became a lien on the property; the date of the delivery of the transfer of tax lien, and that the subsequent liens have not been paid, but even a proper allegation of nonpayment would be put in issue by a mere denial without affirmatively alleging payment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2124–2133; Dec. Dig. § 980.*]

4. MUNICIPAL CORPORATIONS (§ 980*)—FORECLOSURE OF TAX LIEN—ALLEGATIONS OF COMPLAINT.

The complaint, in an action to foreclose a tax lien, was defective for not alleging that, at the time of the sale, there were unpaid taxes, assessments, or water rents for which the city of New York had a lien which it could sell.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2124–2133; Dec. Dig. § 980.*]

5. MUNICIPAL CORPORATIONS (§ 980*)—FORECLOSURE OF TAX LIEN—ALLEGATIONS OF COMPLAINT.

The complaint, in an action to foreclose a tax lien for property sold by the city of New York for taxes, should allege that the necessary statutory proceedings were duly had before the sale; the statute being the city's only authority for selling and transferring its lien.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2124–2133; Dec. Dig. § 980.*]

6. MUNICIPAL CORPORATIONS (§ 980*)—FORECLOSING TAX LIEN—ALLEGATIONS OF COMPLAINT.

Greater New York Charter, § 1032 (Laws 1901, c. 466, as amended by Laws 1908, c. 490) provides that the aggregate amount of each tax lien transferred shall be due in three years from the date of sale, and until such aggregate is paid the holder of the transfer of tax lien shall receive interest thereon from the date of sale, and at his option the aggregate amount shall become payable after default in the payment for 30 days, or default for six months after the delivery of transfer of tax lien in payment of any taxes, etc. *Held*, that where an action to foreclose a tax lien was brought within three years after the date of sale, the complaint should allege that the holder of the transfer of tax lien elected to consider the amount due by failure to pay subsequent taxes, etc., the mere failure to make such payment not accelerating the time for bringing the action without such election.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2124–2133; Dec. Dig. § 980.*]

Appeal from Special Term, New York County.

Action by Aron Altman against the Bungay Company of New York and others. From an order striking an answer as frivolous and granting judgment for plaintiff on the pleadings, the defendant named appealed. Reversed, and motion denied.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

Roy C. Gasser, of New York City, for appellant.

Theodore I. Schwartzman, of Brooklyn, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SCOTT, J. This is an action to foreclose a tax lien under the provisions of chapter 17, tit. 5, of the Greater New York Charter (Laws 1901, c. 466, as amended by Laws 1908, c. 490, and Laws 1911, c. 65). By the terms of section 1035 such an action is to be "regulated by the provisions * * * of law, and rules of practice applicable to actions to foreclose mortgages on real property," except as otherwise especially provided in the act. The exceptions are of minor importance. The general scheme of the title is that when taxes, assessments, or water rates, which are by law made a lien upon real property, shall remain unpaid and overdue for a certain period, the city may sell at auction and transfer to the purchaser thereat the lien upon the real estate for the amount of the unpaid charges, which lien the purchaser may at the time, and by the means provided in the act, proceed to foreclose by action.

The complaint in the present case alleges in its first and second paragraphs that at a public auction held on April 21, 1913, one Lillian C. Schwartzman purchased and became the owner of a tax lien affecting certain real estate in the borough of the Bronx, in the city of New York, and that the transfer thereof was duly entered as a public record.

The third paragraph alleges that on June 2, 1913, the said Lillian C. Schwartzman duly sold, assigned and transferred the said transfer of tax lien, and all moneys due and to become due thereunder to the plaintiff.

The fourth paragraph reads as follows:

"That the defendants have failed to pay the taxes which became due on said property, as required by the provisions of chapter 17, tit. 5, of the Greater New York Charter."

The fifth paragraph alleges that there is now due upon the said transfer of tax lien the sum of \$15.06 with interest.

[1] The defendant the Bungay Company "denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations made and contained" in paragraphs first, second, third, and sixth. The court at Special Term was of the opinion that this form of denial was insufficient and raised no issue because the matters attempted to be thus denied were of public record. While this criticism may be well founded as to the first and second allegations of the complaint, as to which we express no opinion (see *Kirschbaum v. Eschmann*, 205 N. Y. 127, 98 N. E. 328), it is inapplicable to the third paragraph, which sets up the plaintiff's right and title to sue. That paragraph merely asserts that an assignment was made to plaintiff, which is not, however, alleged to be a matter of record. It is improbable that the defendant could have any knowledge of such an assignment, and it was entitled to put plaintiff to his proof in that regard. This denial was therefore certainly not frivolous.

[2] The positive denials of the allegations of nonpayment contained in the fourth and fifth paragraphs of the complaint were deemed to be insufficient because "payment is an affirmative defense, and cannot be raised by a mere denial." As a general rule this proposition is unassailable, but where the nonpayment of a sum of money is a fact upon

which plaintiff bases a cause of action for the recovery of a separate and distinct sum of money, the burden of pleading and proving non-payment of the first-mentioned sum rests on the plaintiff, and the fact of nonpayment is put in issue by a denial. This rule was clearly expressed by this court in *Gruenstein v. Jablonsky*, 1 App. Div. 580, 37 N. Y. Supp. 538, in the following words:

"The plaintiff here seeks to recover the whole amount of her debt and to have a personal judgment against Biersack for it, if the mortgaged property will not upon the sale bring enough to pay it. The fact that the mortgage debt is all due is not established by merely producing the mortgage. The plaintiff must prove in addition that an installment had not been paid, and that she elects to consider it all due. Her allegation that it is so is not that of a mere conclusion of law, but of a fact. *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542. This fact is put in issue by the answer. But it is said that part payment is an affirmative defense, and cannot be shown under a denial. That is true. *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696. If the suit were brought simply to foreclose for the failure to pay the installment which fell due September 1st, and the relief asked were only for that installment, it might be that the defendant, to raise that question, would be compelled to plead that he had paid it. But that failure is alleged here not merely as a failure to pay, but as one of the facts upon which the plaintiff bases her claim that a condition subsequent has not been performed, and that the whole debt has become due. Considered as such a fact, an essential one in the chain, the plaintiff must prove it. When that fact stands in such a relation to the plaintiff's case the fact of nonpayment is put in issue by a denial. *Knapp v. Roche*, 94 N. Y. 329. The answer is, therefore, not frivolous, and the motion for judgment should have been denied."

[3] To demonstrate the application of this rule to the present case it will be necessary to read the complaint in the light of the statute, and incidentally to consider the sufficiency of the complaint. The act provides (section 1032) as follows:

"Sec. 1032. The aggregate amount of each tax lien transferred pursuant to this title, shall be due three years from the date of the sale. Until such aggregate amount is fully paid and discharged, the holder of the transfer of tax lien shall be entitled to receive interest on such aggregate amount from the day of sale, semiannually on the first day of January and July, at the rate which the purchaser shall have bid. At the option of the holder of any transfer of tax lien the aggregate amount thereof shall become due and payable after default in the payment of interest for 30 days or after default for six months after the delivery of transfer of tax lien in the payment of any taxes, assessments or water rents, which become a lien on and after the day of the date mentioned in the advertisement of the sale as stated therein, of the tax lien transferred by such transfer of tax lien."

"Sec. 1035. If the amount of any tax lien which shall have been transferred by a transfer of tax lien shall not be paid when under its terms and the provisions of this title such amount shall be due, the holder of such tax lien may maintain an action in the Supreme Court to foreclose such tax lien."

These provisions, read together, provide that the amount of a tax lien shall become due three years from the date of sale, unless the due date is accelerated by default in the payment of interest upon the amount paid for the tax lien for 30 days, or by default for six months after delivery of transfer of tax lien in the payment of any taxes, assessments, or water rents which became a lien on or subsequent to the date mentioned in the advertisement of sale as the date of the tax lien sold.

The complaint does not state when the transfer of tax lien was delivered to plaintiff's assignor, but it must have been at some time subsequent to April 21, 1913, alleged to have been the date of sale. Three years had not elapsed since the date of sale when this action was commenced, and it was therefore necessary for plaintiff to allege, in order to maintain the action at all, that the due date had been accelerated for one of the reasons provided in the statute, and to specify in intelligible language which reason so accelerated it. He has apparently attempted to do so in his fourth allegation that:

"The defendants have failed to pay the taxes which became due on said property, as required by the provisions of chapter 17, tit. 5, of the Greater New York Charter."

This is clearly an insufficient allegation of such nonpayment of taxes as will operate to accelerate the due date of plaintiff's lien. The statute provides that it may be accelerated if defendants have made default—

"for six months after the delivery of transfer of tax lien in the payment of any taxes, assessments or water rents, which became a lien on and after the day of the date mentioned in the advertisement of the sale as stated therein, of the tax lien transferred by such transfer of tax lien."

To properly allege acceleration of the due date of the transferred lien under this provision, the pleader should allege: (1) The date specified in the advertisement of sale as the day of the date of the tax transferred to and held by plaintiff; (2) that on or after that date taxes, assessments, or water rents became a lien on the property, and these should be stated specifically; (3) the date of the delivery of the transfer of tax lien sought to be foreclosed, with an allegation that the subsequent liens have not been paid. Even if properly pleaded, it would still be the allegation of the nonpayment of a sum of money as the basis of a cause of action to recover a separate and distinct sum of money, and this allegation would be put in issue by a denial, without the necessity of a positive allegation of payment, under the rule quoted from *Gruenstein v. Jablonsky*, supra.

What has already been said is sufficient to necessitate the reversal of the order appealed from. There are other omissions in the complaint to which attention is called, and which are claimed to render it insufficient.

[4] While it is alleged that the city on a given date sold a tax lien, there is no allegation that at the time of sale there were any unpaid taxes, assessments, or water rents for which the city had a lien which it could sell.

[5] It is not alleged that the necessary statutory proceedings were duly had prior to the sale. The only authority of law for a sale and transfer of the city's lien is the statute above cited, and no valid sale can be made under it unless the prescribed preliminary steps are duly taken.

[6] Nor is it alleged that the holder of the transfer of tax lien has elected to consider the amount thereof due in consequence of the failure to pay subsequent taxes, assessments, or water rents. Such failure does not ipso facto accelerate the due date, but merely gives the

holder of the transfer of tax lien the option to consider the amount as presently due. The exercise of this option is a fact to be pleaded and proved.

We do not now pass upon the validity of all of these objections to the complaint, merely calling attention to them, to the end that the plaintiff, if he elects to amend, as he must do to prosecute his action, may be advised of the possible objections he will be called upon to meet.

The order appealed from must be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs. All concur.

NIXON v. CARNEGIE TRUST CO. et al.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

PLEDGES (§ 33*)—ACTION FOR POSSESSION—EVIDENCE—DISCHARGE OF LIEN.

Plaintiff, in replevin for his stock, which was pledged as security only for a loan made by defendant to C. on C.'s note, is entitled to show just what agreement or contract was made between C. and defendant, when on the day that said note became due defendant accepted from C. his demand note, as though the demand note by itself would not extend payment or change the relation of the parties, thus discharging the lien on the stock, any agreement of such effect then made by them would have that result.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 89, 92; Dec. Dig. § 33.*]

Hotchkiss, J., dissenting.

Appeal from Trial Term, New York County.

Action by Lewis Nixon against the Carnegie Trust Company, impleaded with others. From a judgment entered on dismissal of the complaint, on a trial before a jury, plaintiff appeals. Reversed, and new trial ordered.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Stuart M. Kohn, of New York City, for appellant.

Frank M. Patterson, of New York City, for respondents.

INGRAHAM, P. J. The action was in replevin to recover the possession of 5,000 shares of the stock of the Standard Motor Construction Company. At the end of the trial both parties submitted motions, the plaintiff to direct a verdict for the plaintiff, and the defendant to direct a verdict for the defendant. There was no suggestion that there was any question for the jury, and counsel stipulated that when the court made its ruling it should be accepted as if the direction had been made to the jury in the presence of the jury, then in court. The court subsequently dismissed the complaint, upon which judgment was entered, and the plaintiff appeals.

There was no substantial dispute about the facts. The plaintiff was the owner of 5,000 shares of the stock of the Standard Motor Con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

struction Company. It appeared that in the summer of 1909 the defendant Sexton called upon the plaintiff and stated that he was anxious to secure a loan; that he had a number of securities the actual value of which was far in excess of the proposed loan, but for some reason more securities were wanted, and asked the plaintiff if he would lend him some of this stock; that the plaintiff thereupon delivered this 5,000 shares of said stock to Sexton, and later left for Europe, but upon his return from Europe in the autumn he ascertained that this stock had been placed with other securities for a loan to Charles W. Chapman & Co. upon their promissory note, dated October 8, 1909, payable 60 days after date, for the sum of \$66,345.78, which was indorsed by Charles W. Chapman and C. M. Sexton. The plaintiff then called on Mr. Dickison, the president of the bank, and stated to him that the use of this stock by Chapman & Co. was a breach of faith with him; that the stock was the plaintiff's stock, and he wanted it back. Mr. Dickison finally said that at the maturity of the note he would see that the plaintiff got his stock back, and on the 23d of November, 1909, plaintiff wrote the Carnegie Trust Company a letter, stating that this was his stock, and that he had never received the slightest consideration for it, that he protested against the surrender of the stock by the Trust Company in case the loan was paid, except with the plaintiff's written consent. It was further proved that when this note became due on the 7th of December, 1909, the Trust Company accepted a new note, signed by Chapman & Co. and indorsed by Chapman and Sexton, for \$67,009.23, payable on demand after date, which was secured by this stock in question, with the other securities deposited to secure the payment of the note of October, 1909; that the plaintiff again demanded the return of this stock, after December 7, 1909, when the original note became due, which demand was refused, whereupon the plaintiff brought this action in replevin to recover the stock.

Upon the trial, the plaintiff, having proved these facts, called as a witness Robert L. Smith, who testified that after the receipt of the letter of November 23, 1909, the plaintiff's stock was segregated from the rest of the collateral held to secure this note of October 8, 1909, and he laid it outside the other collateral; that the Trust Company recognized the claim of the plaintiff, and declared to his counsel that they would return that stock to him on numerous occasions; that he was acting president of the Trust Company on the 7th of December, 1909, when the demand note was taken, and had to do with the transaction as to the taking of the new note. He was then asked whether there was any entry on the books to show that the note of October 7, 1909, was paid, which was objected to and excluded. He was then asked whether, when he took the demand note on December 7, 1909, he took it in payment of the note of October 7th. That was objected to by the defendant and excluded. He was then asked:

"Will you explain the circumstances, Mr. Smith, that you took the note marked 'Plaintiff's Exhibit F,' being a demand note marked 'December 7,' will you state what was said between you and the maker of the note at the time it was taken?"

This was objected to and excluded. It is to be noted that the demand note was for a different amount than that secured by the original note of October 8th; the note of October 8th being for \$66,345.78, the demand note being for \$67,009.23. The plaintiff's stock had been deposited with the Trust Company as security for the loan to Chapman & Co. The plaintiff had notified the bank that the stock belonged to him, demanded its return, and both the president and the acting president of the bank had assured him that the stock would be returned in December when the note became due.

While I think the Trust Company had the right to retain this stock as security for the payment of the note for which it was pledged, after it received notice that it was the plaintiff's stock, and had been pledged for this loan to Chapman & Co. without the plaintiff's authority, they were bound, upon the payment of that note, as collateral security for which the stock was held, to return it to the plaintiff. If the note of October 7, 1909, was actually paid in consequence of any arrangement between the maker of the note and the bank, then I think it clear that the stock was released, and the plaintiff was entitled to its return. The stock stood in the position of a security for that particular loan made before the Trust Company had notice that plaintiff claimed it. Any binding contract to extend payment of the note, or any agreement between the makers of the note and the bank, which substantially changed the relations of the parties, would discharge the lien upon the stock and entitle the plaintiff to its recovery. And so I think that if, by any agreement based upon a valid enforceable contract, the note of March 7th was actually paid, so that it ceased to be an instrument which the plaintiff could pay, and thus discharge his stock from the lien of the Trust Company and enforce the note against those liable on it, the lien on the stock was discharged and plaintiff would be entitled to recover. Now, what arrangement was made at the time when the note of October 7th became due and the Trust Company accepted this new demand note was relevant to determine whether or not the lien upon the plaintiff's stock continued. The court excluded all testimony as to that transaction, and I think that was error which requires a reversal of the judgment. I am inclined to agree with the court below that merely accepting the note of December 7, 1909, was not an actual extension of the time of payment of the October 7th note, and that the mere acceptance of the demand note of December 7th did not change the relation between the parties, which would entitle the plaintiffs to recover the stock until the note of October 7th was paid. Assuming that the Trust Company could not, after receiving the demand note, have maintained an action to recover the amount of this demand note until the morning of December 8th, there was no extension of payment, for the maker was entitled to the whole of December 7th to pay the note of October 7th, and no action could have been maintained on it until the morning of December 8th. So that on the face of the papers the acceptance of the demand note was not an extension of payment. Nor did it change the relation of the parties to the transaction, but the maker of the note and the Trust Company could make such an arrangement as they pleased in

regard to the payment of the demand note; and whether or not the arrangement that was actually made would have been sufficient to discharge the lien upon plaintiff's stock could not be ascertained until the evidence as to the arrangement that was made was before the court. The plaintiff was entitled to prove the exact agreement or contract made between Chapman & Co. and the Trust Company, and it is useless to speculate upon what such an arrangement might be until the testimony as to what such an arrangement was, was received.

I think, therefore, it was error to sustain the objection to this evidence, and that it is necessary that there should be a new trial.

It follows that the judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

CLARKE, SCOTT, and DOWLING, JJ., concur:

HOTCHKISS, J. (dissenting). I see no error in excluding the questions put to the witness Smith by which it was sought to prove that the renewal note was taken in payment of the original note. The former was payable on demand, and was for the exact amount of the latter plus accrued interest. The renewal note expressed nothing more than the legal relations of the parties as they then stood, based on the original note. So far as appears, there was no additional collateral or further security of any kind taken. The debt, evidenced by the original note, remained unpaid. It was for this debt, with interest, that the renewal note was taken, and of which it was the mere evidence. If Smith had testified that the renewal note was taken in payment of the original note, it would not have affected the right of the Trust Company to continue to hold the plaintiff's collateral for the unpaid debt.

I think the judgment should be affirmed.

CASUALTY CO. OF AMERICA V. UNITED STATES CASUALTY CO.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

1. INSURANCE (§ 686*)—REINSURANCE—ACTIONS UPON CONTRACTS OF REINSURANCE—EVIDENCE.

In an action upon a reinsurance contract, evidence *held* not to sustain a finding that a clause exempting the reinsurer from liability for accidental injuries occurring to the insured while on a trip to Alaska was omitted from the reinsurance contract by mistake.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1823; Dec. Dig. § 686.*]

2. INSURANCE (§ 679*)—REINSURANCE—CONTRACT—CONSTRUCTION.

An insurance company insured the insured against accidental injuries from 1904 to 1909, but each year issued a new policy based upon a new application. A reinsurance company issued separate contracts of reinsurance for each of the policies issued; such contracts being based upon the policy and application for that particular year. *Held*, that each policy was a new, separate, and independent contract, and likewise each re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

insurance contract constituted also a new contract to be read with the application and policy for that year.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1811, 1812, 1818, 1819; Dec. Dig. § 679.*]

Appeal from Special Term, New York County.

Action by the Casualty Company of America against the United States Casualty Company. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Theodore H. Lord, of New York City, for appellant.

Abraham L. Gutman, of New York City, for respondent.

SCOTT, J. One Henry G. Elliott was insured by the plaintiff from May, 1904, until December, 1909, the date of his death, against accidental injuries and death by accident. He held successive policies of insurance each being issued for the term of one year. In 1905 and 1908 the outstanding policy was extended for one year by certificate. In 1904, 1906, 1907, and 1908 new policies were issued based upon new applications. Defendant by contract with plaintiff reinsured the risk each year to the extent of one-half thereof. In December, 1909, Elliott was accidentally killed while on a visit to Alaska, and plaintiff paid the amount for which he was insured in compliance with the terms of its outstanding policy and now calls upon defendant for contribution in accordance with the terms of its reinsurance contract. Defendant by way of counterclaim asks that its contract of reinsurance be reformed by inserting a clause therein relieving the defendant from liability in case the said Elliott should sustain accidental injuries, fatal or nonfatal, or suffer disease or illness while outside of the limits of Canada, Europe, and the United States; the territory of Alaska not to be included as a part of the United States. It is alleged, and the court at Special Term has so found, that it was the intention of both parties to the reinsurance contract outstanding at the time of Elliott's death that this clause should be inserted therein, and that its omission was due to mutual mistake.

[1] The basic facts are undisputed, and are proven by written evidence; the only controversy being as to the deductions to be drawn from them.

It appears that separate contracts of reinsurance were executed whenever new policies were issued or old policies extended by plaintiff. In each instance when plaintiff issued a new policy upon a new application, copies of the application and the policy were furnished to defendant and constituted the basis upon which its contract of reinsurance was made.

In 1904 it appeared from Elliott's application for insurance that he contemplated a trip to Alaska, and defendant, noticing this, declined to reinsure the risk unless it should be exempted from liability in case of death or injury in Alaska. Plaintiff, having an agreement with Elliott that its policy should not be effective while the insured was in Alaska,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

undertook in writing that if defendant should reinsure the risk it should not be bound thereon outside the limits of the United States, Canada, and Europe; Alaska not included. Upon this undertaking, defendant reinsured the risk assumed by plaintiff by its policy of 1904. The next application made by Elliott was in 1906, and neither in this application, nor in those made by him in 1907 or 1908, was there any statement that he contemplated a visit to Alaska. On the contrary, in each of those applications he stated in effect that he did not contemplate any special journey or hazardous undertaking. It is doubtless owing to this fact that no special agreement excluding injuries or death while in Alaska was made between Elliott and the plaintiff nor between plaintiff and defendant. Upon these facts the court at Special Term arrived at the conclusion that it was the intention of the parties that the clause exempting defendant from liability in case of death or accident in Alaska should be inserted in each of the successive contracts of reinsurance and that its omission was due to a mutual mistake. This conclusion was arrived at by considering each successive contract of reinsurance as a mere continuation of the first contract of reinsurance issued in 1904 and subject to the express qualifications attached to that contract.

[2] We are unable to agree either with the conclusions or with the grounds upon which it was arrived at. In our view each policy issued by plaintiff, at least each of those issued in 1904, 1906, 1907, and 1908, was a new, separate, and independent contract, based upon a new application which constituted a part of the contract of insurance. In the same way each contract of reinsurance executed by defendant, at least in the years mentioned, constituted a new, separate, and independent contract based upon, and to be read in connection with, the application made to plaintiff in the particular year and the new policy issued by it upon such application. The mere fact that in its letter inviting reinsurance in each year plaintiff referred to the proposed contract as a "renewal" of a former contract did not serve to so link the successive contracts together as to attach to each the special exemption from liability agreed to when the first contract for reinsurance was executed. There was a very special reason in 1904 why the defendant should insist upon and receive an exemption from liability in case of death or accident in Alaska, to wit, the declared intention of the insured to make a visit to Alaska. That reason did not exist in any of the subsequent years, and we find it impossible to believe that either plaintiff or defendant intended in 1908 to include in the reinsurance contract a proviso against liability which neither had reason to anticipate. The truth undoubtedly is that both plaintiff and defendant were misled by Elliott's declaration that he contemplated no special journey and for this reason omitted to safeguard themselves against a loss resulting from a visit to Alaska.

The result is that the judgment appealed from must be reversed, with costs, and the counterclaim of defendants dismissed. It is obvious that the basic facts cannot be changed upon a new trial, and we do not understand that defendant contests its liability if the reinsurance contract be not reformed. Judgment will therefore be given for plaintiff, with costs.

The appropriate modification and reversal of the findings of fact, and the new findings to be made, will be passed upon on the settlement of the order. All concur.

ALLWIN REALTY CO. v. BARTH.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

1. BROKERS (§ 69*)—COMMISSION ON RENTS—LEASE WITH OPTION OF RENEWAL.

Where a broker, to whom the principal was to pay the regular commission on the amount of rent received for premises leased through him, secured a tenant who leased the premises for seven years with an option of renewing at the end of that term upon giving four months' notice prior thereto, under the same conditions and a further option for a second renewal, the broker was entitled to a commission only on the rent for the first term and not on that for the renewal term.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 55; Dec. Dig. § 69.*]

2. FRAUDS, STATUTE OF (§ 45*)—NONPERFORMANCE WITHIN ONE YEAR—COMMISSION ON RENEWAL OF LEASE.

An agreement by the principal that the broker should receive a commission on the rent for the renewal of the term if the tenant exercised his option was an agreement for the payment of money not to be performed within one year, and therefore within the statute of frauds. Personal Property Law (Consol. Laws, c. 41) § 31.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 67, 68, 70, 71; Dec. Dig. § 45.*]

3. BROKERS (§ 60*)—COMPENSATION—FAILURE TO COMPLETE TRANSACTION—OPTION TO RENEW LEASE.

Even if that contract was enforceable, the broker was not entitled to any commission where tenant failed to exercise its option at the time specified, but did take a new lease with different provisions after considerable negotiations with the principal.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 91; Dec. Dig. § 60.*]

Dowling and Hotchkiss, JJ., dissenting.

Appeal from Appellate Term, First Department.

Action by the Allwin Realty Company against Mary G. Barth. From a determination of the Appellate Term affirming a judgment of the Municipal Court in favor of the plaintiff, the defendant appeals. Reversed, and new trial ordered.

See, also, 145 N. Y. Supp. 1111; 147 N. Y. Supp. —.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Joseph Day Lee, of New York City, for appellant.

Leo Schafran, of New York City, for respondent.

INGRAHAM, P. J. This action was brought in the Municipal Court and the pleadings were oral. The complaint was for commissions due, and the answer was general denial, and statute of frauds, and a bill of particulars was demanded. No bill of particulars was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ever furnished, and the case came on for trial before the court without a jury.

[1] The plaintiff's assignor was called as a witness for the plaintiff, and he testified that he was a real estate broker; that he was employed by the defendant to procure a tenant for the defendant's property on Third avenue; that the defendant's interest in the property was that of tenant having a lease for 21 years; that the defendant agreed that she would give the broker the regular commission of one per cent. on the amount of rent she should get for the premises; that he subsequently procured a tenant, and a lease was executed, which was introduced in evidence. That lease was dated July 26, 1904, between the defendant, as the party of the first part, and the Twentieth Century Laundry Company, as the party of the second part, whereby the defendant leased the premises to the tenant "for a term of six (6) years and nine (9) months from the 1st day of August, 1904, expiring May 1, 1911, at the yearly rental of sixty-five hundred (\$6,500) dollars per annum, to be paid in equal monthly payments in advance. * * *" The lease also contained a provision by which the defendant agreed to grant to the said tenant a renewal of this lease for a further term of seven years to expire May 1, 1918, upon the same terms as those therein contained, and provided further that said tenant give to said landlord notice in writing claiming such renewal at least four months before the 1st day of May, 1911, and also to grant to the said tenant a second renewal of lease for the further term of seven years to expire May 1, 1925, upon the same terms as those therein contained, upon giving a like notice. The witness was paid his commission based upon the amount of the rent to be received during the term of six years and nine months, for which time the property was leased. I think that under his employment that was all the commission to which the broker was then entitled. This term demised of six years and nine months was from August 1, 1904, and that was the term of the lease. It covered all the rent which was received under the lease made by the tenant procured by the broker. The covenant of renewal was entirely at the option of the tenant, and whether or not there should be a renewal of the lease could not be determined until the time when the tenant was called upon to give the notice by which he was to exercise his option. Certainly the broker would not, when the lease was executed, be entitled to sue for and recover commission based upon the amount of rent that should be paid if the tenant did exercise his option to take a new lease for a second term of seven years. All that the tenant whom the broker procured agreed to pay was the rent for the term of six years and nine months, which was the term demised, and it seems to me clear that the rent during such term was all the rent that was secured to be paid by the lease and on which the broker was entitled to his commission.

[2] The broker further testified that, at the time of the execution of the lease, he told the defendant's husband:

"We will have to get our commission now for the term of the lease, as we agreed upon between us."

To which the latter replied:

"No, * * * you know my wife is very short on money. We had that building vacant for such a long time now, and we will have to pay the taxes and the ground's rent, wouldn't you take the percentage this way? As to the seven years now, and I will try to pay you that as soon as I can. * * * When the seven years is over and the tenant should take his option as he will on that lease, then you will get your commission on the seven; and if that is off, you will get your other percentage for the other seven years to come."

To which the broker assented. He further testified that eventually he received payment of commission for the term of the lease. If that was all of the commission to which he was entitled at that time, it is difficult to see where there was any consideration for the agreement to pay commission for the extended time, if the tenant exercised its option to take it. But, if this was a new agreement to pay an additional commission over and above the sum agreed upon, it would seem to be a contract for the payment of a sum of money not to be performed within a year. To sustain the plaintiff's cause of action at all, it must appear that the broker was entitled to be paid at the time the contract was made a sum of money by the defendant, based upon his having obtained a tenant who had agreed to pay rent under the lease as then executed. As before stated, under the lease the only obligation of the tenant to pay rent was for the period of six years and nine months from the 1st of August, 1904. An agreement then that the defendant would pay to the broker a further sum in addition to the commission for the original term of the lease, if the tenant exercised the option four months before the 1st of May, 1911, was a contract for the payment of money not to be performed within a year, and was therefore within the statute of frauds and void unless in writing. See section 31, Personal Property Law (Consol. Laws, c. 41).

[3] But, assuming the contract was enforceable, I do not think the defendant was liable for this additional commission. The agreement as stated by the broker was:

"When the seven years is over and the tenant should take his option as he will on that lease, then you will get your commission on the seven; and if that is off, you will get your other percentage for the other seven years to come."

The condition upon which the broker was to receive this additional commission was the exercise of the option by the tenant at the expiration of the term of six years and nine months. To exercise that option the tenant had to give the defendant a notice in writing claiming such renewal at least four months prior to the 1st of May, 1911, in which case, without further negotiations or trouble, the lease would be extended for seven years. It is conceded that the tenant did not exercise the option and refused to take the extended term under the lease as it was executed, and, when the tenant refused to exercise the option and take the new term of seven years, the obligation of the defendant to pay the broker's commission, assuming the contract could be enforced, was at an end. The advantage to the landlord in having the tenant exercise that option is obvious. If four months before the end of the term demised the tenant exercised the option,

the landlord was relieved of the trouble and expense of obtaining a new tenant. It might well be that the landlord would be willing to pay a commission for the term of seven years, if the tenant would exercise the option, and it was for the broker then to procure the tenants to take such option. The tenant, however, refused to exercise the option, and the right to an extended term of the lease expired and was at an end. The parties were then at liberty to make a new lease or to make whatever disposition of the property their interests required. The defendant then entered into negotiations with various parties to lease the property. On the trial the defendant attempted to prove that the tenant refused to exercise the option, what negotiations he had with the tenant as to the exercise of the option four months before the expiration of the lease, and the negotiations with the old tenant that subsequently resulted in the execution of a new lease prior to May 1, 1911. This testimony was all excluded by the court and the defendant excepted. All that was proved was that on April 5, 1911, the defendant made an entirely new lease with the old tenant, on somewhat different terms, and without an option to renew the lease for a term of seven years at the end of the term then demised. I think it was error to refuse to allow the defendant to prove the circumstances under which the new lease was obtained. If the new lease was not the result of any services performed by the plaintiff and for which the plaintiff should be entitled to recover a commission, plaintiff cannot recover. The new lease itself showed that it was executed, not as the result of the exercise of the option by the tenant, but of an entirely new letting, upon different terms; and it was not therefore the result of any of the plaintiff's efforts to procure a tenant that the new lease was executed.

Therefore I think this judgment cannot be sustained, and the determination of the Appellate Term and of the Municipal Court should be reversed, and a new trial ordered, with costs in this court and in the Appellate Term to the appellant to abide the event.

CLARKE and SCOTT, JJ., concur. DOWLING and HOTCHKISS, JJ., dissent.

ENGLISH v. NEW YORK, N. H. & H. R. CO.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

1. DEATH (§ 48*)—ACTIONS FOR CAUSING DEATH—PLEADING—STATUTE GIVING RIGHT OF ACTION.

In an action brought in New York by a mother, as foreign administratrix, for the wrongful death of her son occurring in Connecticut, the complaint was fatally defective for not pleading a statute of Connecticut conferring such right of action upon plaintiff.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 173; Dec. Dig. § 48.*]

2. COURTS (§ 14*)—FOREIGN CORPORATIONS—ACTIONS AGAINST—JURISDICTION.

Under Code Civ. Proc. § 1780, prescribing the actions which a nonresident may maintain against a foreign corporation, a nonresident admin-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

istrator could not maintain an action against a foreign corporation for wrongful death occurring in another state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 39; Dec. Dig. § 14.*]

8. COURTS (§ 14*)—FOREIGN CORPORATIONS—ACTIONS AGAINST—JURISDICTION.

Where a railroad employé, a resident of Connecticut, was killed in that state, and the railroad was a Connecticut corporation, though doing business in New York, the action should have been brought in Connecticut, and the courts of New York should not entertain jurisdiction of such an action since, though having jurisdiction, as foreign corporations are treated as domestic for the purpose of suing and being sued, the court is not obliged to exercise such jurisdiction and should do so only in case of a resident plaintiff.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 39; Dec. Dig. § 14.*]

Appeal from Trial Term, New York County.

Action by Celia E. English, as administratrix of James S. English, deceased, against the New York, New Haven & Hartford Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

Francis P. Burns, of New York City, for appellant.

John M. Gibbons, of New York City, for respondent.

LAUGHLIN, J. After the plaintiff introduced her evidence and rested her case, counsel for defendant moved to dismiss the complaint on the ground that the plaintiff had failed to make out a cause of action "by proving any negligence on the part of this defendant." The court reserved decision on the motion and took a recess. On reconvening the court announced that the complaint would be dismissed on the ground that the court was without jurisdiction; and the formal order and judgment followed.

This action is brought to recover damages alleged to have been sustained by the next of kin of one James S. English, who, on the 13th day of April, 1907, was in the employ of the defendant as a brakeman, and according to the allegations of the complaint, solely through the negligence of the defendant on that day received injuries while engaged in the performance of his duty on a train passing through Meriden, Conn., which resulted in his death.

The only facts alleged upon which it is claimed the cause of action is vested in the plaintiff is her appointment as administratrix by the probate court of the district of Hartford, Conn., on the 27th day of October, 1907. The complaint does not show where the decedent resided; but the plaintiff testified that she was the mother of the decedent and that he resided with her in Hartford, Conn., where she still resides, and that he met with the accident, from which he died, in that state. On these facts appearing and before the close of the evidence, counsel for defendant objected to the taking of further evidence on the ground that the court was without jurisdiction. The court thereupon intimated that the action should have been brought in Connecticut, but continued

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with the trial with a view to affording the plaintiff an opportunity to endeavor to extricate herself by obtaining ancillary letters if so advised.

[1] The complaint was fatally defective in not alleging a statute of the state of Connecticut authorizing the action (*Zeikus v. Florida East Coast Ry. Co.*, 144 App. Div. 91, 128 N. Y. Supp. 933); and neither was the complaint amended, nor was any evidence offered showing that the state of Connecticut had conferred a right of action in such case. The dismissal of the complaint might well be sustained on that ground alone; but, since the point was neither raised on the trial now presented here, we shall discuss the point on which the dismissal was predicated by the trial court.

[2, 3] Counsel for the plaintiff contended upon the trial, and argues here, that the court had jurisdiction on the ground that, although the defendant is a foreign corporation, it was alleged in the complaint and not denied by the answer that the defendant's railroad extends into the state of New York, and that it owns and operates a railroad, in part, in this state. If those facts give the courts of this state jurisdiction, it is only upon the theory that, in such circumstances, for the purpose of suing and being sued, the foreign corporation will be deemed a domestic corporation; but even on that theory it should have been, but is not, alleged that the defendant is for the purposes among others of suing and being sued a domestic corporation. If the defendant is to be deemed, as alleged in the complaint, a foreign corporation, then by virtue of the provisions of section 1780 of the Code of Civil Procedure as it existed in October, 1908, when this action was commenced, the courts of this state are without jurisdiction, for the action is neither brought to recover damages for breach of a contract made within this state, nor is it one relating to property situated here or to the title to real property without the state, and the cause of action did not arise here.

There is authority for the contention that this defendant will be deemed a domestic corporation for the purpose of suing and being sued, and, although that question may not be said to have been authoritatively decided in favor of jurisdiction, I think the weight of authority tends to sustain the jurisdiction. In *Phelps v. N. Y., N. H. & H. R. Co.*, 17 App. Div. 392, 45 N. Y. Supp. 178, it was stated in the majority opinion of this court in discussing this question and referring to this defendant as follows:

"So far as its capacity to sue and to be sued in the courts of this state is concerned, it is to be regarded as a corporation of this state."

In that case Justice Ingraham concurred in the decision solely upon that ground. It had been previously held in *N. Y., N. H. & H. R. Co. v. Welsh*, 143 N. Y. 411, 38 N. E. 378, 42 Am. St. Rep. 734, that, the defendant company having been authorized by statute to extend its lines into this state, had the same authority as a domestic railroad corporation to acquire necessary lands by condemnation. In extension of this doctrine it has been frequently held that a foreign corporation, like a domestic corporation, is, for the purpose of determining the place of trial of an action against it, deemed a resident of every county through which it operates its road. *Polley v. Lehigh Valley R. Co.*, 138 App. Div. 636, 122 N. Y. Supp. 708, affirmed 200 N. Y.

585, 94 N. E. 1098; *Poland v. U. S. Traction Co.*, 88 App. Div. 281, 85 N. Y. Supp. 7, affirmed 177 N. Y. 557, 69 N. E. 1129. It appears by the opinions of this court and of the Court of Appeals in *Hoes v. N. Y., N. H. & H. R. R. Co.*, 73 App. Div. 363, 77 N. Y. Supp. 117, and *Id.*, 173 N. Y. 435, 66 N. E. 119, that this defendant was deemed to be a foreign corporation; but that question was not presented for decision, and no reference was made to the earlier authorities herein cited. The question presented for decision in the *Hoes Case* was with respect to the power of the surrogate to appoint an administrator here. The case of *Ziemer v. Crucible Steel Co.*, 99 App. Div. 169, 90 N. Y. Supp. 962, likewise hinged on the same question.

I am of opinion, therefore, that by service on the secretary of the defendant within this state jurisdiction over the defendant was acquired. *Grant v. Cananea Con. Copper Co.*, 189 N. Y. 241, 82 N. E. 191. The jurisdiction, however, over a foreign corporation based on the fact that it has been permitted to acquire and operate part of a line of railroad in this state in the absence of more explicit legislation should only be exercised in favor of a resident plaintiff. The plaintiff failed to allege or to prove a single fact tending to show the propriety of bringing the action in this state. The accident occurred in a sister state where the decedent and the plaintiff both reside and where the defendant was incorporated. Manifestly, the issues should be tried in Connecticut where the cause of action arose; and, although the courts of this state have jurisdiction, they are not obliged to exercise it in such circumstances. *Collard v. Beach*, 81 App. Div. 582, 81 N. Y. Supp. 619; *Hoes v. N. Y., N. H. & N. R. R. Co.*, supra, 73 App. Div. at page 369, 77 N. Y. Supp. 117; *Zeikus v. Florida East Coast Ry. Co.*, supra; *Ziemer v. Crucible Steel Co.*, supra; *Robinson v. Oceanic S. Nav. Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636. The case of *Zeikus v. Florida East Coast Ry. Co.*, supra, was distinguished in *Zeikus v. Florida East Coast Ry. Co.*, 153 App. Div. 345, 138 N. Y. Supp. 478; but in that case the decedent was a resident of this state and the administrator was appointed here.

It follows that the judgment and order should be affirmed, with costs.

INGRAHAM, P. J., and McLAUGHLIN and SCOTT, JJ., concur.
HOTCHKISS, J., concurs in result.

OWENS v. BLACKBURN et al.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

1. BILLS AND NOTES (§ 493*)—NEGOTIABLE INSTRUMENTS—REQUISITES.

Under Negotiable Instruments Law (Consol. Laws, c. 38) § 20, requiring an instrument, to be negotiable, to be payable to order or to bearer, a note not payable to bearer or order is nonnegotiable, and hence is not presumed to be supported by a consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652-1662; Dec. Dig. § 493.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BILLS AND NOTES (§ 98*)—CONSIDERATION—RECITALS—ADMISSIONS.

A recital, in a nonnegotiable note, "value received" is an admission that the instrument was issued for a sufficient consideration, binding, as such, upon each of the makers; the promise being joint and several.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1371, 1375; Dec. Dig. § 98.*]

3. CONTRIBUTION (§ 9*)—ACTIONS—ALLEGATIONS OF PAYMENT.

In an action by one of the makers of a nonnegotiable note against the other makers for contribution, an allegation that plaintiff was compelled to pay the note sufficiently alleged that neither of defendants paid it.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 14, 16-22; Dec. Dig. § 9.*]

4. CONTRIBUTION (§ 4*)—CONTRIBUTION BETWEEN MAKERS.

Though a note was in terms joint and several as to the makers, their liability as between themselves was presumably joint, so that those who paid no part of the note will be required to contribute proportionally to one who paid the note.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 3, 4; Dec. Dig. § 4.*]

5. CONTRIBUTION (§ 9*)—ACTIONS—ALLEGATIONS OF COMPLAINT—AGREEMENT.

Since the law implies an agreement by the other signers of a joint and several note to equally contribute in case one of the signers is required to pay it, the one paying and suing for contribution need not allege an agreement to contribute by the other signers.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 14, 16-22; Dec. Dig. § 9.*]

Appeal from Special Term, New York County.

Action by John B. Owens against Joseph E. Blackburn and another. From an interlocutory judgment sustaining a demurrer to a cause of action alleged in the complaint, plaintiff appeals. Reversed, and demurrer overruled.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

Cornelius W. Wickersham, of New York City, for appellant.

Herman Kahn, of New York City, for respondents.

LAUGHLIN, J. The plaintiff's first cause of action is on an instrument in writing which is set forth in the complaint as follows, viz.:

"\$4192.50.

Zanesville, Ohio, February 12, 1907.

"Four months after date we or either of us promise to pay to the Old Citizens' National Bank of Zanesville, Ohio, four thousand one hundred ninety-two and 50/100 dollars, value received, payable at said bank with interest at 6 per cent. per annum.

"No. 17319. Due June 12.

J. E. Blackburn.

"Elmer Dover.

"J. B. Owens."

[1, 2] The note, not being payable to bearer or order, is nonnegotiable (Neg. Instruments Law, § 20; Kerr v. Smith, 156 App. Div. 807, 142 N. Y. Supp. 57; National Citizens' Bank v. Toplitz, 178 N. Y. 464, 71 N. E. 1), and there would therefore be no presumption of consideration; but the recital "value received," in the body of the note, constitutes an admission that the instrument was issued for a sufficient consideration (Prindle v. Caruthers, 15 N. Y. 425; Hamilton v. Ham-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ilton, 127 App. Div. 871, 112 N. Y. Supp. 10, cited with approval in National Citizens' Bank v. Toplitz, 178 N. Y. 464, 71 N. E. 1). The cases of Browning, King & Co. v. Terwilliger, 144 App. Div. 516, 129 N. Y. Supp. 431, and Czerney v. Haas, 144 App. Div. 430, 129 N. Y. Supp. 537, and St. Lawrence C. Nat. Bank v. Watkins, 76 Misc. Rep. 633, 135 N. Y. Supp. 461, which has been reversed (153 App. Div. 551, 138 N. Y. Supp. 116), and Kinsella v. Lockwood, 79 Misc. Rep. 619, 140 N. Y. Supp. 513, upon which counsel for respondent relies, are plainly distinguishable on the ground that in those cases the nonnegotiable instrument was not pleaded in *hæc verba*, and the courts were considering allegations to the effect that an instrument or promise was made for a valuable consideration, which were deemed in the nature of conclusions of law and not sufficient allegations of the facts; but manifestly those authorities have no bearing in a case where the pleading sets forth the instrument which recites an acknowledgment of the receipt of consideration. The promise is both joint and several. All of the makers, and each of them, therefore, has admitted the receipt of consideration for the promise. The plaintiff is one of the makers, and the defendants are the other two.

The plaintiff alleges that he was compelled to pay the note, and that he paid it in full, with interest, and that he has demanded that each of the defendants contribute to him one-third of the amount paid.

[3] There is no merit in the contention that the plaintiff should have alleged that neither of the defendants paid the note. That is fairly to be implied from the allegation that he was compelled to pay it.

[4] The three makers were liable to the payee both jointly and severally, but presumptively, as between themselves, their liability was joint, and equity requires that they bear the burden equally, and that those who have not paid shall contribute to the plaintiff, who has been obliged to pay the entire amount for which all three makers were liable. *Aspinwall v. Sacchi*, 57 N. Y. 331; *Hard v. Mingle*, 141 App. Div. 170, 126 N. Y. Supp. 51, affirmed 206 N. Y. 179, 99 N. E. 542, 42 L. R. A. (N. S.) 1131; *Dillenbeck v. Dygert*, 97 N. Y. 303, 49 Am. Rep. 525; *McCready v. Van Antwerp*, 24 Hun, 322; *Kimble v. Williams*, 51 App. Div. 616, 65 N. Y. Supp. 69.

[5] It was not incumbent on the plaintiff, in the circumstances, to allege an agreement for contribution, for that is an obligation implied and enforced by courts of equity. *Aspinwall v. Sacchi*, *supra*; *Van Denmark v. Van Denmark*, 13 How. Prac. 372; *Hard v. Mingle*, *supra*; *McCready v. Van Antwerp*, *supra*.

It follows that the interlocutory judgment should be reversed, and the demurrer overruled, with costs, with leave to respondent to withdraw the demurrer and answer on payment of costs of the demurrer and of the appeal. All concur.

OWENS v. BLACKBURN et al.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

Appeal from Special Term, New York County.

Action by John B. Owens against Joseph E. Blackburn, impleaded with another. From an interlocutory judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed, and demurrer overruled.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and HOTCHKISS, JJ.

Cornellus W. Wickersham, of New York City, for appellant.

Herman Kahn, of New York City, for respondent.

LAUGHLIN, J. This is an action on a nonnegotiable promissory note in the same form, so far as the questions presented for decision are concerned, as that considered in the opinion in *Owens v. Blackburn et al.*, 146 N. Y. Supp. 966, decided herewith; and the complaint here is to the same effect as in the other action, with the exception that only one cause of action is set forth, and it is here alleged that the plaintiff paid the note at maturity.

The points being the same, the opinion in the other case, to which reference has been made, is controlling, and requires that the interlocutory judgment be reversed, and demurrer overruled, with costs, with leave to respondent to withdraw the demurrer and answer on payment of the costs of the demurrer and of the appeal. All concur.

In re GREENBAUM.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

1. ATTORNEY AND CLIENT (§ 53*)—DISBARMENT—SUFFICIENCY OF EVIDENCE.

Evidence, in a disbarment proceeding, held to show that respondent committed perjury in verifying an answer in a suit against him for an admitted debt, and also in testifying before the referee on the hearing of charges based thereon.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.*]

2. ATTORNEY AND CLIENT (§ 38*)—DISBARMENT—GROUNDS.

An attorney who verified a false answer in a suit against him, for the purpose of avoiding or postponing payment of an admitted debt, should be disbarred.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 51, 61; Dec. Dig. § 38.*]

Application to discipline Nathan Greenbaum, an attorney, upon report of official referee, on charges presented by the Association of the Bar of the City of New York. Respondent disbarred.

See, also, 156 App. Div. 940, 141 N. Y. Supp. 1121.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and HOTCHKISS, JJ.

Thomas D. Thatcher, for petitioner.

Charles H. Murray, of New York City (Fredric W. Frost, of New York City, on the brief), for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep.'s Indexes

INGRAHAM, P. J. [1] The respondent had a lease for an office in a building in the city of New York, and Dr. David L. Haight was the agent for the owners of the building. He failed to pay his rent, and gave two notes and two checks in payment, which were not paid, and an action was commenced in the Municipal Court of the city of New York to recover the amount represented by the notes and checks. The defendant demurred to the complaint, and, upon some arrangement made by the attorney for the owners of the building or by Dr. Haight, the respondent gave two notes for the amount then due, and the action was discontinued, and the notes and two checks previously given were surrendered to the respondent. These notes were dated July 19, 1910, one for \$250, payable January 2, 1911, and the other for \$248, payable on February 15, 1911. On January 2, 1911, when the first note became due, it was not paid, and an action was commenced in the City Court of the City of New York by the owners of the building to recover the amount thereof. In that action the respondent interposed a verified amended answer, alleging that this note was given in pursuance of an agreement with Dr. Haight, as representative of the owners of the building, whereby the action commenced in the Municipal Court of the City of New York was to be discontinued, without costs; it being expressly understood and agreed between the parties, and as a consideration for the withdrawal of the demurrer and the discontinuance of the action without costs, that the said plaintiffs or David L. Haight, their agent and representative, were to institute an action against Henry Block on the said lease, and that the defendant, the respondent herein, was to act as surety, and in the event that the said plaintiffs succeeded in recovering judgment against the said Henry Block, and found themselves unable to satisfy their judgment, then the plaintiffs were to assign the said judgment to the defendant, who was to pay to said plaintiffs the judgment so recovered, and that thereafter and pursuant to said agreement, and as collateral security, the defendant made, executed, and delivered the promissory note set forth in the complaint, it being expressly understood and agreed that no suit was to be commenced on said note, but it was simply to be held as collateral security, and in the event that the plaintiffs recover judgment against the said Henry Block, and after being unable to satisfy the judgment the defendant should refuse to comply with the agreement as aforesaid, then the plaintiffs were authorized and empowered to commence suit on said note. The date of this agreement is not stated in the amended answer, but it is alleged that it was made prior to July 19, 1910, the date of the notes. These allegations were made upon the knowledge of the defendant and not upon information and belief. The answer was verified by the defendant as "true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true." As there was no allegation upon information and belief, the verification was absolute. The defendant was required to furnish a bill of particulars in that action, and in that he stated:

"That heretofore and at the city of New York, during the month of June, 1910 (the precise date being unknown to the defendant), the defendant and

David L. Haight, acting on behalf of the plaintiffs, entered into the agreement alleged and set forth in paragraphs marked 'fourth' and 'fifth' in the defendant's amended answer."

The plaintiff endeavored to have this case placed upon the preferred calendar in the City Court, which the defendant succeeded in defeating. Finally, when the action came on for trial, the defendant consented that the plaintiff should take judgment, and he did not then attempt to sustain his defense. In this proceeding the respondent was charged with committing perjury in swearing to this amended answer. The matter was referred to an official referee, who has reported that the amended answer was false, and the respondent committed perjury in swearing to it, and it is upon that report that the case now comes before the court.

The respondent is entirely uncorroborated as to the making of this agreement. Dr. Haight personally testified that he had no such agreement with the respondent; that he never saw the respondent from the time he leased the premises until he saw him before the grievance committee of the association of the bar; and that he never had any conversation with him regarding the giving of the notes. The attorney for the owners of the building testified that the notes were given to him on July 19, 1910, and that nothing was said about bringing suit against Henry Block, and that the action in the Municipal Court had been discontinued some time before as the result of a consultation between the attorney for the owners of the building and the partner or representative of the respondent, who stated that, if the action was discontinued, an arrangement would be made for the payment of the rent due. The attorney for the owners of the building further testified that the action in the Municipal Court was discontinued about the middle of June, and on July 19, 1910, the respondent came to the attorney's office; that an additional amount of rent had then become due; that the respondent fixed the dates at which he could pay the notes; that the respondent himself drew up the two notes, and signed and delivered them to the attorney for the owners of the building. After the notes had become due, the respondent called on the attorney for the owners of the building and offered to pay \$10 a month on the notes until the notes were paid, and the attorney for the owners of the building refused the offer, and respondent then said he would have to interpose an answer, to which the attorney said, "If you do that you commit perjury," to which the respondent replied, "Well, there are ways of putting in answers, and you can put an answer in any way," and then he left. He later interposed an answer and an amended answer.

An examination of this testimony satisfies me that the claim of the respondent that he made any such agreement is absolutely without foundation, entirely inconsistent with the testimony of the attorney for the owners of the building, and the whole story is improbable in itself. Block was not a party named in the lease. In it the respondent was described as the only lessee and the only party to it. Block, it seems, intended to occupy a portion of the offices, and the respondent procured him to sign the lease. It is unnecessary to decide whether

he might have been held responsible for the rent. The respondent was clearly responsible for the rent for which he had given notes and checks, and there was no reason why the landlord should be obliged to bring an action against Block as a condition to bringing an action against the respondent for the amount which he conceded that he owed for rent. There evidently was no consideration for the agreement he alleged, and the claim that the discontinuance of the action in the Municipal Court was consideration for the agreement was obviously unfounded. The discontinuance of the action in the Municipal Court was so obviously for the benefit of the respondent that it could not be any consideration moving to him for a contract with him; and it is also a fact that the action had been discontinued some time before the notes were given. The respondent was concededly indebted for this rent. He concededly gave his promissory notes, which were absolute promises to pay a sum stated at a day fixed by him to discharge that indebtedness. When sued upon the notes, he interposed what is obviously a false answer. After securing all the delay possible in consequence of serving this false answer, when the case was finally called for trial, he abandoned the defense and confessed judgment. This respondent does not deny that he owed the persons in whose favor the notes were executed the amount of money represented by them. The respondent did not testify that in the interview with Dr. Haight there was anything said about the notes being given as collateral security or any limitation upon the right of the plaintiffs to enforce them. The respondent testified that he told Dr. Haight:

"Now, here you are suing me, and you are letting the other man Block, who was a cotenant with me on the lease, go scot free. Now, I will tell you what I am willing to do. I am willing to pay this, but I would like you to commence an action against Block alone or against Block and myself, and if you can't recover on your judgment, if you can't make your judgment good against Block, then I will pay the judgment or give you some collateral security. I will give you my note."

To which Dr. Haight replied:

"Well, that sounds reasonable; it sounds fair, as long as you are willing to pay your obligation."

The utmost that could be said about this was that it sounded fair for the respondent to pay the obligation, and it might be said there was some kind of an implied understanding that he would sue Block. But the note was not given on that condition, nor was there any limitation upon the express promise contained in the note to pay the amount when it became due. I think it is clear that the whole defense was an invention of the respondent to avoid the payment of his obligation. That was renewed by his testimony before the official referee, which was also clearly false. Thus the respondent has been guilty of the offense of putting in a false answer, which he personally verified, and has been guilty of perjury before the official referee in trying to avoid the result of his offense.

[2] The question is whether an attorney guilty of such conduct should be permitted to remain a member of the profession. If an attorney acting for a client had interposed an answer which he knew to

be false, and had thereby induced his client to commit perjury, we should have no hesitation in disbarring him. I think the same result should follow when a lawyer, sued on an admitted indebtedness, interposes an answer which is false for the purpose of avoiding or postponing the payment of the debt.

There can be no question, I think, but that such conduct requires that the respondent should be disbarred; and it is so ordered. All concur.

McCARTY v. DOWNES et al.

(Supreme Court, Appellate Division, First Department. April 3, 1914.)

1. MORTGAGES (§ 427*)—FORECLOSURE BY ACTION—PARTIES.

Where real estate was devised to testator's children, and upon foreclosure of a second mortgage all were made defendants, and two who were the executors, with power to sell, bought it in as such and later sold it, the others were not proper or necessary parties to the subsequent foreclosure of the first mortgage, as their interest was cut off by the first foreclosure, and the executors in buying the property in represented the estate rather than the devisees.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1269, 1272-1287; Dec. Dig. § 427.*]

2. EXECUTORS AND ADMINISTRATORS (§ 148*)—MANAGEMENT OF ESTATE—REAL PROPERTY.

Executors have no right as such to purchase land, and, if they invest in land, it is considered personalty, which they may sell, and for which they are accountable as such, and therefore executors, with power to sell, who purchased real estate owned by testator at a foreclosure sale, could sell the same so as to pass title free from any claim of the testator's devisees or representatives; the sale being doubly protected by the power of sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 595-601; Dec. Dig. § 148.*]

3. EXECUTORS AND ADMINISTRATORS (§ 148*)—MANAGEMENT OF ESTATE—REAL PROPERTY—SALE.

Where executors, with power to sell, purchased testator's realty at foreclosure, if a sale thereof by them to the wife of one was voidable, it was a matter to have been considered upon their accounting, and did not affect the title of those claiming thereunder, particularly after the lapse of more than ten years without any question being raised.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 595-601; Dec. Dig. § 148.*]

4. MORTGAGES (§ 534*)—FORECLOSURE BY ACTION—OPERATION AND EFFECT.

Where the executors, with power to sell, who purchased testator's realty at foreclosure of a second mortgage, to which the devisees were parties defendant, and who later sold it, were subsequently made parties to the foreclosure of the first mortgage along with the purchaser from them, the purchaser at the foreclosure sale under the first mortgage took title free from any claim of the testator's devisees or representatives.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1555; Dec. Dig. § 534.*]

Appeal from Special Term, New York County.

Action by John H. McCarty against Anna M. Downes and another to foreclose a mortgage. From an order requiring the purchaser at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the foreclosure sale, Joseph B. Weed, to complete the purchase, the said purchaser appeals. Affirmed.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, DOWLING, and HOTCHKISS, JJ.

Bernard I. Finkelstein, for appellant.

Carroll & McCormack, of New York City (Henry M. Bellinger, Jr., of New York City, of counsel), for respondent.

CLARKE, J. [1] This action was to foreclose a mortgage upon 174 West Seventy-Sixth street. Judgment for foreclosure and sale was duly entered September 23, 1913. The premises were sold by a referee under the usual terms of sale to Joseph B. Weed for \$1,350, the highest bid above the amount of the first mortgage of \$17,000. On the closing day the purchaser refused to accept the referee's deed and pay the balance due. He refused to give specific reasons for his rejection, except to state that the title was bad and unmarketable and a title company had refused to insure it. Thereafter a motion was made to compel him to take. From the order granting the motion he appeals.

Title to the premises in question vested in Sarah E. Lowther by deed from James B. Fonner and wife, dated May 31, recorded June 6, 1887. Mrs. Lowther executed a mortgage thereon for \$19,250 to Mary E. Garrison dated and recorded July 22, 1887, and also a second mortgage thereon for \$6,000 to Garret L. Schuyler dated and recorded July 22, 1887, subsequent to the aforesaid. Said \$6,000 mortgage was assigned to Walter G. Schuyler by his father, Garret L. Schuyler, on June 12, recorded June 14, 1888. This assignment was to prevent a merger, for by deed dated June 12, recorded June 14, 1888, Mrs. Lowther conveyed to Garret L. Schuyler the said premises subject to the aforesaid first and second mortgages.

On April 20, 1889, Garret L. Schuyler died seised in fee of said premises, leaving a will which was probated May 22, 1889. Said will provided:

"Second. Any residue I give, devise and bequeath to all my children now surviving in equal proportions."

The will conferred upon his executors full power of sale of all his real estate. Nine children survived him. Walter G. and James E. Schuyler, two of his children, were named as executors, and letters testamentary were issued to them June 4, 1889.

Thereafter the second mortgage, for \$6,000, was foreclosed by advertisement. All of the nine children were parties defendant, were duly served, and had notice of all proceedings. No question is made as to the regularity of said foreclosure. The premises were purchased on the sale by the executors of Garret L. Schuyler as such executors. The deed to them was recorded April 11, 1896.

By deed dated September 17, 1901, the executors conveyed the said premises to Jennie B. Schuyler, wife of Walter C. Schuyler, one of the executors. This conveyance was made subject to all mortgages and liens and was supported by a consideration of \$6,000.

Three days later by deed dated September 20, recorded September 24, 1901, Jennie B. Schuyler conveyed, for a consideration of \$11,000, the said premises, and others, to William Schneider subject to all liens and incumbrances of record.

Thereafter the first mortgage in the sum of \$19,250, which had continued as a lien on said premises, was foreclosed; the judgment being entered August 6, 1902. William Schneider, Jennie B. Schuyler, and Walter G. and James E. Schuyler individually and as executors of Garret L. Schuyler were made defendants; but the other children of Garret L. Schuyler were not.

At the sale on said foreclosure the referee delivered his deed to Arthur W. Saunders, who on March 3, 1908, conveyed to Anna B. Downes, who executed and delivered a mortgage for \$3,000 bearing said date, which thereafter and by mesne assignments was duly assigned to John H. McCarty, the plaintiff herein, by an instrument dated October 22, 1909. This action was brought to foreclose said mortgage.

The appellant claims that the said nine children of Garret L. Schuyler, except Walter G. and James E. Schuyler, were never foreclosed of their right and interest under their father's will in the premises the subject of this action, still have an interest therein superior to any right or title the plaintiff has acquired, and the title tendered by reason thereof is not marketable. He prays therefore to be relieved from paying the balance of the purchase price and that the referee be directed to pay to him \$135, his 10 per cent. payment, the auctioneer's fee of \$17, and \$250 laid out and expended by him for counsel fee and disbursements in examination of title.

[2] Upon Garret L. Schuyler's death, title vested in his nine children as devisees, subject to the two outstanding mortgages. As all of said children were parties to the foreclosure of the second mortgage, they were thereby foreclosed of all their right, title, and interest upon the sale thereunder. Walter G. Schuyler and James E. Schuyler, who purchased as executors, and to whom the deed was made as executors, took as representatives of the estate of Garret L. Schuyler, and not as representatives of his heirs and devisees. They had no right as executors to purchase land, and, if they invested in land, said land was to be considered as personalty, and they were accountable therefor.

In *Lockman v. Reilly*, 95 N. Y. 64, Judge Rapallo said:

"It may happen that an executor or administrator, without authority, invests the funds of the decedent's estate in land; or he may take land in payment of a debt due to the estate which he represents, or may purchase it for the protection of the estate at an execution sale under a judgment belonging to the estate. Under such circumstances, the executor or administrator in one sense holds the land in trust for the persons beneficially interested in the estate, and can be compelled to account for it. But if the land is subject in his hands to a prior mortgage, the mortgagee in foreclosing it is not bound to make the devisees or legatees in the case of an executor, or the next of kin in case of an administrator, or the creditors of the deceased in either case parties to the foreclosure. The legal title to the land is in the executor or administrator, but, as between him and the legatees, next of kin and creditors of the deceased party, it is personal estate, and he holds it as the legal

representative of the deceased. * * * In the present case the effect of the conveyance to the executrix was to make the land in her hands take the place of the mortgage, as personal estate; and she was liable to account for it as such. * * * That land bought in by executors on a foreclosure of a mortgage belonging to the estate is to be treated as personal property, which the executors may sell, and for which they are accountable as such, has been frequently decided, and it is immaterial whether the deed is taken in the names of the executors as such or in their individual names. *Clark v. Clark*, 8 Paige, 152 [35 Am. Dec. 676]; *Schoomaker v. Van Wyck*, 31 Barb. 457; *Valentine v. Belden*, 20 Hun, 537; *Cook v. Ryan*, 29 Hun, 249. In all these cases land thus purchased by an executor or administrator is regarded as a substitute for the mortgage foreclosed and takes its place for all purposes as between the executor or administrator and the parties interested in the estate. It is not treated as land belonging to the testator. His heirs or devisees take no direct interest in it and cannot dispute the title of a purchaser from the executor, though no power of sale be contained in the will."

[3] That case differed from the one at bar in that the testator had conveyed the title before his death. But the title which descended to the children in this case was divested by the foreclosure to which they were all parties. Therefore the principle laid down was equally applicable. In addition, the will in the case at bar did contain a power to the executors to sell. The sale therefore by the executors after acquiring title by the foreclosure of the second mortgage is doubly protected. If the sale by the executors to the wife of one of them may be considered as voidable, that was a matter to be considered upon the accounting and did not affect the title. Furthermore having taken place in 1901, more than ten years have since elapsed without question.

[4] Upon the authority of the *Lockman Case*, supra, the devisees were not proper or necessary parties to the suit on the foreclosure of the first mortgage, and the executors, and the purchaser from them, having been made parties, the title here offered rests upon valid precedent foreclosures, under which no right, title, or interest in the premises remains outstanding in any of the representatives or devisees of Garret L. Schuyler.

Lockman v. Reilly, supra, has been cited, quoted, and followed down to (*Storm v. McGrover*) 189 N. Y. 569, 82 N. E. 160, and presents the law of the state upon the subject. We think the title tendered marketable.

The order appealed from should be affirmed, with \$10 costs and disbursements to the respondent. All concur.

PEOPLE *ex rel.* JENNINGS v. JOHNSON, Fire Com'r.

(Supreme Court, Appellate Division, Second Department. April 3, 1914.)

1. MANDAMUS (§ 187*)—DENIAL OF PEREMPTORY WRIT—APPEAL—CONCLUSIVENESS OF VERDICT.

There having, after verdict for relator in mandamus on all the facts contained in the alternative writ, been merely a motion for a peremptory writ, the verdict is, on appeal from the denial of the motion, not open to review, but conclusive on the facts litigated at the trial.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 427-437; Dec. Dig. § 187.*]

2. EQUITY (§ 76*)—LACHES—INSANE PERSONS.

Laches cannot be imputed to one of unsound mind.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 241; Dec. Dig. § 76.*]

3. MANDAMUS (§ 143*)—LACHES.

One bringing mandamus for correction of the amount of his pension named in the order of his retirement from the fire department, to have it correspond to the amount to which he was entitled under the statute, is not to be charged with laches under the same rule as in case of application for reinstatement.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 282-285; Dec. Dig. § 143.*]

4. MANDAMUS (§ 164*)—OBJECTIONS AFTER RETURN.

After return by defendant in mandamus, he cannot object to defects of form, but only to want of title in relator to the relief sought, or other defects in substance.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 344-360; Dec. Dig. § 164.*]

5. MANDAMUS (§ 73*)—TO FIRE COMMISSIONER—UNAUTHORIZED CHANGE IN ORDER OF RETIREMENT.

The fire commissioner's order of retirement of a member of the force, fixing his pension at the amount he was entitled to under New York City Charter, § 790 (Laws 1897, c. 378), having after it went into effect been changed to reduce the amount, without any attempted exercise of authority by the commission, the member is entitled to a peremptory writ of mandamus for correction thereof.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 115, 135, 144-149; Dec. Dig. § 73.*]

Appeal from Special Term, Queens County.

Mandamus, on the relation of John Jennings, against Joseph Johnson, as Fire Commissioner. From a final order denying application for a peremptory writ, relator appeals. Reversed and remitted.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Augustus L. Richards, of New York City, for appellant.

Frank Julian Price, of New York City (James D. Bell, of Brooklyn, on the brief), for respondent.

JENKS, P. J. The relator moved for an alternative writ of mandamus. The writ was allowed, the defendant made return, the issues

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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were tried at Trial Term, the jury returned its verdict for the relator upon all the facts contained in the writ, but a motion thereupon made for a peremptory writ at Special Term was denied, and the relator appeals from the order of denial.

[1] The verdict of the jury is not before us for review upon the facts, inasmuch as no motion was made for a new trial, ordered entered thereupon, and appeal taken therefrom. *People ex rel. Berlinger v. Wells*, 178 N. Y. 415, 70 N. E. 926. It must therefore be regarded as conclusive upon the facts litigated at trial. *People ex rel. McDonald v. Clausen*, 163 N. Y. 523, 57 N. E. 739. Consequently the following facts were before the Special Term:

The relator, a member of the fire force ranking as an engineer, was retired from active duty and placed upon the retired list by an order of the commissioner of fire, made, entered, and promulgated on June 5, 1899, to become effective at 8 a. m. of June 6, 1899. The order recited, whereas it appeared from the report of the medical officers of June 1, 1899, that the said relator was totally and permanently physically disabled for performance of duties, and such inability was caused in or induced by the actual performance of his duties, that under the provisions of section 790 of chapter 378, Laws of 1897, the said relator was retired at an annual pension. The amount of the pension originally named in the order was \$800 per annum. On June 5, 1899, the order was entered; officially recorded and transmitted to the quarters of relator's company about 6 p. m. of that day. After 10:20 a. m. of June 6th, erasures and substitutions were made in said order, which had been called back, and also in the records in the office of the fire commissioner, by which the figures 800 were erased, and in place thereof the figures 533.33 were substituted, and a similar change was made in the paper purporting to be a copy of the order filed in the pension bureau. The said medical certificate referred to in said order was changed by inserting the word "not," so that it appeared that the relator was not injured in the line of duty. But the order in its present form still recites the certificate of the medical examiners as showing that the relator was permanently injured in the line of his duty. The changes in the order and records were made by a clerk, who did not remember who directed him, who could not remember whether it was the commissioner or the secretary. The clerk did not remember whether he had an order to make the change, but "must have." The said insertion of the word "not" was made by one of the medical examiners by way of correction to "conform" to the wishes of the other physicians. Whatever change was made was made in the medical office. But he who made the change did not recall any time when it was changed. The certificate might have been sent back to him later. In June, 1898, the relator went into the hold of a fire boat to clean out ashes from the rear of the boiler. That work required a lantern. The lantern suddenly went out and left the relator in darkness. He seized the lantern to relight it, and burned himself so that in starting back he accidentally struck his head against an iron bulkhead. In consequence of his injuries and within the next month, the relator was adjudged insane, was incarcerated in two asylums and one sanitarium, and remained insane until in or about 1913. In May, 1913, he underwent a

second surgical operation, requiring trephining, which restored him to sanity. The relator now remembers that he received his pension every month, and that he signed a paper of some kind. He was released from Bloomingdale Asylum and went or was taken to Ireland by his brother, who had been sent for, and when he came back he testifies that he signed a number of papers; and subsequent to October, 1912, he appeared at the pension bureau and signed receipts—a part of the time before his last operation and a part of the time afterwards. But between October, 1909, and October, 1912, he received his pension through a guardian. These proceedings were begun in July, 1913.

[2, 3] The opinion at Special Term shows the denial was in the exercise of discretion "upon the ground of the relator's laches in not making his application for many years, although throughout the period he received without question the pension at the yearly rate of \$533.33," and the single authority cited is *People ex rel. Miller v. Sturgis*, 82 App. Div. 580-583, 81 N. Y. Supp. 816, appeal dismissed 178 N. Y. 632, 71 N. E. 1137.

I think that laches cannot be attributed to the relator. A finding of fact binding upon the court is that, shortly after the accident, the relator became insane and remained insane until in or about the year 1913, which latter period is made more definite by the testimony of the surgeon who performed the second operation, as May, 1913. As we have seen, this proceeding was begun in July, 1913. An insane person cannot be guilty of laches. *Pomeroy on Equity Jurisprudence* (*Pomeroy's Equitable Remedies*, vol. 1) § 30, says:

"Laches cannot be imputed to one of unsound mind; and this rule holds, although the next friend who brings the suit is clearly guilty of laches."

See, too, *Am. & Eng. Ency. of Law* (2d Ed.) pp. 107, 108.

In *Cyc.* vol. 16, p. 168, it is said:

"Laches cannot be imputed to one of unsound mind, and mental affliction not wholly incapacitating plaintiff may excuse delay where defendant is not prejudiced."

See, too, *Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111; *Trowbridge v. Stone*, 42 W. Va. 454, 26 S. E. 363; *Kidder v. Houston* (N. J. Ch.) 47 Atl. 336.

In *Laws of England*, by Earl Halsbury (volume 13, p. 170), it is stated:

"As regards capacity, there is no acquiescence, and laches is not imputed, while the party is under the disability of infancy or lunacy."

Further we held in *Matter of Ramsay v. Lantry*, 123 App. Div. 71, 107 N. Y. Supp. 828, that the rule of laches declared by the courts in respect to applications to be reinstated in an office or place has no application where the statute duty of the fire commissioner was to fix the pension at \$800 and he had fixed it at \$533.33, for the reason that a person dismissed should be prompt to seek relief and not wait until another had "become seasoned to his place, or the condition of the department has become adjusted to his absence," but that such reason does not apply where one asked but for what he was entitled to, and the relief afforded could harm none other. And we expressly named

and thus practically distinguished the sole case cited by the learned Special Term in its opinion in this case.

[4, 5] Upon such procedure as was followed in this case, a relator has not an absolute right to the peremptory writ. For a defendant "may object to a want of sufficient title in the relator to the relief sought, or show any other defect in substance," though he cannot, after return, object to defects of form. *Commercial Bank v. Canal Commissioners*, 10 Wend. 25, affirmed as the rule in *People ex rel. D., etc., R. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *People ex rel. Fogarty v. Cassidy*, 118 App. Div. 695, 103 N. Y. Supp. 671; *People ex rel. Ajas v. Dept. of Health*, 138 App. Div. 561, 123 N. Y. Supp. 294. But I think in this case the relator was entitled to the writ. The order of retirement was made pursuant to section 790, c. 378, of the Laws of 1897, that provides that the amount of the annual pension in case of total permanent disability caused or induced by the actual performance of duties shall be one-half of the annual compensation if the condition of the pension fund warrant. It was established that the relator's compensation at the time of his retirement was \$1,600 per annum, and that the pension fund was adequate. The order was originally made, published, entered, and transmitted in accordance with this statute, and the relator was accordingly retired. It became effective at 8 a. m. on the 6th of June. The verdict determined that the pension determined by the order when it went into effect was at the rate of \$800 per annum. It does not appear that the subsequent changes were made by an attempted exercise of authority by the commissioner of fire. If it did so appear, then an interesting question would be presented, whether, after the determination had been made and an order thereon had gone into effect, the commissioner could arbitrarily, without notice or further proceeding, reduce the pension by inserting a lesser sum in his order and in his official entries. For the statute provides that such pension when granted shall not be revoked, repealed, or diminished.

The remedy of mandamus was sought properly. *Ramsay v. Hayes*, 187 N. Y. 367, 80 N. E. 193; *Ramsay v. Lantry*, *supra*.

The order is reversed, with costs, and the case remitted to the Special Term for the issuance of a peremptory mandamus. All concur.

DAVIS v. SEAWARD et al.

(Supreme Court, Special Term, Kings County. April 1, 1914.)

1. JUDGES (§ 47*)—DISQUALIFICATION—ATTORNEY.

In an action to enforce a legatee's rights under a will bequeathing testator's property to his wife and providing that such property as she should leave at her death should go to plaintiff, a judge of the Appellate Division was not disqualified under Judiciary Law (Consol. Laws, c. 30) § 15, merely because he had acted as attorney for the widow in attending to the execution of her will, where the sole question involved was whether there remained any of the personal property coming to her from her husband, and the construction or validity of her will was not involved.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214-219, 222, 223; Dec. Dig. § 47.*]

2. WORDS AND PHRASES—"CAUSE"—"MATTER."

"Cause" in legal terminology means an action, while the word "matter" may mean a special proceeding, or the subject of the controversy, commonly spoken of as the subject-matter.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1009-1015; vol. 5, p. 4413; vol. 8, pp. 7597-7598, 7718.]

3. JUDGES (§ 47*)—DISQUALIFICATION—ATTORNEY—CONSTRUCTION OF STATUTE.

Since the provision of Judiciary Law (Consol. Laws, c. 30) § 15, which disqualifies a judge from sitting in a cause or matter in which he has been attorney, creates a disqualification which did not exist at common law, its operation cannot be enlarged by construction.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214-219, 222, 223; Dec. Dig. § 47.*]

4. JUDGES (§ 47*)—DISQUALIFICATION—ATTORNEY.

That the services were performed by clerks or other members of the firm of which a judge was a member will not prevent him from being disqualified under Judiciary Law (Consol. Laws, c. 30) § 15, from sitting in a case in relation to which the firm has performed legal services.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214-219, 222, 223; Dec. Dig. § 47.*]

5. JUDGES (§ 45*)—DISQUALIFICATION—RELATIONSHIP TO LITIGANT.

In an action to enforce a legatee's rights under a will bequeathing testator's property to his wife and providing that such property as she should leave at her death should go to plaintiff, a judge of the Appellate Division was not disqualified under Judiciary Law (Consol. Laws, c. 30) § 15, merely because he was related by affinity within the sixth degree to a legatee under the widow's will, where the sole question involved was whether she left any of the estate received from her husband and the validity or the construction of her will was not involved.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 208-212; Dec. Dig. § 45.*]

6. JUDGMENT (§ 9*)—VALIDITY—DISQUALIFICATION OF JUDGE.

That the judgment of the Appellate Division is void because of disqualification of a judge will not invalidate a decision of the Court of Appeals, or subsequent proceedings in the Supreme Court upon a retrial, where the law given by the Court of Appeals is applied.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 9.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexer

7. ACTION (§ 6*)—SCOPE OF INQUIRY—ACADEMIC QUESTIONS.

A court of equity will not undertake to pass on merely academic questions or on proceedings not injurious to litigants.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 40; Dec. Dig. § 6.*]

8. WILLS (§ 612*)—CONSTRUCTION—DISPOSITION OF PROPERTY.

Where testator bequeathed property to his wife with an absolute power of disposition and devise over of any remaining at her death, the fact that the wife changed the money part of the property from one bank to another, and turned into cash that part consisting of government bonds, did not amount to an absolute disposition of it so as to preclude it being applied as provided by her husband's will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1387-1392, 1608; Dec. Dig. § 612.*]

Action by Buell G. Davis, individually and as executor of Mary E. King, deceased, against George W. Seaward, with the will annexed of William Z. King, deceased, and others. Judgment for defendants.

See, also, 198 N. Y. 415, 91 N. E. 1107; 148 App. Div. 805, 133 N. Y. Supp. 384.

Clarence J. Shearn, of New York City, for plaintiff.

Alton B. Parker, of New York City, and Meier Steinbrink and Robert H. Wilson, both of Brooklyn, for defendants.

CRANE, J. Two questions are presented for my decision: First. Was Mr. Justice Joseph A. Burr disqualified from sitting in the Appellate Division upon the appeal in the case of George W. Seaward as Administrator, etc., v. Buell G. Davis as Executor, etc.? Second. If he were disqualified, what effect does it have, or can it have, upon the judgments in this case?

This controversy arises out of the following facts: William Z. King died in February of 1899 leaving a will containing the following provisions:

"Third: I give and bequeath all my personal property of every name and kind to my wife excepting my piano which I give to Lilly Corwin aforesaid.

"Whatever personal estate may remain at the decease of my wife I give and bequeath to Buell Davis and Abigail Davis, the parents of my wife, or if they are not living then to my sisters aforesaid and Lilly Corwin share and share alike."

The law firm of Burr, Coombs & Wilson, employed by Mary E. King, the widow of William Z. King, probated the will, and thereafter conducted proceedings leading up to her accounting as executrix and final discharge. The will was probated April 27, 1899. The personal estate left by William Z. King amounted to approximately \$17,000. In June of 1899 the said firm conducted for Mrs. King proceedings in the Surrogate's Court in Kings County, In the Matter of Appraisal under the Transfer Tax Act of the property of William Z. King, Deceased, and in connection therewith prepared an affidavit for Mrs. King, wherein she stated as follows:

"The personal property bequeathed to me by paragraph third of said will is an absolute bequest. The qualifications following that bequest are void, and I claim all the personal property absolutely under the provisions of the will."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Upon the accounting of Mrs. King as executrix a decree was entered May 18, 1900. It was prepared by Burr, Coombs & Wilson, and provided that Mrs. King—

"be permitted and allowed to sell the government bonds referred to in Schedule A. of her account remaining unsold, and of the face value of \$12,000, and inventoried at \$13,560, and turn over the proceeds of such sale to herself as sole legatee under the said will, or, if she so elect, to have the title of such bonds transferred to her. * * *

"It is further ordered that the said executrix, upon making the payments and turning over the property hereinbefore described, be discharged from all liability on account of her acts as such executrix as to the items embraced in this accounting."

The only property which Mary E. King had came to her upon this accounting and through her husband's will, with the exception of her meager dower obtained upon the settlement of an action brought therefor by the same firm of lawyers. This property, amounting approximately to \$17,000, as before stated, consisted of United States government bonds appraised at \$15,828, money in bank, and other personal property. Prior to the accounting Mrs. King had sold \$2,000 par value of the bonds, and after the accounting, and on May 29, 1900, the office of Burr, Coombs & Wilson had the remaining bonds transferred at the Treasury Department to Mrs. King individually.

Certain wills were prepared by Burr, Coombs & Wilson for Mrs. King, one antedating November 20, 1899, and another drawn on May 8, 1901, in which she made bequests aggregating \$12,100. For all of these services rendered to Mary E. King, either individually or as executrix of the estate of William Z. King, deceased, the firm of Burr, Coombs & Wilson were paid, and their relations as attorneys to the estate ended with the accounting in May of 1900 and to Mary E. King individually in May of 1901. Thereafter no legal services were performed by these attorneys for Mary E. King. She subsequently consulted a lawyer of Greenport, Long Island, Frederick H. Tasker, who drew another will for her, which after her death, in May, 1905, was admitted to probate. By this will Mrs. King attempted to dispose of the property which she possessed by making certain bequests, one in the sum of \$1,000 to Jennie F. Douglass. Buell G. Davis was made the sole executor. All this personal estate remaining at the decease of his said wife William Z. King had given to his sisters and Lilly Corwin. Thereafter Cynthia A. Tuthill, as administratrix with the will annexed of the goods and chattels of William Z. King, deceased, commenced an action against Buell G. Davis as executor of the last will of Mary E. King to recover the property remaining at her decease, under the third clause of the husband's will. This action came on for trial at a Special Term of this court in December of 1905 and was dismissed, but the judgment of dismissal was reversed by the Appellate Division in July of 1907. 121 App. Div. 290, 105 N. Y. Supp. 672. Upon a retrial interlocutory judgment was entered in July of 1908, directing Buell G. Davis as executor to account for the property which Mary E. King had received from the estate of her husband, charging him with the full amount of the inventory of William Z. King's estate as filed by Mary E. King. Final judgment being entered, an appeal was taken to

the Appellate Division, where the judgment was modified in so far as it charged the executor with the amount of the inventory, holding that he should only account for the amount remaining at the time of Mrs. King's death, and which had come into his possession as executor. This appeal was decided in June of 1909, and is reported in 133 App. Div. 191, 117 N. Y. Supp. 468. Cynthia A. Tuthill having died, George W. Seaward on February 5, 1908, was substituted as plaintiff. In December, 1904, Joseph A. Burr of the firm of Burr, Coombs & Wilson had become a Justice of the Supreme Court, and was a member of the Appellate Division which heard and decided this appeal, writing a dissenting opinion therein. The case was carried to the Court of Appeals where the decision, reported in 198 N. Y. 415, 91 N. E. 1107, affirmed the Appellate Division in modifying the judgment of the lower court, and directed the accounting to proceed. Thereafter the accounting proceeded before a referee, and it was found that Mrs. King left at her decease personal property amounting to \$15,861.92 which had come into the hands of her executor, and by final judgment entered on the 4th day of April, 1911, he was directed to turn it over to the plaintiff. Another appeal was taken to the Appellate Division, where the final judgment was affirmed with opinion, to be found in 148 App. Div. 805, 133 N. Y. Supp. 384. Mr. Justice Burr again sat in the Appellate Division, but did not vote. After contempt proceedings had been started Buell G. Davis, as executor, complied with this final judgment to the extent of turning over to the plaintiff property to the value of \$14,536.37, leaving a balance unpaid of \$1,325.55.

[1] It is now claimed in this action that all proceedings after and including the second appeal to the Appellate Division, wherein Justice Burr sat as a member of the court, are void for the reason that he was disqualified under section 15 of the Judiciary Law. The claim is twofold: First, that he was disqualified because he had been attorney or counsel in the cause or matter before him; second, because he was related by affinity to a party to the controversy within the sixth degree, to wit, that his wife was a first cousin to Benajah H. Douglass, husband of Jennie F. Douglass, a legatee under the will of Mary E. King, deceased.

Upon the hearing of this case no objection was raised to the maintenance of this action, or the power of this court to pass upon the questions presented, but rather it was stated that a full and complete submission of all the facts upon both sides was desired in that the claim of disqualification might, for obvious reasons, be speedily heard and disposed of. As the case comes to me the parties apparently acquiesce in the suggestion that if there were a disqualification in the Appellate Division, its judgment would be void, and that this court could at least vacate its own judgment based thereon. I pass, therefore, to the consideration of disqualification.

If Justice Burr were disqualified under the Judiciary Law, the judgments of the Appellate Division as reported in 133 App. Div. 191, 117 N. Y. Supp. 468, and 148 App. Div. 805, 133 N. Y. Supp. 384, were absolutely void. *Oakley v. Aspinwall*, 3 N. Y. 547. The Judiciary Law referred to reads as follows:

"A judge shall not sit as such in, or take any part in the decision of, a cause or matter to which he is a party, or in which he had been attorney or counsel, or in which he is interested, or if he is related by consanguinity, or affinity to any party to the controversy within the sixth degree."

[2] Are the words "cause or matter in which he has been attorney or counsel" broad enough to include the subject-matter? "Cause" in legal terminology means an action, while the word "matter" may mean a special proceeding, or the subject of the controversy commonly spoken of as the subject-matter. The term "In the Matter of" is familiar to every lawyer, and is the common way of referring to and entitling a certain class of litigation. Proceedings to probate wills, settle accounts, condemnation proceedings, and the like are but instances of proceedings entitled and referred to as "In the Matter of." Causes or actions are brought by a person known as the plaintiff against another person called defendant. By our Code all legal proceedings are divided into actions and special proceedings. Does this provision of the Judiciary Law, therefore, require that the judge must have been an attorney or counsel in the same action or the same special proceeding to disqualify him, or is it broader than this and inclusive of all actions and proceedings in which he has given advice and counsel relating to the subject-matter?

[3] In considering this statute we must remember that at common law a judge was disqualified if he was a party to the cause or interested in it—financially interested—but he was not disqualified by reason of having been counsel or attorney in the very same action he sat to hear or determine as a judge; this disqualification is purely statutory. 17 Am. & Eng. Ency. (2d Ed.) 740, 741; 23 Cyc. 576; Taylor v. Williams, 26 Tex. 583. Thus in the case of Thellusson v. Rendlesham, 7 House of Lord's Cas. 428, Lord St. Leonards sat in a case on appeal in which he had been counsel. When, therefore, a statute creates a disqualification which did not exist at common law, the statutory grounds are exclusive and cannot be enlarged. 17 Am. & Eng. Ency. of Law, 740, and cases cited under note 8. The reason for the decision of the Court of Appeals in Keffe v. Third National Bank, 177 N. Y. 305, 69 N. E. 593, is therefore quite apparent. In that case the court determined that the words "cause or matter" in this section of the Judiciary Law, then section 46 of the Code of Civil Procedure, referred to an action or a special proceeding, and that the judge would not be disqualified unless he had been the attorney or counsel in the identical action or special proceeding brought before him as a judge. The facts in that case involved the actions of Justice Hiscock of the Supreme Court. His firm of Hiscock, Doheny & Hiscock, when he was a member of it, was given notes to collect, upon which an action was brought and a judgment obtained. Execution being issued, part of the amount was paid leaving a balance due. Thereafter Judge Hiscock went upon the Supreme Court bench and tried an action brought before him pertaining to this very judgment which his firm, while he was a member of it, had obtained. The purpose of the action was the collection of the balance of the judgment out of property which, as alleged, was held in trust for one of the judgment debtors. It was open to the defendants in such action to attack the judgment obtained by the firm of Hiscock, Do-

heny & Hiscock, even if they did not do so. *Prentiss v. Bowden*, 145 N. Y. 342, 40 N. E. 13. Subsequently an action was brought to set aside the judgment obtained before Judge Hiscock on the ground that it was void because of his disqualification; he having been an attorney in the cause or matter. The Court of Appeals, however, decided otherwise. To quote from that opinion:

"It seems quite clear that the words 'cause or matter' in section 46 were intended to refer only to actions or special proceedings in which a judge might sit or take part, the word 'cause' meaning a cause of action, and the word 'matter' referring only to some judicial matter or proceeding, and under the Code is included in special proceedings for the enforcement of civil rights. * * * Hence the ultimate and precise question presented is whether the trial justice acted as attorney or counsel *in the action which he heard and decided*. * * * While it is true that the second action was brought in aid of the judgment obtained in the first, yet it was an entirely independent and separate action, in which the parties were not the same, and the purpose of which was different. The issues in the two actions were essentially unlike. * * * The contention of the appellants is that, as the general purpose of the first action was to collect the defendant's debt, and as the second action was in furtherance of the same purpose, they should be regarded as but one action, and as falling within the inhibition of section 46. *The infirmity of that contention lies in the fact that such is not the language of the statute.*"

This statement of the law as to the disqualification of a judge finds support in numerous authorities of other jurisdictions. In *The Richmond* (C. C.) 9 Fed. 863, the opinion states:

"The decisions, so far as I have been able to find, are unanimous that 'of counsel' means 'of counsel for a party in that cause and in that controversy,' and if either the cause or the controversy is not *identical* the disqualification does not exist."

The Court of Appeals of Maryland in *Blackburn v. Craufurd*, 22 Md. 447, speaking of their statute which disqualified a judge where he had been of counsel in the case, said:

"The fact that he was counsel in a case theretofore tried between two of the parties to the said bill, which 'involved some of the issues raised in the bill,' does not bring him within the letter or spirit of the constitutional inhibition. The former requires he should have been of counsel in the case then before him."

Section 170, Code of Civil Procedure of the State of California, provided:

"No * * * judge * * * shall sit or act as such in any action or proceeding, when * * * he has been attorney or counsel for either party * * * in the action or proceeding."

The Supreme Court of that state said of this provision in *Cleghorn v. Cleghorn*, 66 Cal. 309, 5 Pac. 516:

"It happens that the judge before whom this cause was tried had been, before his election to the bench, the attorney of the defendant in an action which involved one of the issues in this case, but that did not disqualify him to sit in the trial of this action, in which he had not been the attorney of either party."

In the case of *Tampa Street Railway & Power Company v. Tampa Suburban Railroad Co.*, 30 Fla. 595, 11 South. 562, 17 L. R. A. 681, the plaintiff founded its right to recover upon state legislation, and it was

held that the defendant could not recuse the judge by showing that he had been an attorney for the plaintiff and had advised it as to its rights under municipal authority regarding the subject-matter of the controversy.

The Supreme Court of Louisiana in *Stewart v. Mix*, 30 La. Ann. 1036, gave the following as the law:

"The fact that a Justice of this court was of counsel for certain parties in two former suits is no ground for his recusation in a subsequent suit in which the same parties are litigants, when it appears that the validity of none of the proceedings and the decision of none of the questions involved in the previous suits are put in issue in the subsequent suit."

See, further, *Cook v. Berth*, 102 Mass. 372.

In the following cases to which I may refer it will be found upon examination that the judge was either attorney in the very cause which was before him, or had represented some one interested in the identical issue; *People v. Haas*, 105 App. Div. 119, 93 N. Y. Supp. 790; *McLaren v. Charrier*, 5 Paige, 530 (here a master in chancery was at the same time assisting one of the parties); *People ex rel. Roe v. Suffolk Common Pleas*, 18 Wend. 550. In *Curtis v. Wilcox*, 74 Mich. 69, 41 N. W. 863, cited in the *Haas Case* the statute read "has been consulted or employed as counsel in the *subject matter* in said suit." *Hubbell v. Harbeck*, 54 Hun, 147, 7 N. Y. Supp. 243; *O'Brien v. Long*, 49 Hun, 80, 1 N. Y. Supp. 695; *Stebbins v. Brown*, 65 Barb. 272; *People v. Frederick*, 21 N. Y. Supp. 26; *McGregor v. Crane*, 98 Mass. 530.

The following decisions, however, and the facts upon which they are based, are irreconcilable with the decision of our Court of Appeals in the *Keeffe Case* above cited; *Darling v. Pierce*, 15 Hun, 542; *State ex rel. Ambler v. Hocker*, 34 Fla. 25, 15 South. 581, 25 L. R. A. 114; *Slaven v. Wheeler*, 58 Tex. 23.

Applying the law as laid down by the Court of Appeals in *Keeffe v. Third National Bank*, supra, to the facts in this case, Judge Burr was not disqualified, as he had not been attorney or counsel in the cause or proceeding before him. He had been attorney for Mrs. King in drawing her will, but her will was not before him for construction or interpretation, neither was its validity put in question. He had probated William Z. King's will, and had been the attorney in the proceedings to assess the property for the collateral inheritance tax, also the attorney in the accounting proceedings of Mrs. King as executrix; but none of these proceedings were on appeal before the Appellate Division, nor was their validity in question. That upon the accounting proceedings Mrs. King rightfully received all the property coming to her under her husband's will and was properly discharged has never been questioned. The firm of Burr, Coombs & Wilson were paid and discharged. Their relationship as attorney in any of these matters ended in 1901. In 1905, after Mr. Burr had become a Supreme Court Justice, Mrs. King died, and then for the first time question arose as to whether or not she had left any of the personal property coming to her from her husband. The question could not arise in any judicial proceeding before her death. The action

brought by Seaward against Davis was to determine this one question whether or not Mrs. King had disposed of all her personal property coming to her from her husband under his will, for it is now conceded that the provisions of William Z. King's will, giving whatever of his personal estate might remain at the death of his wife to his sisters, was valid. Justice Burr had never been attorney or counsel in this action or proceeding, and had never given any advice whatever regarding its merits.

It is true that if William Z. King had never made a will and Mrs. King had never received any money upon the accounting from his estate, the case of *Seaward v. Davis* could never have arisen. The will, the accounting, and the proceeds were all necessary for the maintenance of the *Seaward* action, and to this extent prior proceedings were involved, but they were not the issues which were before the Appellate Court for hearing. Certainly Mr. Justice Burr was no more disqualified on the appeal in the *Seaward* Case than was Justice Hiscock upon the trial of the *Keeffe* Case. In fact Justice Hiscock was nearer to disqualification in that the judgment recovered by him as an attorney might have been attacked upon the trial, while all the parties in *Seaward v. Davis* based their contention upon the regularity of prior proceedings. While the decree upon the accounting stated that Mrs. King took this property as sole legatee, yet this in no way extended her control of it, as under the will she had the conceded right to use up all the property anyhow, if she so desired. Although the papers thus drawn in the office of Burr, Coombs & Wilson were wrong in this particular, yet they in no way affected the case of *Seaward v. Davis*, as that action only related to what Mrs. King had remaining, and in no way questioned her right to use and dispose of the property in her lifetime.

[4] Evidence was presented before me showing the part which the members of the firm and the clerks had taken in these various matters. I deem it entirely immaterial for the purpose of this decision, for the reason that whatever was done by the clerks or by other members of the firm must be considered in law to have been done by Justice Burr as a member of that firm; the actions of Burr, Coombs & Wilson or their clerks would constructively be his acts. Following, therefore, the interpretation put upon the Judiciary Law by the Court of Appeals of this state, I conclude that Mr. Justice Burr was not disqualified by reason of having been the attorney or counsel in a cause or matter before him as a judge.

[5] Was Judge Burr disqualified by reason of his relationship? Under the will of Mary E. King, Jennie F. Douglass was given a fifth share of \$5,000. Benajah H. Douglass was her husband, and also the first cousin of Mr. Justice Burr's wife. By affinity Benajah H. Douglass and Jennie F. Douglass were related to the judge within the sixth degree, and if Jennie F. Douglass as a legatee were a party to the controversy Mr. Justice Burr was disqualified. Jennie F. Douglass was not a party to the record, the action being *George W. Seaward, as Administrator with the Will Annexed of the Goods, Chattels, and Credits which were of William Z. King, Deceased, Plaintiff,*

against Buell G. Davis, as Executor of the Last Will and Testament of Mary E. King, Deceased, Defendant. Neither was the validity or construction of Mary E. King's will before the Appellate Division, nor the claim of Jennie F. Douglass to a legacy thereunder. As before stated, the sole question was whether there was any money in the estate of Mary E. King to which the provisions of this valid will could attach. It was said in the Matter of Dodge & Stevenson Mfg. Co., 77 N. Y. 101, 33 Am. Rep. 579, that—

“to exclude a judge from sitting in a case by reason of kinship, under the provisions of the Revised Statutes (2 R. S. [(1st Ed.) pt. 3, c. 3, tit. 1] p. 275, § 2), prohibiting him from sitting in any cause, ‘in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties,’ such kinship must exist between him and some person who is actually a party; it is not enough that he is related to some person not a party, who is or may be interested in the cause.”

Accordingly it was decided that a stockholder of a corporation which is a party, related to a judge within the inhibited degree, does not disqualify the judge, as the stockholder, although interested, is not a party. Within the ruling of this case Buell G. Davis, as executor, etc., was, so far as the Judiciary Law applies, the party to the controversy, not Jennie F. Douglass. *Searsburch Turnpike Co. v. Cutler*, 6 Vt. 316, p. 322.

What would be the effect of holding that legatees were parties to an action brought only in the name of an executor and which did not involve the validity or construction of the will, but merely the corpus of the estate? If the Judiciary Law regarding the judge's relationship applied to such legatees not parties of record, it would also apply to every creditor of the estate who by law has a claim upon the assets prior to that of legatees. It would make no difference whether the creditor was known or unknown, or whether the parties or the judge were aware of the circumstances, if the fact should be that a relative of the judge within the sixth degree were a creditor, all the proceedings would be void, and no consents or acquiescence could make them valid. The discovery of such a fact at any time would avoid the judgment. Thus, in an action upon a note or book account, or a contract, or to recover possession of personal property, the creditors, as well as legatees, would be interested in the recovery or loss, and yet if it should turn out that there was a creditor in existence unknown to anybody who was related within the inhibited degree to the judge, all proceedings would go for naught; they could be absolutely ignored as being void. The consequences of such a doctrine would be that no executor could sue or be sued with safety, and that no judge would dare sit in any such case unless he was so unfortunate as to be the last of his race. Authority, as well as reason, is therefore against the contention that Jennie F. Douglass was a party to the case of *Seaward v. Davis*.

I have confined myself strictly to passing upon the legal propositions which have been presented. Whether or not it was wise or proper for Mr. Justice Burr to sit in review of the case of *Seaward against Davis* is not submitted for my opinion. While I decide that he was not disqualified under the Judiciary Law, yet I cannot go to the extent claimed that, being qualified, he was obliged to sit. See *Oakley v. Aspinwall*, 3

N. Y. 547, at page 562; Matter of Dodge & Stevenson Mfg. Co., 77 N. Y. 101, at pages 112 and 113, 33 Am. Rep. 579; People ex rel. Devery v. Jerome, 36 Misc. Rep. 256, 73 N. Y. Supp. 306. There is a propriety and decorum which almost has the force of law, but it rests with the individual judge to determine whether the circumstances call upon him to apply it.

Again, this decision does not call for the expression of my opinion upon the professional ethics of Coombs & Wilson. The papers drawn in their office for Mrs. King when the firm was Burr, Coombs & Wilson erroneously stated that the remainder over of the legacy left to her was void, and that she took the property without any limitations. For drawing these papers they were paid. When Mrs. King died Coombs & Wilson brought the action as attorneys for Tuthill and Seaward, as above stated, claiming the reverse to that set forth by them in Mrs. King's affidavits, and the agreement for their services was to be one-third of the recovery. Whether or not such conduct was professional is a matter over which I have no jurisdiction; that rests entirely with the Appellate Division.

[6] Conceding, however, for the sake of argument that the judgment of the Appellate Division upon the second appeal as reported in 133 App. Div. 191, 117 N. Y. Supp. 468, was void because of the disqualification of that court, yet it could have no effect whatever upon the subsequent proceedings in this branch of the Supreme Court. When this judgment of the Appellate Division was taken to the Court of Appeals, that court laid down the law to be applied upon a rehearing of the case, which it directed. Thereafter a trial was had before the referee and the rule given by the Court of Appeals applied, and the report of the referee confirmed by a final judgment. The fact that a decision of the intermediate court might be void could not weaken the decision of the Court of Appeals as an authority, nor affect the subsequent proceedings in this court upon a retrial, where the law as given by the Court of Appeals was applied. A similar situation would arise if a plaintiff had recovered a verdict at the trial term before a judge who was disqualified, and on appeal the judgment had been reversed and a new trial ordered, whereupon a new trial was had before a qualified judge, resulting in a verdict for the defendant. Could the plaintiff claim that the judgment on the second trial was void because the judge upon the first trial was disqualified? I think not. There must have been error on the retrial.

The plaintiff before the referee proceeded to prove the case as directed by the Court of Appeals, and did show, what is now conceded, that when Mary E. King died she had remaining in her possession over \$15,000 which had come to her under her husband's will. As before stated, final judgment in April of 1911 confirmed the referee's findings directing the executor to pay over the money, and was affirmed by the Appellate Division in 148 App. Div. 805, 133 N. Y. Supp. 384, Woodward, J., writing the opinion, in which he stated that the court had very carefully examined the financial statement prepared by Buell G. Davis, and was of the opinion that the account was entirely in harmony with the suggestions made by the Court of

Appeals. The disqualification, if any, of the intermediate court would therefore be of no effect upon the subsequent proceedings.

[7] A court of equity will not undertake to pass upon merely academic questions, or set aside proceedings which can in no way harm the litigants before it. "Equity intervenes always for a reason and never needlessly." *Prentiss v. Bowden*, 145 N. Y. 342-346, 40 N. E. 13; *Bispham's Equity*, § 377; *Matter of Gage*, 141 N. Y. 112, 35 N. E. 1094, 25 L. R. A. 781; 2 Cyc. 533.

[8] It has been claimed, however (see opinion, *Seaward v. Tasker*, 80 Misc. Rep. 570, 141 N. Y. Supp. 618), that the law of the Court of Appeals was not applied before the referee, and upon the entry of final judgment in this case in April of 1911. It is there stated that Mary E. King absolutely disposed of her property by changing the money from one bank to another, and by turning the government bonds into cash; that although she died possessed of \$15,000, all of which came from her husband's estate under his will, yet that this sum was not remaining at her death, and had been disposed of by her. I confess I cannot follow this reasoning. To my mind it makes no difference whether she was given the money for her own use, or with a beneficial power of disposition, or with an absolute power of disposition. The fact is she died possessed of \$15,000, and therefore had neither used or disposed of that amount. Mrs. King, by changing the nature of the securities or the property which she received, did not absolutely dispose of it within the terms of any case that I can find. Cases like *Terry v. Wiggins*, 47 N. Y. 512; *Crozier v. Bray*, 120 N. Y. 366, 24 N. E. 712; *Leggett v. Firth*, 132 N. Y. 7, 29 N. E. 950, hold that where a person is given real property with an absolute power of disposition and devise over of any remaining, a sale of the property by the devisee gives a title in fee free from any limitations of remainders. These cases would be applicable to the situation here if Seaward, as administrator, etc., had brought action against the purchasers of the government bonds to impress upon them a trust in favor of William Z. King's sisters, but such was not the action. The purchaser of the bonds got a good title, but the provisions of William Z. King's will applied to any of the personal property in whatsoever form remaining at Mrs. King's death. See *Swarthout v. Ranier*, 143 N. Y. 499, 38 N. E. 726; *Rose v. Hatch*, 125 N. Y. 427, 26 N. E. 467; *Terry v. Rector of St. Stephens' Church*, 79 App. Div. 527, 81 N. Y. Supp. 119.

But even if the decision of the Court of Appeals had not been followed by the final judgment, the only method of reviewing the matter was and is by appeal.

If Buell G. Davis as executor is of the opinion that the last appeal was also heard by a disqualified court, there is no reason that I know of why he cannot now apply to that tribunal for a rehearing of the case.

If this case has heretofore been carefully sifted and every point minutely scrutinized, it is, in my opinion, due to the fact that Buell G. Davis, the executor, was kept in jail for four months, although guilty of no act amounting to a moral wrong. In June of 1911 he

was adjudged guilty of contempt for failure to pay over the \$15,-861.92 as directed by the final judgment. After this order of contempt, and on June 6, 1911, he turned over as directed \$14,536.37, leaving a balance of only \$1,325.55. Two days thereafter he went to jail for failure to pay this balance, all upon the motion and insistence of Coombs & Wilson, who had a contingent fee interest of one-third in the amount. If the papers drawn in the office of Burr, Coombs & Wilson were correct in their recitals, Buell G. Davis, as executor of the estate of Mary E. King, was justified in believing that any remainder over in the personalty was void, and that she had a right to will away the property. In a situation thus created by the opposing lawyers themselves, they might well have stopped with the collection of \$14,536.37, without pressing further for the balance of \$1,325.55. The fact that Davis went to jail at all would indicate that he had no more money. When, however, it appears that after staying in prison for three months he made application for discharge, showing not only ill health, but the payment of all this balance for legal services, and that this application for discharge was opposed by Coombs & Wilson, comment is unnecessary; the facts speak for themselves. Sufficient to say that every objection and every criticism that could possibly be made to any step in the entire proceeding, by Buell G. Davis, or others in his behalf, could well have been expected—it had been unnecessarily invited.

Judgment for the defendants, without costs.

PEOPLE ex rel. NIGER v. VAN DELL, Constable.

(Supreme Court, Special Term, Erie County. April 2, 1914.)

1. ASSOCIATIONS (§ 2*) — CONSTITUTIONAL LAW (§ 239*) — DISCRIMINATION AGAINST CLASS.

Penal Law (Consol. Laws, c. 40) § 936a, punishing any person who, acting as an officer of any secret fraternal order maintaining lodges, solicits or initiates persons to membership in a lodge on condition of payment of dues, assessments, etc., to any grand officer, unless "elected by or from delegates chosen by members of the local lodges," is invalid as discriminatory against a class, and violates the fourteenth amendment to the federal Constitution.

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 2; Dec. Dig. § 2;* Constitutional Law, Cent. Dig. §§ 694, 696; Dec. Dig. § 239.*]

2. CONSTITUTIONAL LAW (§ 81*)—POLICE POWER.

Where a business is lawful and open to all and beyond the prohibitive power of the Legislature, the right of governmental control must be confined to such reasonable regulation as is designed to conserve the health, safety, morals, peace, and order, or it is invalid as exceeding the legislative power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

Habeas corpus by the People, on the relation of Frank T. Niger against Andrew Van Dell, Constable and Police Officer of the Village of Albion, Orleans County, for the discharge of relator from arrest. Relator discharged.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Elijah W. Holt, of Buffalo, and William J. Hickey, for relator.
John C. Knickerbocker, Dist. Atty., of Albion, for defendant.

WHEELER, J. This is a proceeding by writ of habeas corpus for the discharge of the relator from arrest. The relator was arrested, charged with a violation of section 936a of the Penal Law of the state, in that, while one of the supreme officers of the Order of Owls, he solicited new members to form a new subordinate nest of said order at Albion, N. Y. The relator concedes that if the statute he is charged with having violated is valid, he is guilty of the offense, but he challenges the constitutionality of the act, and contends that the statute is invalid because unconstitutional, and his arrest therefore unauthorized.

[1, 2] The sole question, therefore, before the court for consideration is the constitutionality of the act. The act provides:

"Section 936a. Unlawful Dues or Assessments of Certain Secret Fraternities. Any person or persons acting as the general officer, chief officer, grand officer or supreme, or grand officers or body, in and for a secret fraternal association, society, order or organization, which maintains in this state local branches, lodges, nests, aeries, divisions, chapters or subdivisions, who shall solicit, receive, invite, admit or initiate any person or persons to membership or to participation in any such local branch, lodge, nest, aerie, division, chapter or subdivision, upon condition that such person shall pay any dues, assessments, money or reward, directly or indirectly, to any grand officer, chief officer, grand officer or supreme, or grand officers or body, unless such grand officer, chief officer, grand officer or supreme, or grand officers or body shall have been chosen or elected by and from delegates chosen by the members of the local branches, lodges, nests, aeries, divisions, chapters or subdivisions of such secret fraternal association, society, order or organization to their regular convention at which such officer shall be elected, shall be guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars or more than two hundred dollars, or by not more than thirty days' imprisonment, or both."

The Order of Owls is a purely unincorporated fraternal association, having subordinate lodges, or nests. It has a supreme governing lodge known as the Home Nest, but the officers of the Home Nest are not chosen or elected by delegates chosen by the members of the subordinate or local nest, or lodge, as prescribed in said act. Therefore, when the relator solicited persons to organize a local nest at Albion, and to pay the initiation fee required by the order, he violated the provisions of the act in question.

Is the act constitutional? Its constitutionality is attacked because it is claimed it interferes with that liberty of action and contract guaranteed every citizen by the Constitution of the state and of the United States. Its constitutionality is defended by the district attorney as a legitimate exercise of the police power vested in the state. Let us examine the law and ascertain just what it prohibits, and what it does not condemn. The act does not condemn or make unlawful fraternal associations where the supreme officers are chosen or elected otherwise than by delegates chosen by members of local branches, lodges, or nests. It does not prohibit the existence of such associations, whether incorporated or unincorporated, or make it unlawful for persons to become members thereof. It does not prohibit the payment of

dues, assessments, or money to any such grand or supreme officer or lodge by members. It does not prohibit others than officers soliciting, inviting, admitting or initiating other persons to become members in any local branch or lodge. It simply makes it a misdemeanor for "any person or persons acting as the general officer, chief officer, grand officer, or supreme, or grand officers or body" in such association to "solicit, receive, invite, admit, or initiate any person or persons to membership * * * in such local lodge * * * on condition that such person shall pay any dues, assessments," etc., "to any grand officer," etc., "unless such grand officer," etc., "shall have been chosen or elected by delegates chosen by the members of local branches," etc.

In this case, the Order of Owls is an association organized in the state of Indiana in 1904. It has never conducted the business of life insurance, accident insurance, sick or indemnity insurance, or any other form of insurance. So it cannot be claimed to come under the insurance laws of the state, or subject to the control of the Insurance Department. It appears from the evidence to be a purely social and fraternal organization.

The order is governed by a ritualistic system of conferring degrees on its members. On joining a subordinate nest the member receives the first degree. The second degree consists of not more than 150 members chosen from those of the first degree. The third degree of not more than 50 members chosen from the second degree, and the fourth degree is composed of members chosen from the third degree. The members of the fourth degree are the supreme governing body of the order, and control the general policy of the order. It will thus be seen that the chief or governing body of the Order of Owls is not selected by delegates to a general convention chosen from the subordinate nests or lodges, and in soliciting members the relator violated the statute, and the only defense is the alleged unconstitutionality of the statute.

It is urged by the district attorney that the Legislature had the right to pass the statute attacked, by virtue of the police power of the state, for the purpose of preventing fraud and deception by persons pretending to be officers of the order. The statute does not prohibit membership. It does not declare membership in such an organization unlawful or against the policy of the state, but the prohibition is against an officer asking another to become a member of the organization, and the argument advanced is that this is a legitimate exercise of the police power, reserved to the state so as to prevent fraud upon the person solicited. The statute is not addressed to the punishment of fraud where actually committed, but is rather a prohibition against certain acts for fear fraud may be perpetrated. The Legislature might, with equal propriety, and upon the same argument, pass an act prohibiting certain persons trading within the state in order that they might not possibly perpetrate frauds upon those with whom they deal. Such legislation would clearly violate the right of individual liberty guaranteed every citizen by the Constitution of the state and of the United States. It is not legitimate legislation to prohibit the prosecution of a lawful business or calling because some unscrupulous

person may, in connection with it, perpetrate a fraud. The thing to do is to prohibit and punish the fraud—not the business.

It would seem that if the statute attacked in this proceeding is to be sustained, it can only be upheld upon the theory that its enactment was justified as a proper exercise of the police power reserved to the state. It is the law, however, that when an industry or calling is itself lawful and open to all, and beyond the prohibitive power of the Legislature, the right of government control must be confined to such reasonable enactments as are designed to conserve health, safety, morals, peace, and order. *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133; *Ives v. South Buf. Ry. Co.*, 201 N. Y. 305, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156.

"The Legislature, under the guise of police regulation, cannot arbitrarily invade personal or property rights; and, where such regulations are called in question, the test should be whether they have some relation to the public health, morals, or safety, and whether such is, in fact, the end sought to be attained. If not, they should be declared invalid as exceeding legislative power." *People v. Ringe*, 197 N. Y. 143, 90 N. E. 451, 27 L. R. A. (N. S.) 528, 18 Ann. Cas. 474; *Hauser v. Ins. Co.*, 206 N. Y. 455, 100 N. E. 52, 42 L. R. A. (N. S.) 1139; *People v. Jenkins*, 202 N. Y. 53, 94 N. E. 1065, 35 L. R. A. (N. S.) 1079; *Schnaier v. Hotel Co.*, 182 N. Y. 83, 74 N. E. 561, 70 L. R. A. 722, 108 Am. St. Rep. 790; *People v. Wilber*, 198 N. Y. 1, 90 N. E. 1140, 27 L. R. A. (N. S.) 357, 19 Ann. Cas. 626.

For a citation of many other cases enunciating the same doctrine, see the opinion of Judge Werner in the case of *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156.

Applying the tests laid down in these numerous well-considered cases, we think the statute in question must be condemned as unconstitutional and void.

It certainly cannot be claimed the organization of the Order of Owls is an illegal or immoral society. Its charter and declared purposes disprove any such inference. It is essentially a fraternal, social, and charitable organization, differing in no material respects from many other like organizations throughout the country. Its existence, it seems to us, has no relation whatever to the public health, safety, or morals. In fact the existence is not condemned by the act in question. The solicitation of persons to become members of the order, or the payment of dues or assessments to it, is not prohibited. The statute simply arbitrarily declares that no one "acting as the general officer, chief officer, or grand officer," etc., "shall solicit, receive, invite or initiate any person" * * * to membership, unless such grand officer is chosen and elected in some specified manner.

If the order is meritorious and beyond legal condemnation, how can it fairly be said that the method by which officers are chosen to the position they occupy has any relation to public health, morals, or safety? To prohibit such persons from soliciting or initiating new members is the most arbitrary exercise of legislative power; upon no possible theory can it be deemed reasonable. It is, in our opinion, an unjustified discrimination against a class, unsupported by any good or sufficient reason, and violates the fourteenth amendment of the fed-

eral Constitution, providing that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

We are quite aware of the suggestion made by the higher courts that questions of the constitutionality of statutes should be left by the lower courts to appellate courts, but the decision which should be rendered in this case appears to us so free from doubt that we feel constrained to follow the dictates of our own convictions and judgment in this case, and declare the act upon which the prosecution against the relator is based unconstitutional and void. It follows that the relator should be discharged from arrest.

We think this order should be without costs against the defendant, as he was acting under the authority of the warrant issued to him for execution, and under color of the statute.

So ordered.

DAMON et al. v. EMPIRE STATE SURETY CO.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

1. PRINCIPAL AND SURETY (§ 41*)—FRAUD—EFFECT.

The obligees in a bond given to secure them against damage on a contract were not bound by fraudulent representations made to the surety by the other party to the contract, without their knowledge or participation.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 78-81; Dec. Dig. § 41.*]

2. PRINCIPAL AND SURETY (§ 42*)—FRAUD—EFFECT.

The obligee, before accepting the bond of a surety, is bound to disclose facts within his knowledge, the concealment of which would amount to a suppressio veri, and, to defeat liability, the concealment thereof need not inure to the benefit of the obligee, if it operates to the prejudice of the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 86-90; Dec. Dig. § 42.*]

3. PRINCIPAL AND SURETY (§ 42*)—FRAUD—EFFECT.

Under an agreement between plaintiffs and the M. Co. relative to the manufacture of certain machinery, plaintiffs had delivered two notes, one of which had been discounted by the M. Co., and had gone into the hands of third parties and had not been paid at maturity. The company was in default under the contract. A written contract was executed in renewal of the previous agreement, but not mentioning it, which required the company to give a bond to secure plaintiffs against damage, and recited that "we accept" such two notes. A note was then given by plaintiffs, discounted by the company, and the proceeds paid to plaintiffs, who, after the giving of the surety bond, applied such proceeds on the overdue note mentioned. *Held*, that plaintiffs' failure to disclose that the contract was a renewal of a previous agreement, and the facts concerning the two notes which the surety was entitled to assume were accepted about the date of the written contract, was such a fraud as defeated the surety's liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 86-90; Dec. Dig. § 42.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Kings County.

Action by D. Everett Damon and others against the Empire State Surety Company. From a judgment dismissing the complaint, plaintiffs appeal. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Almet Reed Latson, of New York City (Evan L. Tambllyn, of New York City, on the brief), for appellants.

M. J. Wright, of New York City, for respondent.

CARR, J. This case was submitted on March 5, 1914, without oral argument. The action was brought to recover on a surety bond. It was tried in Kings county on February 10, 1910. The complaint was dismissed at the close of the plaintiffs' proofs. Judgment of dismissal was entered on February 16, 1910, notice of appeal filed March 16, 1910, the appeal papers perfected on April 1, 1910, and case ordered filed on May 13, 1910. It comes now before us for consideration for the first time four years after the appeal was taken, and is then submitted without oral argument. The bond on which the action was brought is set forth in the record in ipsissimis verbis. This bond was given to secure the plaintiffs against damage on a written contract, forming a part of the bond, between the Nichols & Langworthy Machine Company and the plaintiffs. The proofs taken were very short, and consisted of the testimony of but one witness, one of the plaintiffs. The defendant rested upon its cross-examination of this witness to establish its defense. In dismissing the complaint, the trial court rendered no opinion, oral or otherwise. The defense was fraud arising out of fraudulent concealments of material facts when the plaintiffs accepted the bond in question from the defendant.

[1, 2] The plaintiffs, prior to the acceptance of the bond, had no direct dealings with the defendant. It was the machine company that applied for the bond. The machine company was not the agent of the plaintiffs, and they are not bound by any fraudulent representations in which they did not participate or which were made without their knowledge. *Western N. Y. Life Ins. Co. v. Clinton*, 66 N. Y. 326; *Ludekens v. Pscherhofer*, 76 Hun, 548, 28 N. Y. Supp. 230; *Howe Machine Co. v. Farrington*, 82 N. Y. 121; *Powers v. Clarke*, 127 N. Y. 417, 28 N. E. 402. At the same time it is well recognized that the obligee, before accepting the bond of the surety, is called upon to make such disclosures of facts within his knowledge, of which the concealment would amount to a *suppressio veri*, and thereby become fraudulent, and it is not necessary that this concealment should inure to the benefit of the obligee, provided it operates to the prejudice of the surety. The most familiar example of this rule is to be found in cases where an employer, knowing of the prior dishonesty of an employé, but concealing that knowledge, accepts an indemnity of suretyship for the future good conduct of the employé. *U. S. Life Ins. Co. v. Salmon*, 91 Hun, 535, 36 N. Y. Supp. 830; *Id.*, 157 N. Y. 682, 51 N. E. 1094; *Dinsmore v. Tidball*, 34 Ohio St. 411;

State v. Sooy, 39 N. J. Law, 135. This rule has a broader application than to mere employes or agents.

[3] The written contract between the plaintiffs and the machine company bore date May 28, 1909. It purported to speak of an agreement made as of said date. There was no expression in it to indicate that it was but a renewal agreement of a contract previously made and as to which there had been a default in performance by the machine company. It related to the manufacture and delivery of certain machinery. It recited as follows:

"In full payment of the above machines, we accept two notes, one of which is dated January 20, 1909, amount \$1,156.25, which will be due on July 20, 1909. The second note is dated May 28, 1909, amount \$1,156.25, due August 28, 1909."

This contract bore an indorsement of acceptance by the plaintiff. The defendant surety company was entitled to assume that a contract was made on May 28, 1909, and two notes then delivered by the plaintiff, the proceeds of which, by sale or discount, would be available to the machine company to enable it to perform. It appears from the testimony of the plaintiffs' only witness that this agreement of May 28th was but an extension of a prior agreement made in the preceding January, and as to which the machine company was in the complete default. The agreement of May refers to two notes which "we accept." The word "accept" is used in the present tense, and the defendant surety company was entitled to assume that these two notes were accepted on or about the date of the May agreement. Under the agreement of January, the plaintiffs had delivered two notes, the first of which had been discounted by the machine company and had gone into the hands of third parties. The plaintiffs had neglected to pay this note at its maturity. The machine company was then in default under the January contract. After some negotiations, the paper dated May 28th was prepared. The plaintiffs insisted upon security from the machine company, and a provision to that effect was inserted in the latter paper. The plaintiffs did give a note, dated May 28, 1909, but they procured the machine company to have it discounted immediately, and they received back the proceeds of the discount, which they held until the surety bond was issued on June 8, 1909, whereupon they applied said proceeds to take up their unpaid note of January, 1909. The result of this manipulation was that, at the time the surety bond was issued, the machine company had no notes of the plaintiff to aid it in the performance required from it. The plaintiffs had practically but one note outstanding, as they had funds of the machine company, realized from the discount of the May note, which were received to take up the January note, which they did so take up the moment they received the defendant's bond. We think that their concealment of these circumstances was a suppression veri and fraudulent. In the following July the machine company became bankrupt.

The judgment is affirmed, with costs. All concur, except BURR, J., taking no part.

COLYER v. RICHARD K. FOX PUB. CO.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

1. TORTS (§ 8*)—"USE OF PORTRAIT FOR ADVERTISING OR TRADE PURPOSES."

The publication of a person's portrait in a daily, weekly, or periodical paper or magazine, though it contains a great number of advertisements, is not a use of the portrait for advertising purposes, or purposes of trade, within Civil Rights Law (Consol. Laws, c. 6) § 50, prohibiting such use without the consent of the person, and section 51 giving a right of action for damages caused by such use.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 8; Dec. Dig. § 8.*]

2. STATUTES (§ 217*)—CONSTRUCTION—HISTORY.

Civil Rights Law (Consol. Laws, c. 6) §§ 50, 51, as to the use without consent of a person's portrait for advertising purposes or purposes of trade, though its language is general and susceptible of a very wide meaning, must be interpreted in the light of its history and the evil at which it was aimed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. § 217.*]

Appeal from Trial Term, Kings County.

Action by May Colyer, an infant, by Johanna Colyer, her guardian ad litem, against the Richard K. Fox Publishing Company. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

Charles J. Belfer, of Brooklyn, for appellant.

Chauncey E. Treadwell, of New York City (Louis J. Vorhaus, of New York City, on the brief), for respondent.

CARR, J. [1, 2] The plaintiff is a young woman, under legal age, who brings this action against the defendant, a corporation that publishes a weekly paper in the city of New York. For several years the plaintiff has been a professional entertainer in the specialty of "high diving," which is described in this record as diving from a height into a shallow tank of water. In this capacity she has appeared before the public in many places throughout this country, as well as in Canada. While in Canada, she had her photograph taken in costume appropriate to her public performances. A copy of this photograph came into the possession of the defendant. Without the written consent of the plaintiff, or her guardian or parents, the defendant published a reproduction of it, in its publication known as "the National Police Gazette," in a single issue of that paper bearing date January 18, 1913. Immediately below the picture appeared the words, "May Collier, a Great Trick Diver." On the same page appeared four other pictures of women vaudeville performers, attired in stage costumes. At the bottom of the page were the words:

"Five of a kind on this page. Most of them adorn the burlesque stage; all of them are favorites with the bald-headed boys."

*For other cases see same topic & § NUMBER in Dec. & Amp. Digs. 1907 to date, & Rep't Indexes

On the claim that this single publication of her picture by the defendant was a violation of sections 50 and 51 of the Civil Rights Law (Consol. Laws, c. 6), this action was brought to obtain an injunction against a further publication of the picture and for damages. The case came originally before the equity side of the court, but, as there was no claim that the defendant threatened or intended to repeat the publication of the picture, the case was sent into the jury Trial Term for disposition as to damages, if the plaintiff should prove herself entitled thereto. At the Trial Term it was conceded that the plaintiff was a professional "high diver"; that she herself had caused the original photograph to be taken; and that it was published by the defendant without the written consent provided by the statute. The complaint was dismissed, at the close of her evidence, on the ground that she had not brought her grievance within the scope of the statute upon which she relied. For convenience sake I will quote the pertinent sections of the statute, which read as follows:

"Sec. 50. Right of Privacy.—A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

"Sec. 51. Action for Injunction and for Damages.—Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the Supreme Court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages."

As a part of the plaintiff's proof, a copy of the defendant's publication was received in evidence. It is in the form of 16 pages, printed on pink paper. Some pages are devoted very largely to pictures of pugilists, wrestlers, athletes, and vaudeville performers, and prize dogs. Its title page describes it as "the Leading Illustrated Sporting Journal in the World." The issue is numbered "Volume CII.—No. 1849." It appears to be the same publication that hung on the sides of news booths in our boyhood days, and which seems to be, even now, an ornament of village barber shops. It carries a very considerable amount of reading matter that scarcely appeals to a refined mind, and likewise a great number of advertisements of quack nostrums and trivial things. From these circumstances, the appellant asks this court to hold from a mere inspection of the paper that it is but a mere advertising sheet sold as a matter of trade, and that therefore every one of its photographic illustrations must be deemed to be used "for advertising purposes or for the purposes of trade," within the meaning of the statute. The argument addressed to this court to sustain this proposition is largely etymological and lexicographical. The language of the statute is very general and is susceptible of a very wide meaning. Applied as the appellant would desire, it would cover nearly every issue of our newspapers, and es-

pecially our great number of monthly magazines, in which the advertising matter is as great in bulk, and oftentimes as interesting, as the letterpress. But this statute has been considered judicially many times since its original enactment in 1903, and we are admonished that its very general language must be interpreted in the light of its history and the evil at which it was aimed. *Binns v. Vitagraph Co.*, 210 N. Y. 51, 103 N. E. 1108; *Rhodes v. Sperry & Hutchinson Co.*, 193 N. Y. 223, 85 N. E. 1097, 34 L. R. A. (N. S.) 1143, 127 Am. St. Rep. 945; s. c., 120 App. Div. 467, 104 N. Y. Supp. 1102. In every reported decision in which a judgment for damages under this act was upheld, the prohibited use of the name and photograph was clearly for advertising or trade purposes. So far this statute has not been so far extended as to prohibit, under penalty of exemplary damages, a publication, in a daily, weekly, or periodical paper or magazine, of the portrait of an individual. When the statute was enacted originally in 1903, the custom of publishing in papers the portraits of individuals who were distinguished in their activities of life was very general. If the Legislature had intended to wipe out this custom, it could have said so easily in positive language. It did not so say in terms, and the courts have proceeded to give the statute full enforcement, within the meaning of its express provisions, considered in the light of its history. No attempt has been made to speak *ex cathedra* as to every possible application of this statute, because it has been deemed the better judicial policy to apply its provisions to each case as it may arise. *Binns v. Vitagraph Co.*, 210 N. Y. 51, 56, 103 N. E. 1108. We are satisfied, as was the learned trial justice, that in the case at bar no cause of action was made out under the statute invoked by the plaintiff. See *Jeffries v. N. Y. Evening Journal Pub. Co.*, 67 Misc. Rep. 570, 124 N. Y. Supp. 780. We express no opinion as to whether the printed words describing the photograph were libelous, for this action is not brought for a libel but under a particular statute.

The judgment and order should be affirmed, with costs. All concur.

JURGENSEN et al. v. DANA et al.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

1. WILLS (§ 784*)—DEVISE—ELECTION—INCHOATE DOWER RIGHT.

An inchoate dower right of one person in land devised to another is such an interest as requires her to elect to take her dower right or accept a devise of other land.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2010; Dec. Dig. § 784.*]

2. WILLS (§ 788*)—DEVISE—ELECTION—INCHOATE DOWER RIGHT.

Where testator, having an interest in described land, devised to devisees the entire fee and devised other land in joint tenancy, to other devisees, one of whom owned an undivided one-third of the described

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

land, and the other an inchoate dower interest therein, the right of election to take under the will or the interest in the described land might be exercised severally, and it was error to compel a joint or concurring election.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2012; Dec. Dig. § 788.*]

Appeal from Special Term, Suffolk County.

Petition by Kathryne Floyd Dana Jurgensen, an infant, by Edward J. Lynch, her guardian ad litem, against Richard Floyd Dana and others. From a judgment of the Special Term (81 Misc. Rep. 431, 143 N. Y. Supp. 67) dismissing the complaint on the merits as to plaintiff and requiring defendants Richard Floyd Dana and Hazel B. Dana to elect whether to accept the benefits of the will of William B. Dana, deceased, or take an interest in property described in the complaint, plaintiff and defendants Richard Floyd Dana and Hazel B. Dana appeal. Modified and affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

George R. Bristor, of New York City, for appellants.

Percy L. Housel, of Riverhead, for respondents.

THOMAS, J. [1, 2] The testator gave the land in California to the defendants appellants in joint tenancy and a legacy to each, and to Ethel Floyd Dana Shepherd and William Dana Shepherd all of the land in Suffolk county, although Richard Floyd Dana owns the fee in an undivided third of it, and his wife, Hazel, has an inchoate dower right in it. It is decided: (1) The testator intended to devise the whole title in the land in Suffolk county. (2) It is immaterial what interest the testator had in the land or what he believed concerning it, provided the will shows, as it does, a clear intention to dispose of the whole fee (*Havens v. Sackett*, 15 N. Y. 365; *Beetson v. Stoops*, 186 N. Y. 456, 79 N. E. 731, 9 Ann. Cas. 953). (3) Disproportion in values of the lands is unimportant, save as it may bear on the testator's intention (*Lee v. Tower*, 124 N. Y. 370, 375, 26 N. E. 943). (4) The inchoate dower right of Hazel B. Dana in the land in Suffolk county is a sufficient interest to constrain her to make election (*Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523; *Wallach v. Riverside Bank*, 119 App. Div. 238, 104 N. Y. Supp. 661; *Lee v. Tower*, 124 N. Y. 370, 26 N. E. 943). (5) The plaintiff's father, John Kirkland Dana, conveyed his interest in the land in Suffolk county unconstrained by any undue influence by the grantee, but induced to the act by the wish expressed to him by his adopted mother. The failure of the testator, William B. Dana, to recognize in his will a sentiment so honorable may affect a favorable estimate of his generosity, but not the validity of the conveyance. (6) The judgment provides for a joint or concurring election by Richard Floyd Dana and his wife, whereas their property interests are individual.

The joint tenancy in the land in California does not so unify the tenants as to compel them to elect in unison. They may elect severally, and have 60 days to do so after entry and service of the final

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

judgment upon their attorneys, and the judgment appealed from should be modified accordingly, and, as so modified, affirmed, without costs in this court. All concur.

(84 Misc. Rep. 104)

FARLEY v. CERTAIN LIQUORS SEIZED (SHAFAER, Claimant).

(Ulster County Court. February, 1914.)

1. INTOXICATING LIQUORS (§ 250*)—PROCEEDINGS FOR SEIZURE AND FORFEITURE—BURDEN OF PROOF.

In proceedings by the state commissioner of excise for the seizure and forfeiture of liquors under Liquor Tax Law, § 33, the burden was on plaintiff to prove that the liquors seized were kept, stored, or deposited for unlawful distribution.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 386-388; Dec. Dig. § 250.*]

2. INTOXICATING LIQUORS (§ 250*)—PROCEEDINGS FOR SEIZURE AND FORFEITURE—PURPOSE OF UNLAWFUL SALE—PROOF.

While the payment of a United States retail liquor dealers' tax, and the storing of liquors in a building not used exclusively for a dwelling, was prima facie evidence, under Liquor Tax Law (Consol. Laws, c. 34) § 33, subd. 4, that the liquors were kept for sale, and the fact that liquors were sold on the premises in question on July 4th was presumptive evidence that the liquors seized on July 7th were kept for sale on the date of the seizure, such presumptive evidence was insufficient, in proceedings for the seizure and forfeiture of liquors, to authorize a finding that the liquors were kept for unlawful sale, where the evidence as an entirety tended as well to support the claimant's contention that he was holding the liquors pending final determination by the court of his right to legally sell same, as to support plaintiff's contention that they were held for unlawful sale.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 386-388; Dec. Dig. § 250.*]

3. INTOXICATING LIQUORS (§ 255*)—PROCEEDINGS FOR SEIZURE AND FORFEITURE—JUDGMENT.

Where, in proceedings for seizure and forfeiture of liquors under Liquor Tax Law (Consol. Laws, c. 34) § 33, the evidence was insufficient to authorize a finding that the liquors seized were being kept for an unlawful sale, claimant was entitled, under Laws 1913, c. 614, amending Liquor Tax Law, § 33, to judgment for delivery to him of the liquors seized.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 394; Dec. Dig. § 255.*]

4. INTOXICATING LIQUORS (§ 254*)—PROCEEDINGS FOR SEIZURE AND FORFEITURE—Costs.

Where, in proceedings for the seizure and forfeiture of liquors under Liquor Tax Law (Consol. Laws, c. 34) § 33, claimant prevailed by reason of the insufficiency of the evidence to show that the liquors were kept for unlawful sale, he was entitled to costs.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 393; Dec. Dig. § 254.*]

Proceedings by William W. Farley, as State Commissioner of Excise, for seizure and forfeiture under Liquor Tax Law, § 33, of certain liquors at certain premises in the village of New Paltz, Ulster county, N. Y., claimed by Anthony A. Shafer. Judgment for claimant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

A. M. Sperry, of Albany (A. D. Van Buren, of Kingston, of counsel), for plaintiff.

John J. Linson, of Kingston, for certain citizens of the town of New Paltz.

Joseph H. Vanderlyn, of New Paltz (A. H. Van Buren, of Kingston, of counsel), for defendants.

JENKINS, J. Upon the verified complaint of John Everts, a peace officer, showing that there was probable cause to believe that liquors were kept at the hotel of Anthony A. Shafer, in the town of New Paltz, within the state of New York, for unlawful sale or distribution, a warrant was issued pursuant to section 33 of the Liquor Tax Law, directed to any peace officer or special agent, commanding that the premises described in said warrant be searched for the said liquors specified therein, and that such liquors be seized if found. On July 8, 1913, William Pringle, a peace officer of Ulster county, made return of his proceedings under such warrant, stating that he had taken from the claimant, Anthony A. Shafer, and from the premises described in said warrant, the liquors and vessels enumerated in said return. The claimant, Anthony A. Shafer, thereafter interposed an answer to the complaint, and the issues framed by the interposition of such answer were tried, by consent, by the court without a jury.

[1] The plaintiff to succeed must establish that the liquors seized were kept, stored, or deposited for the purpose of unlawful sale or distribution. The testimony fails to establish such purpose. The place where said liquors were seized was a hotel at the time of their seizure; payment for a retail liquor dealer's special United States internal revenue tax for the place, and covering the period within which the liquors were seized, had been made; the said liquors were kept in a building not used exclusively for a dwelling, and on July 4, 1913, three days before the granting and execution of the warrant, liquors were sold at the place searched.

[2] The payment of a United States retail liquor dealer's tax for a place where the trafficking of liquors is unlawful by the laws of this state is prima facie evidence that liquors kept, stored, or deposited in such place are so kept, stored, or deposited for unlawful sale. Likewise, keeping, storing, or depositing liquors in a building, not used exclusively for a dwelling, where the business of trafficking in liquors is unlawful under the laws of this state, is prima facie evidence that such liquors are kept, stored, or deposited for a like sale. Liquor Tax Law (Consol. Laws, c. 34) § 33, subd. 4.

The fact that liquors were sold at the premises on July 4, 1913, is presumptive evidence that the liquors seized at the premises on July 7, 1913, were kept for sale on the date of seizure. *Matter of Geschwinde*, 68 Misc. Rep. 97, 124 N. Y. Supp. 939.

Applying these presumptions of law to the facts of this case, the conclusion is that the liquors found on Shafer's premises on July 7, 1913, were kept there for the purpose of sale.

That the liquors found on the claimant's premises were kept there by him for the purpose of sale in the future is not denied. But he emphatically contends that he did not keep such liquors for the purpose of

unlawful sale. He claims that he was holding the liquors pending a final determination, by the courts, of his right to legally sell them in the town of New Paltz, and calls attention to the decision of the courts upon the question of his right to make such sale, to the acts of public officers in accordance with such decision, and to his own conduct in relation to keeping and storing his liquors.

On November 7, 1911, the electors of the town of New Paltz voted on four local option questions. The return of the inspectors of election rejected as void a number of ballots and the election was declared a tie on the question with reference to the sale of liquors by hotel keepers. Such a result meant a decision against issuing a liquor tax certificate for the sale of liquors by hotel keepers for two years from October 12, 1912. Afterward, upon the application of Warren C. Tamney, a writ of mandamus issued out of the Supreme Court, directing the inspectors of election to count certain of the ballots which they returned as void. Such ballots were counted, and the result of such count was a majority of two in favor of licensing hotel keepers. An appeal was taken from the order granting the writ of mandamus to the Third Appellate Division of the Supreme Court, and said order was unanimously affirmed. *Matter of Tamney v. Atkins*, 151 App. Div. 309, 136 N. Y. Supp. 865. An appeal was then taken to the Court of Appeals, and that court decided on June 20, 1913, to reverse the Supreme Court on the ground that the statute invoked for the application for the writ did not permit such writ to be ordered upon the application of said Tamney. *Tamney v. Atkins*, 209 N. Y. 202, 102 N. E. 567.

Prior to October 1, 1912, a duly certified statement, issued pursuant to the recount ordered by the Supreme Court, was filed with the county treasurer of the county of Ulster; this statement showed that the electors of the town of New Paltz had voted by a majority of two to allow the business of trafficking in liquors to be carried on by hotel keepers. Accordingly, upon application duly made, the county treasurer of the county of Ulster, on October 1, 1912, issued to the claimant, Anthony A. Shafer, a liquor tax certificate. This certificate was in the form prescribed by law, and the payment required therefor was duly made by the claimant, Shafer, to the county treasurer of Ulster county. It was issued after the Appellate Division of the Supreme Court had unanimously declared that the electors of the town of New Paltz had voted in the affirmative on the proposition of licensing hotel keepers to sell liquors. The claimant carried on the business of trafficking in liquors under said liquor tax certificate until he became apprised of the decision of the Court of Appeals, above referred to. He points out that on or about July 5, 1913, he caused liquors kept in the bar or salesroom of his hotel to be removed to the storerooms thereof, and that he caused such removal for the purpose of storing and holding his liquors until a final determination of the courts as to his right to sell them in the town of New Paltz. The interpretation sought by him to be given his acts and conduct should be adopted by the court. If his purpose is susceptible of two interpretations, one lawful and one unlawful, he is entitled, under the circumstances of this case, to the benefit of the presumption of lawful purpose.

During the pendency of these proceedings the Supreme Court has expressed an opinion, at least, of the legality of the certificate issued October 1, 1912, in an action in which the plaintiff, Farley, is one of the defendants and the claimant here, is plaintiff. It adjudged as follows:

"That the liquor tax certificate issued to the plaintiff on October 1, 1912, as stated in the eighth finding of fact was lawfully issued, was a legal and valid certificate, the same was never canceled or revoked, and plaintiff had the right to traffic in liquors under and by virtue of the same during the term for which it was issued." Supreme Court decision and judgment filed in Ulster county clerk's office December 31, 1913.

The rights given the plaintiff were what he was contending for, and he claims they explain his purpose of keeping the liquors seized. Under the law as thus laid down, and under the facts of this case, it cannot be found that the keeping of the liquors seized was for an unlawful sale. It follows that the claimant is entitled to judgment.

[3] The statute requires the peace officer or agent executing the warrant to safely keep the liquors and vessels seized until final action on the warrant. He is required to give a receipt for the articles seized. In case the liquors seized are declared forfeited, the statute provides that the final judgment must order that they be delivered to the state commissioner of excise by the officer who made the seizure; and, in case judgment is in favor of the claimant of the liquors, it provides that they be delivered to him. Laws of 1913, c. 614, amending Liquor Tax Law, § 33.

[4] The claimant is entitled to costs. *Farley v. Sixteen Bottles of Champagne*, 153 App. Div. 502, 138 N. Y. Supp. 276.

Judgment for claimant.

In re WEEKES.

(Surrogate's Court, New York County. April 8, 1914.)

1. EVIDENCE (§ 37*)—FOREIGN LAWS—PROOF.

Whenever a foreign law is in issue, it is to be proved as any other fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 52; Dec. Dig. § 37.*]

2. CHARITIES (§ 50*)—DEVISES—PERSONS ENTITLED TO TAKE.

In a proceeding involving the validity of a bequest, evidence held to show the capacity of a foreign unincorporated association to take a bequest for a public or charitable use.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 96-99; Dec. Dig. § 50.*]

3. CHARITIES (§ 2*)—CHARITABLE USES—WHAT LAW GOVERNS.

The validity of bequests to foreign voluntary associations for public or charitable uses depends upon the law of the domicile of the legatee, and not the law of the domicile of the testator.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 2; Dec. Dig. § 2.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of the judicial settlement of the accounts of John A. Weekes, as executor of the last will, etc., of Augusta De Peyster, deceased. A bequest held valid.

See, also, 156 App. Div. 938, 141 N. Y. Supp. 1116.

Arthur Sutherland, of New York City, for executor and another. Samuel Keeler, of New York City, for Fire Department of Ridgefield, Conn.

FWLER, S. The only question submitted to the surrogate in this matter concerns the validity of the late Miss De Peyster's testamentary bequest of \$5,000 to the Fire Department of Ridgefield, state of Connecticut, a voluntary and unincorporated association. The solution of this question depends on the law of the state of Connecticut.

[1,2] Whenever foreign law is at issue, it is a matter of fact which may be proved to the court as any similar fact is established in a court of justice. Two duly qualified experts, skilled in the law of Connecticut, were accordingly called as witnesses and duly sworn. Both were qualified lawyers of the Connecticut Bar, and one had been a probate judge in Connecticut; the other was the present Attorney General of the state. These gentlemen testified, under oath, and quite in accord, that by the law of Connecticut an unincorporated association could take by bequest if the use was public or charitable. They, however, conceded that the capacity of such associations so to take by devise was less clearly stated in the law of Connecticut, but in their opinions such associations could also take by devise if the use was public or charitable. I can well understand that unincorporated associations may in Connecticut take even by devise, for it was once so at common law. Coke says distinctly that *probi homines* of Dale were in ancient times capable of taking lands by purchase, which, of course, included devise. Coke on Litt. 3a. But at a later time they could not so take, for the law had changed. *Reformed Church v. Schoolcraft*, 65 N. Y. 134, 155; Co. on Litt. 3a; 10 Rep. 26b; Shep. Touch. 237. But even after such change, if a use was charitable or public the Roman Christian law prevailed in England by way of exception, and under the general doctrines relating to charities which had been taken over by the Ecclesiastical Chancellors. But be this as it may the oral evidence of the experts from Connecticut was not contradicted, and it seems to me to dispose of this matter as it establishes the fact in this forum that such is the law of Connecticut. Both witnesses testified in substance that the bequest of Miss De Peyster was a charitable or public use, and that both by the statute of uses in force in Connecticut, and by the common law in force in such state, such bequest was good by the law of Connecticut, as the voluntary association had capacity to take in Connecticut.

It is not difficult for us to understand that such is the law of Connecticut, for the law of New York was once so. *Hornbeck's Ex'r v. Am. Bible Soc.*, 2 Sandf. Ch. 133; *Banks v. Phelan*, 4 Barb. 80. It was not until after the enactment of the Revised Statutes of 1830 and after the courts had held that the Revised Statutes abolished charitable or public uses that bequests to unincorporated associations of this state

for a public use were declared invalid in our law. *Owens v. Missionary Soc. of M. E. Church*, 14 N. Y. at page 385, 67 Am. Dec. 160; *Bascom v. Albertson*, 34 N. Y. 584; *Carpenter v. Historical Soc'y*, 2 Dem. Sur. 574.

[3] But bequests to foreign voluntary associations for a public or charitable use have, even since our Revised Statutes, stood on a different foot from bequests to domestic associations. The capacity, power, or right of such foreign associations to take depends on the law of their domicile, *lex domicilii*, and not on the law of this state. *Matter of Bullock*, 6 Dem. Sur. 335; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Kurzman v. Lowy*, 23 Misc. Rep. 380, 383, 52 N. Y. Supp. 83; *Matter of Huss*, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 620; *Hope v. Brewer*, 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458; *Robb v. Washington & Jefferson College*, 185 N. Y. 485, 496, 78 N. E. 359. *Matter of Miller*, 149 App. Div. 113, 133 N. Y. Supp. 828, is not to the contrary; the adjudication turned on an entirely different proposition.

The bequest in this instance is for a public use, which is a species of charitable use. After the Statute of Charitable Uses (43 Eliz. c. 4), gifts or bequests for the advancement of objects of general public utility were held to be charitable uses within the meaning of that statute. Before that statute they were certainly such. *Ayres v. Meth. Church*, 5 N. Y. Super. Ct. at page 376; *Sherwood v. Am. Bible Soc.*, 40* N. Y. 561; *Owens v. Meth. Epis. Church*, 14 N. Y. at page 389, 67 Am. Dec. 160; *Jones v. Williams, Ambler*, 651; *Atty. Gen. v. Craig*, 2 My. & C. at p. 623; *Shelford on Mortmain*, 61.

While as an original question I might have had some doubt in this matter, the right, power, and capacity of the Fire Department of Ridgefield, Conn., to take this bequest, has been amply established by evidence and as matter of fact, and no evidence has been offered to the contrary.

I accordingly find that the bequest of the late Miss De Peyster to the Fire Department of Ridgefield, Conn., is a valid bequest, as such association has, by the law of the state of Connecticut, capacity to take such bequest. Settle decree accordingly.

ROSENBERG v. GOLDSTEIN.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

1. TRIAL (§ 252*)—INSTRUCTIONS—CONFUSING INSTRUCTIONS.

In an action for injuries claimed to be due to the negligence of the driver of a wagon, an instruction that defendant was not responsible for his driver's error of judgment or miscalculation tended merely to confuse the jury, where there was no evidence or claim that any error of judgment or miscalculation was made, nor any fact from which either could be inferred.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

2. TRIAL (§ 234*)—INSTRUCTIONS—FAILURE TO PRODUCE—PRESUMPTIONS.

In an action for injuries alleged to have been due to the negligence of the driver of a wagon, an instruction that the jury might consider plaintiff's failure to call as a witness a butcher whose shop he claimed to have been visiting just before the accident, and his failure to produce his books, was erroneous; there being no intimation that the butcher witnessed the accident, and the books being incompetent from any point of view.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.*]

Seabury, J., dissenting.

Appeal from City Court of New York, Trial Term.

Action by Herman Rosenberg, an infant, by Ike Rosenberg, his guardian ad litem, against Morris Goldstein. From a judgment on a verdict for defendant, plaintiff appeals. Reversed, and new trial granted.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Leon Dashew, of New York City (J. Brownson Ker, of New York City, of counsel), for appellant.

William A. Jones, of New York City (Alden S. Crane, of New York City, of counsel), for respondent.

BIJUR, J. The appellant relies exclusively upon alleged errors in the judge's charge to the jury.

This was a comparatively simple accident case where a child about 11 years of age was alleged to have been injured by the negligence of defendant's servant while driving defendant's wagon south on Suffolk street between Broome and Grand streets.

[1] The learned judge below delivered an extensive charge in the course of which reference was made to many matters quite immaterial to the issues. Thus, for example, the learned judge charged that the defendant was not responsible for the driver's "mere error of judgment or miscalculation." As there was no indication in the evidence, and no claim made by either side, that any error of judgment or miscalculation had been made, nor any fact from which that could be inferred, that charge tended merely to confuse the jury.

[2] The learned judge also charged that the jury might take into consideration the failure to produce on the witness stand a butcher,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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whose shop plaintiff had claimed to have been visiting just before the accident, and also failure to produce his books, as having some effect on the plaintiff's or the defendant's case. There is not the slightest intimation in the record that the butcher witnessed the accident, and his books, of course, would be quite incompetent as evidence from any point of view. While the learned court did not intimate which side might, in the minds of the jury, be prejudiced by the absence of this alleged testimony, it did permit the jury to speculate on the subject, although it was one entirely outside of their consideration, and not connected with the issues in the case.

These and other errors are adequately presented by a number of exceptions taken by plaintiff's counsel.

It seems evident to us that the issues were not properly submitted to the jury, and the judgment must be reversed and a new trial granted, with costs to appellant to abide the event.

LEHMAN, J., concurs.

SEABURY, J. I dissent. While the charge of the learned court was not wholly free from error, the erroneous statement related to matters immaterial to the issue; and, in my judgment, was not of so grave a character as to justify a reversal of the judgment.

WIEN v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

1. CARRIERS (§ 181½*)—FREIGHT—ACTION FOR NONDELIVERY—DEFENSES.

The fact that the shipper, upon learning that the goods had not been delivered long after they were shipped, and after directing the initial carrier to have them returned at once, took the matter up with the delivering carrier on the suggestion of the initial carrier, would not relieve the initial carrier from liability for nondelivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 829; Dec. Dig. § 181½.*]

2. CARRIERS (§ 181½*)—FREIGHT—ACTION FOR NONDELIVERY—DEFENSES.

Even if the shipper should have accepted the consignee's offer to take the goods at two-thirds of their value, where they had not been delivered after long delay, instead of having them returned to the shipper, when they were sold for one-half their value, failure to do so would not warrant the dismissal of the complaint in an action against the initial carrier for damages for nondelivery, but would at most go to reduce the amount of recovery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 829; Dec. Dig. § 181½.*]

3. DAMAGES (§ 62*)—FREIGHT—ACTIONS FOR NONDELIVERY—DUTY TO REDUCE DAMAGES.

The shipper was not bound to accept the consignee's offer to take the goods at two-thirds of their value, when they were not delivered after long delay, instead of having them returned, though they were sold on return for only one-half of their value; the shipper not being bound to adopt at his own risk one of two possible means for reducing the damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-131; Dec. Dig. § 62.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Joseph Wien against the New York Central & Hudson River Railroad Company. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial granted.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

A. M. Becker, of New York City (Joseph Levy, of New York City, of counsel), for appellant.

Alexander S. Lyman, of New York City (William Mann, of New York City, of counsel), for respondent.

BIJUR, J. The testimony shows that plaintiff made a shipment of goods by defendant as initial carrier from New York to Kansas City about January, 1912. At the end of April plaintiff learned for the first time that the goods had not been delivered to the consignee. He complained to defendant's agent, and, on inquiry being made, was informed by the connecting carrier, the Atchison, Topeka & Santa Fé R. R. Co., that the goods had been delivered. About a month later the Santa Fé road corrected its prior advices and admitted that the goods had not been delivered and were still in its possession. Plaintiff directed defendant to have them returned at once, but, on the suggestion of defendant's agent, took the matter up direct with the New York representative of the Santa Fé road. Various negotiations and delays ensued with the result that the goods were not returned until July, when they were sold here at half their original value.

[1] The learned court below dismissed the complaint on the theory that by plaintiff's dealing with the Santa Fé road, after being referred to it by defendant, he had relieved the defendant from legal liability as initial carrier. In this conclusion I cannot agree. The negligence from which plaintiff suffered was negligence of the Santa Fé road acting as connecting carrier of the shipment delivered by plaintiff to defendant. The mere fact that plaintiff, at the suggestion of the defendant, for their mutual convenience, transacted part of the business of salvage through the connecting carrier does not relieve the defendant on any principle of law with which I am familiar, nor is any cited in support thereof.

[2, 3] An incidental claim by the defendant that plaintiff at all events should have accepted the offer of the consignee to take the goods at two-thirds of their value rather than have them returned here where they were sold for one-half of their value certainly does not warrant the dismissal of the complaint. At most it might be applied in reduction of the recovery; but even in this connection defendant fails to appeal to any authority, nor do I know of any which charges the plaintiff at his risk with adopting one of two possible means for reducing the damage.

Judgment reversed and a new trial granted, with costs to appellant to abide the event. All concur.

WEINBERG v. STEEL.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

PRINCIPAL AND AGENT (§ 23*)—EXISTENCE OF AGENCY—WEIGHT OF EVIDENCE.

In an action by a person not a broker by occupation to recover commissions for procuring a tenant, in which defendant denied that plaintiff was employed to procure a tenant, a verdict for plaintiff *held* contrary to the weight of the evidence.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.*]

Seabury, J., dissenting.

Appeal from City Court of New York, Trial Term.

Action by Philip Weinberg against Samuel W. Steel. From a judgment for plaintiff, and an order denying a motion to set aside the verdict, and for a new trial, defendant appeals. Reversed, and new trial ordered.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

House, Grossman & Vorhaus, of New York City (Herman Joseph, of New York City, of counsel), for appellant.

Levy & Unger, of New York City (Henry W. Unger, of New York City, of counsel), for respondent.

BIJUR, J. Practically the only question raised on this appeal is whether or not the verdict is against the weight of evidence. At the time the action was brought, the plaintiff was engaged in the millinery business, and the defendant was engaged in the millinery and ladies' and children's outfitting business, both in the same neighborhood. Plaintiff's brother was in charge of the defendant's millinery department, and the plaintiff had a half interest in his brother's connection with the defendant. At that time the defendant was a one-third owner of No. 46 West Fourteenth street which had suddenly become vacant owing to the bankruptcy of the tenants. The relations between the plaintiff and the defendant were friendly business relations.

In this situation plaintiff testifies that the defendant had sent him an urgent message and agreed to pay him a commission if he could effect a lease of No. 46 West Fourteenth street for over \$18,000. The defendant, at that time, had a five days' option on the entire premises from the co-owners of the premises. Five days later the premises were leased to Morrison Bros., and there is no doubt but that plaintiff was the procuring cause of this lease. The defendant, on the other hand, testified that, after having obtained an option on the premises from his co-owners, he sent for the plaintiff and took up the question of their forming a partnership and leasing the premises. The plaintiff stated that he did not desire to do this, as he wanted to consider some larger place for such a partnership venture, but said that he had some friends who might be interested and that it would be a great favor to him if the defendant would rent the premises to these friends.

On plaintiff's cross-examination, after he had denied that he ever

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

had any serious intention of entering into a partnership with the defendant, it was brought out that lengthy partnership papers were prepared, and had been examined and annotated by him, and that he had actually gone so far as to put in a bid on a building for the partnership and be accepted as a tenant—from which he subsequently “backed out.” It was further developed that, on the opening of the next millinery season after the signing of the lease of the premises in suit by Morrison Bros., he took a department in their store. Plaintiff’s explanation of this disclosure was merely that he continued to talk to the defendant about a partnership in order to remain on amicable terms with him until he had collected his commissions in the present case.

It seems to me inherently improbable that one millinery merchant should send for another and ask him to procure a tenant of real estate. Had plaintiff been a broker, the situation would be different. Moreover, plaintiff’s interest in acting as the procuring cause is explained by the fact that he ultimately obtained a department in the tenants’ (Morrison Brothers’) establishment. The business relationships and the continued negotiations between the plaintiff and the defendant are not such that the relationship of principal and broker would nominally be predicated upon them, and, in face of plaintiff’s admitted inaccuracies and self-contradictions on this vital subject, I feel that the verdict must be set aside as against the weight of the evidence.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

LEHMAN, J., concurs. SEABURY, J., dissents.

KUHMARKER MFG. CO. v. HILLS.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

1. SALES (§ 21*)—AGREEMENTS BETWEEN SELLER AND BUYER—CONSIDERATION.
If a contract of sale was valid, an agreement by the buyer’s agent to pay a higher price than that agreed upon was without consideration.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 33-38; Dec. Dig. § 21.*]

2. APPEAL AND ERROR (§ 1177*)—REVERSAL—NECESSITY OF NEW TRIAL.

Where the record on appeal contains no comprehensible calculation from which the exact error in the amount of the judgment could be computed, a new trial will be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. § 1177.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Kuhmarker Manufacturing Company against William Hills, Jr. From a judgment for plaintiff, after a trial without a jury, defendant appeals. Reversed, and new trial granted.

Argued March term, 1914, before SEABURY, LEHMAN, and BIRK, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’r Indexes

Paul M. Crandall, of New York City, for appellant.
Mark Goldberg, of New York City, for respondent.

BIJUR, J. This action was brought to recover for the balance of the purchase price under a written agreement for wax paper furnished by plaintiff to defendant. The only questions disputed were: (1) Whether defendant had agreed with plaintiff, about a month before the end of the term covered by the agreement, that plaintiff might advance the price six-tenths of a cent per pound. (2) Whether plaintiff was entitled to charge for the paper as per net or gross weight, it being shown by defendant that the paper came inclosed in exceptionally heavy packages.

[1] It is difficult to understand on what theory of law or fact the case was tried or decided. No point seems to have been made as to the mutuality of, and consequent validity of, the written agreement. No objection was taken to the admission of the oral evidence of plaintiff which varied it; but, of course, if the agreement was valid, then the offer of defendant's agent (if his agent was authorized to make such offer) to pay an advance price, was without consideration.

[2] Defendant's testimony that the weights were to be net, and not gross, was not objected to by plaintiff, nor contradicted. Moreover, the terms of the contract would seem to so indicate. The record contains no comprehensible calculation from which the exact error in the amount of the judgment rendered can be computed.

Consequently the judgment must be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

BAY RIDGE REFORMED (DUTCH) CHURCH v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

WATERS AND WATER COURSES (§ 203*)—WATERWORKS—WATER RENT.

Where a church used public water for the operation of its pipe organ at the time of the enactment of Laws 1907, c. 135, §§ 1, 2, providing that property owned by any religious corporation and actually used as a place of worship shall be exempt from payment for water taken from the city of New York, and that water shall be supplied in sufficient quantities for all purposes for which it was then used, the city cannot collect for the water used in the operation of the pipe organ.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.*]

Submission of a controversy between the Bay Ridge Reformed (Dutch) Church and the City of New York, under Code Civ. Proc. § 1280. Judgment for plaintiff.

Argued before JENKS, P. J., and BURR, CARR, RICH, and STAPLETON, JJ.

Wilson E. Tipple, of New York City, for plaintiff.

William R. Wilson, of New York City (Curtis A. Peters, of New York City, on the brief), for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RICH, J. In 1887 a statute was enacted and became operative, having for its purpose the exemption of certain institutions in New York City from taxation or charge for water furnished such institutions by said city. From time to time thereafter this statute was amended and its scope extended to other institutions. In 1907 religious corporations were included, and as to them the statute thereafter provided:

"The real estate owned by any religious corporation located in the city of New York as now constituted, actually dedicated and used by such corporation exclusively as a place of public worship, are hereby exempted from the payment of any sum of money whatever to said city, for the use of water taken by same from said city, and water shall be supplied to the same by said city, in sufficient quantity for all purposes for which it is now used by said corporations, * * * or which may be necessary to be used by the same, free of all charge whatsoever, and * * * the real estate owned by any religious corporation located in the city of New York, as now constituted, actually dedicated and used by such corporation exclusively as a place of public worship, is hereby released, discharged and exempted from all lien and charge for water heretofore used or which may hereafter be used by any such * * * corporation. * * * The real estate owned by any religious corporation located in the city of New York, as now constituted, actually dedicated and used by such corporation exclusively as a place of public worship, shall be and hereby is declared discharged and exempt from all assessment laid or made for use of water and sales thereunder, and from all such assessments hereafter, so long as the same shall be owned * * * by any such corporation, * * * and used for the purposes herein mentioned." Sections 1 and 2, c. 135, Laws 1907.

The plaintiff is a religious corporation, incorporated June 2, 1896, occupying a church edifice dedicated and in actual use as a place of public worship, exclusively, and it was so used when the statute was enacted, and has been so used continuously since. At the time of the enactment of this statute, a church organ, operated by water, was used in the church edifice, exclusively in the public religious services and in public worship as part of such service, and it has been so used since that time. For many years prior to 1907, the defendant, the city, through its department of water supply, gas, and electricity, furnished to the plaintiff water for use in said church building for all purposes, including the operation of the organ, such water being delivered through two meters, one of which registered the water used for the operation of the organ, and the other that used for other purposes, so that at the time the statute went into effect the church organ was in use, and the water furnished by the city was being used in part for its operation.

The records of defendant's water department contain charges against the plaintiff for the water, which are apparently valid upon their face and constitute an apparent lien upon the plaintiff's real property, its church edifice, and constitute a cloud upon its title.

Upon the facts stated, the parties submit the single question whether the statute exempts the plaintiff from the payment of a water tax for water used in its church building, for the operation of its organ. It must be answered in the affirmative. Water was being furnished by the defendant to the plaintiff in its church building for all of its uses, including that used to operate its organ, when the statute be-

came operative. The statute in express terms obligates the defendant city to furnish water in sufficient quantity for "all purposes for which it is now used * * * free of all charge whatsoever," and exempts plaintiff, and its church property, from any charge or tax for water thereafter furnished and used for such purposes. The legislative intent, which is the guide to statutory construction, is plainly expressed by the language used (which is to be given its usual meaning), and requires the defendant city to furnish water "in sufficient quantity for all purposes for which it is now used" to all institutions and corporations entitled to the benefits of the statute "free of all charge whatsoever." The purpose for which water was being used at the time the statute was enacted does not affect the right to the exemption or determine whether an institution or corporation is entitled to it; it is sufficient that it was being used at the time, though I believe it was used as a part of the public worship. The exemption from payment applied to water then being used for "all" purposes, including the operation of plaintiff's church organ.

It follows that the judgment must be directed for the plaintiff, releasing, discharging, and exempting it from all liens and charges for water heretofore used or which may hereafter be used for the operation of its organ in its church edifice, and for the cancellation and discharge of the liens upon its real property, in accordance with the terms of the submission, without costs. All concur.

HANATSEK v. WILSON et al.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

1. MASTER AND SERVANT (§ 301*)—INJURIES TO THIRD PERSON—LIABILITY.

In determining whether one who was using a vehicle, hired from a truckman, for delivering goods, was liable for the negligence of the driver, the controlling question is whether the contract between the truckman and the hirer of the vehicle placed the driver under the hirer's exclusive control as to the general management of the team so as to make him the hirer's servant for the time being.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210-1216; Dec. Dig. § 301.*]

2. MASTER AND SERVANT (§ 301*)—INJURIES TO THIRD PERSON—LIABILITY.

Plaintiff was injured by the negligence of the driver of a vehicle, hired from a truckman, to deliver goods for defendant. The truckman was engaged in the trucking business generally, and had a contract with defendant by which defendant was entitled to a preference in the use of four small wagons, defendant's name being upon brass plates screwed upon the wagons, and, at the time of the accident, defendant's goods were in the wagon and his servant sat on the seat with the driver. The driver did not deliver the goods, but merely drove where defendant's servant directed, and was employed and paid by the truckman to whom he reported each morning and received directions to go to defendant's place of business or elsewhere. The truckman could send his wagons out to others, and often defendant was not able to obtain a wagon from him and, when

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

he did, did not select its driver. *Held*, that the driver was not defendant's employé so as to make defendant liable for plaintiff's injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210-1216; Dec. Dig. § 301.*]

3. MASTER AND SERVANT (§ 330*)—EXISTENCE OF RELATION.

The fact that defendant's name plate was on a wagon hired by defendant from a truckman for the delivery of defendant's goods was, at most, only prima facie evidence that the driver of the wagon was defendant's employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.*]

Appeal from Trial Term, Queens County.

Action by Paul Hanatsek, as administrator of Rudolph Hanatsek, deceased, against Peter K. Wilson and others. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and CARR, RICH, STAPLETON, and PUTNAM, JJ.

Henry S. Mansfield, of New York City, for appellant.

John Ewen, of New York City, for respondents.

JENKS, P. J. The action is for the negligent driving of a horse and wagon whereby the plaintiff's intestate was killed when standing at gaze in a city street. The action was begun against Tormey & Co., truckmen, and P. K. Wilson & Son, merchants. But Tormey & Co. adjusted the claim, and the case was continued against P. K. Wilson & Son alone. The plaintiff was nonsuited at Trial Term, and appeals. The question presented is whether the driver at the time of the accident was the servant of the truckmen or of the merchants. As the nonsuit was ordered at the close of the plaintiff's case, the question is not presented by any proof adduced by the defendants.

There are many cases in the books. But, as each case shows peculiar facts, those decisions are of value only so far as they state the principles and apply them to similar facts; and yet facts that have been regarded as controlling in one case may appear as minor in another case, in that they are weakened, limited, explained, or overborne by other facts.

[1] I think that the essential preliminary question in such a case is whether the contract between the general employer of the driver and the hirer of the vehicle placed the driver under the exclusive direction and control of the latter as to the general management of the team, and thus for the time being the driver was the servant of the hirer. *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883, and authorities cited; *Labatt on Master & Servant* (2d Ed.) vol. 1, 177; *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54; *Oulighan v. Butler*, 189 Mass. 287, 75 N. E. 726.

[2] The truckmen were engaged in that business generally. Four small wagons were used to carry the defendants' goods, under a contract that gave a preference to the defendants in such use, and in consideration the defendants paid \$440 a month to the truckmen.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The name of the defendants was placed upon brass plates screwed upon these wagons. At the time of the accident there were packages of the defendants' goods in the wagon, and a servant of the defendants sat on the seat with the driver. The stand of the truckmen had been in front of the premises occupied, upon the ground floor and basement, by the defendants, but was removed, and thereafter the wagons sometimes stood around the street in front of the premises during the daytime, when they were not "down the road." The truckmen kept their wagon and trucks in a stable.

[3] The circumstance of the name plate, at most, was but evidence *prima facie* against the defendants. *Kellogg v. Church Charity Foundation*, supra, 203 N. Y. 196 and 199, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883; *Smith v. Bailey*, 2 Q. B. C. A. 403; *Caston v. Consolidated Plate Glass Co.*, 26 Ont. App. Rep. 63. It appears that the truckmen had seven "clients" other than the defendants, and used the said four wagons for the business of such clients, without requiring special permission from the defendants. The plaintiff sought, but failed, to establish that at the time of the accident the load on the wagon was made up exclusively of the goods of the defendants. When the defendants sought delivery for their goods, one of their servants took the packages to the truckmen, who told that servant in which one of the wagons they must be placed, and the servant then went out with that wagon and returned with the receipts for the deliveries made by him. This servant when on the wagon had personal charge of the goods, personally and exclusively made the deliveries, and from time to time directed the driver to the various places for delivery. The driver took no part in the deliveries, was not even furnished with a list of places, and he did nothing more than drive according to the said directions. The truckmen were the owners of the horses and wagons and harness, and they hired this driver and paid his monthly wages. The driver was accustomed to report to the truckmen each morning, and the truckmen gave directions to him, to go to the defendants' place, or, as I understand it, elsewhere. None save the truckmen or their employes ever gave any directions to the driver save those described as to the driving from place to place when in carriage of the defendants' goods. The defendants had nothing to do with the driver—nothing to do with his selection. The truckmen were free to send out their wagons as they chose, and on many occasions the defendants could not get any wagon from them. This course of business had existed for 13 years. If the defendants had been at any time dissatisfied with the driver, their course was to complain to the truckmen, who would investigate with the view that the driver was satisfactory both to the truckmen and to the defendants.

It seems to me that the probative force of such circumstances as to the stand and the deliveries is much less than the somewhat similar circumstances detailed in *Moore v. Stainton*, 80 App. Div. 296, 80 N. Y. Supp. 244, affirmed on opinion below 177 N. Y. 581, 69 N. E. 1127, and that the testimony as to the name upon the wagon is not a material circumstance in this case. There was no control in the defend-

ants over the driver in the management of his team, save the right to direct the driver where to go and when to stop for the delivery, and this was not sufficient to make the driver the servant of the defendants. *Kellogg v. Church Charity Foundation*, supra, 203 N. Y. at page 197, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883; *Little v. Hackett*, 116 U. S. 366-380, 6 Sup. Ct. 391, 29 L. Ed. 652; *Moore v. Stainton*, supra; *Quinn v. Complete Electric Const. Co.* (C. C.) 46 Fed. 506; *Joslin v. Grand Rapids Co.*, supra.

I think that his proof, all adduced by the plaintiff, did not present as an issue for the jury the question whether the driver was the servant of the defendants. *Authorities*, supra; *Vasligato v. Yellow Pine Co.*, 158 App. Div. 551, 143 N. Y. Supp. 817; *Weaver v. Jackson*, 153 App. Div. 661, 138 N. Y. Supp. 609.

The judgment should be affirmed, with costs. All concur.

DEITCH v. DEITCH.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

LIMITATION OF ACTIONS (§ 100*)—ANNULMENT—LIMITATIONS.

Under Code Civ. Proc. § 1743, subd. 4, authorizing an action to annul a marriage on the ground that the consent of one of the parties was obtained by fraud, and subdivision 5, authorizing such action for physical incapacity to enter into the marriage state, and section 1752, providing that an action on the ground of incapacity may be brought by the injured party or by the incapacitated party if he did not know of the incapacity, or that it was incurable prior to the marriage, and that an action on such ground must be commenced within five years after the marriage, in an action on the ground of incapacity, there can be no occasion to invoke subdivision 4, and plaintiff cannot, by alleging fraudulent representations by defendant as to his capacity, bring the case within section 382, subd. 5, authorizing actions, other than for damages, on the ground of fraud, to be brought within six years after the discovery of the fraud.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

Appeal from Special Term, Kings County.

Action by Ida Deitch against Philip Deitch. From an interlocutory judgment overruling plaintiff's demurrer to an affirmative defense, she appeals. Affirmed.

See, also, 146 N. Y. Supp. 782.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

Abraham P. Wilkes, of New York City, for appellant.

Simon Berg, of Brooklyn, for respondent.

PER CURIAM. The demurrer to the allegation in the answer that the action is barred by the statute of limitations (Code of Civil Procedure, § 1752) has been overruled. Hence the appeal. The demurrer is to such plea only as it affects the second cause of action, which is that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the defendant induced the plaintiff to enter into "said marriage" in 1903 by false and fraudulent representations, upon which she relied, that he was normal and physically capable of entering into and consummating the marriage, whereas he was impotent because he had "simply rudimentary signs" of the "genital organ" and that she did not discover the falsity of the representations until the year 1912. So the discovery of the fraud was some 10 years after the marriage, while the statute allows but 5 years to discover the incapacity and to act upon it. The plaintiff urges that she may bring the action within 6 years of the discovery of the facts constituting the fraud, by virtue of section 382, subd. 5, Code of Civil Procedure. *Montgomery v. Montgomery*, 3 Barb. Ch. 132. The facts constituting the fraud are the representations and their falsity. The fact showing falsity is the existence of the rudimentary genital organ causing impotence. The plaintiff pleads that she did not discover the falsity of the representation until 1912, that is, that not until then did she know of the rudimentary status and the impotence of it. There are, maybe, hypotheses of facts excusing knowledge that must prevail in case of demurrer, although they touch the very limits of credulity. *Kaiser v. Kaiser*, 16 Hun, 602. But decision does not depend upon that consideration. The learned trial justice has decided in effect that, where the physical incapacity is the basis of annulment, the five-year period applies, whether the marriage was or was not induced by fraudulent representation, and irrespective of the time when the plaintiff discovered it. The Code of Civil Procedure, § 1743, enables the action to be brought under conditions defined in five several subdivisions. The fourth is that the "consent of one of the parties was obtained by force, duress or fraud." The fifth is "that one of the parties was physically incapable of entering into the marriage state." In that case, the action can be maintained "under this subdivision" only where the incapacity continues and is incurable. Then, after sections severally related to the subdivisions of section 1743, it is provided by section 1752 that an action to annul a marriage on the ground that one of the parties was physically incapable of entering into the marriage state "must be commenced before five years have expired since the marriage." So the question is, if a party fraudulently represent that he has a genital organ, and in fact has none, save in a mere rudimentary form, can an action for fraud be brought under subdivision 4 of section 1742 within six years of the discovery of the fraud, as section 382 of the Code provides, or must the action rest entirely on the physical incapacity and be brought under subdivision 5 of section 1743 within five years, as provided by section 1752? Subdivision 5 states that an action can be maintained "under this subdivision" only when it continues and is incurable. There is here, perhaps, a suggestion that the action may be brought under subdivision 4. But section 1752 gives the action even to the incapable party, if he "was unaware of the incapacity at the time of marriage, or, if aware of such incapacity, did not know it was incurable." If he did know and did not state, he was guilty of a fraud. *Svenson v. Svenson*, 178 N. Y. 54, 70 N. E. 120; *Wendel v. Wendel*, 22 Misc. Rep. 152, 155, 49 N. Y. Supp. 375. The action is given to the other party

(whether he knew or did not know) against a party disabled, whether he did or did not know it; that is, whether he was or was not guilty of a fraud. So, upon all states of fact concerning incurable physical incapacity, the action may be brought under subdivision 5. There is, and, as I conceive, can be no occasion to invoke subdivision 4. The fact of fraud is not potential. An allegation of physical incapacity with other formal statements perfects the pleading; sufficient evidence of the same makes the proof. Statements of fraud are mere surplusage. The plaintiff is required within five years to discover one thing only, the incurable incapacity, and act upon it. Facts probative of fraud are not even incidents. They are utterly dissociated from the only cause of action necessary. Why, then, if a cause of action preserving every possible right is given under subdivision 5, should the plaintiff be permitted to superimpose irrelevant allegations and proof of fraud for the benefit of a statute of limitations that pertains only to such extraneous and unrelated matter? In other words, the limitation applies only to an issue of fraud which is entirely foreign to the remedy provided, a remedy that compasses all necessary facts.

The judgment should be affirmed, without costs.

In re PEARSALL

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

1. NEWSPAPERS (§ 1*)—DESIGNATION OF OFFICIAL PAPER—STATUTORY PROVISIONS.

In determining which are the "two principal political parties into which the people of the county are divided" for the purpose of designating the papers for the publication of the Session Laws under County Law (Consol. Laws, c. 11) § 20, which requires an annual designation, the vote at the last annual election, and not that at the last election for Governor, shall control, notwithstanding the provisions of Election Law (Laws 1911, c. 891 [Consol. Laws, c. 17]) § 8, subd. 8, describing a party as a political organization which, at the last preceding election for Governor polled at least 10,000 votes.

[Ed. Note.—For other cases, see Newspapers, Cent. Dig. §§ 1-13; Dec. Dig. § 1.*]

2. NEWSPAPERS (§ 1*)—DESIGNATION OF OFFICIAL PAPER—DETERMINATION OF PRINCIPAL POLITICAL PARTIES.

Where two political parties nominated the same candidates, the strength of one of the parties, for the purpose of designating a newspaper for the publication of the session laws, is to be determined, not by the total number of votes cast upon both tickets for the candidates of that party, but by the number of votes cast upon the tickets of that party.

[Ed. Note.—For other cases, see Newspapers, Cent. Dig. §§ 1-13; Dec. Dig. § 1.*]

Appeal from Special Term, Nassau County.

Application by Smith Pearsall for peremptory writ of mandamus against the Clerk of the Board of Supervisors of Nassau County and George M. Goodale, in which proceeding the South Side News Company intervened. From an order of the Special Term granting the writ, the defendant Goodale and the intervener appeal. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

Henry P. Keith, of New York City, for appellant.

Jeremiah Wood, of New York City, for respondent.

Elvin N. Edwards, of Freeport, for intervenor.

THOMAS, J. [1] The question is whether the Nassau County Review, or the Owl, severally representative of the Republican and the National Progressive parties in the county of Nassau, shall be designated to publish the Session Laws and concurrent resolutions of the Legislature, pursuant to section 20 of the County Law (Laws of 1909, chapter 16, and chapter 11 of the Consolidated Laws). By peremptory writ of mandamus the clerk of the board of supervisors has been directed to file with the Secretary of State the designation of the Nassau County Review as one of the official papers for such publication, although he had already, at the direction of the two Democratic members of the board, who are a majority thereof, filed the designation of the Owl and the North Hempstead Record, representing, the former the National Progressive, and the latter the Democratic party. The only other member of the board, a Republican, filed with such clerk a written designation of the Nassau County Review to be filed with the Secretary of State. The same condition exists in the board of supervisors of the county of Nassau as in the year 1912, when the supervisors by direction of the court designated the Owl. *People ex rel. Bonheur v. Christ*, 208 N. Y. 12, 101 N. E. 846. At that time there had been an election at which presidential electors as well as state officers, including Governor, and county officers, were elected, and the vote in the county indicated the voting supremacy of the Progressive party. But in 1913 there was another election which subordinated the Progressive party to the Republican party in the numerical strength of the vote. The question, then, is whether the designation shall be determined by the vote of 1912 or by the vote of 1913. In other words, is the Republican or the National Progressive party one of the "two principal political parties into which the people of the county are divided"? It is the appellants' contention that regard must be had to a general election involving candidates for Governor. In *Matter of Troy Press Co.*, 94 App. Div. 514, 88 N. Y. Supp. 115, affirmed without opinion, 179 N. Y. 529, 71 N. E. 1141, it was considered that the designation was limited in duration to one year, inasmuch as meantime the minority party might become one of the two principal parties. If this view be accepted, it is evident that the annual designation should not be based on the expression of the views of the voters of the county for presidential electors, chosen once in each four years, or of the Governor, chosen once in two years. In 1913 two Judges of the Court of Appeals were chosen, but the elections of judges to that court come at uncertain periods. If, now, the expressions of Mr. Justice Chase in *Matter of Troy Press Co.* are obligatory in the present determination, it would seem to be the duty to discover what vicissitude in opinion was found at the general election, which the Election Law, section 290, directs "shall be held annually" in the month of November.

[2] The official canvass of the state for the election of 1913 would show Judge Bartlett, a Democrat, and Judge Hiscock, a Republican, elected as members of the Court of Appeals, while the vote for the county of Nassau would show that Judge Werner and Judge Hiscock, the Republican candidates, severally received votes largely in excess of the Democratic candidates, and that the candidates on the National Progressive ticket received about one-third of the vote so given Republican competitors. If attention be given to the vote for county officers, there will be found a concerted distribution of nominees between the Democratic party and the National Progressive party. The offices to be filled were member of assembly, sheriff, county clerk, district attorney, county treasurer, superintendent of the poor, and county comptroller. The highest vote received by a Republican as shown by the tally sheet was, for county clerk 8,421, the lowest vote received by a Republican was for county treasurer, 7,068. The highest vote received by a Democratic candidate on the Democratic ticket was for county treasurer, 6,253, and the lowest vote was 5,270 for county clerk. The highest vote received by a candidate of the National Progressive party on its ticket was for sheriff, 3,021, and the lowest vote was for county clerk, 2,057. The average vote on the National Progressive ticket for the seven offices is 2,335. The average vote on the Republican ticket for the seven offices is 7,642. The average vote on the Progressive ticket for the Court of Appeals is 2,427. The average vote on the Republican ticket for Court of Appeals is 7,499. There is no rational doubt that the annual election, which the statute directed should be held in the year 1913, showed that the voters of the Republican party had the greater voting power, and that the voters of the National Progressive party were the least in that regard. So the question is whether the people of the county of Nassau shall be informed of the laws through the medium of an organ that represents the least number of people, or by a paper that represents the voters largely in local ascendancy. The statute is obscure on account of its deficiency in providing for a condition that suddenly arose, but while different views in interpretation may be respected, it seems both fair and reasonable that the votes of the electors of the county so emphatically cast in favor of the Republican party should prevail. It is urged that the vote of the National Progressive party should not be segregated from the total vote that its candidate received, but that he should have the credit for all the vote cast for him, whether they appear on the Democratic or National Progressive ticket. If this rule were adopted, the supremacy of the Progressive party would be obtained by counting the votes on the Democratic ticket, and the total strength of the Democratic party would appear by adding to its votes those received on the ticket of the National Progressive Party. So the truth would not be told. In the interesting brief in behalf of the appellant, it is urged that we should look to the Election Law, which describes a party as "any political organization which at the last preceding election for Governor polled at least ten thousand votes" (Election Law, § 3, subd. 8; Ch. 891, Laws of 1911), or section 301 of the Election Law, which provides for the publication of the list of registration in two newspapers selected with reference to

their support of the candidates "at the last preceding election for governor," and to other parts of that law (sections 302, 196 and 331). I have already pointed out that such test would necessarily make the designation of newspapers biennial, whereas the purpose of the statute is that there shall be an annual designation, to the end that the recent laws of the Legislature may be brought home to the people at the earliest opportunity.

The order should be affirmed, but, in view of the public importance of the matter and of the obscurity of the statute, without costs. All concur.

FALCO v. NEW YORK, N. H. & H. R. CO.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

DISCOVERY (§ 89*)—RIGHT OF DISCOVERY—STATUTORY PROVISIONS—RULE OF COURT.

Code Civ. Proc. §§ 803-809, and General Rules of Practice, 14-16, directing a discovery of books, etc., contemplate the discovery of evidence, and an administratrix suing for the negligent death of a railroad employé struck by a locomotive may not compel an inspection of the reports of the employés of the company as to what they observed with reference to the accident and as to what disposition they made of parts of the engine, because the papers are not evidence, though they may furnish a clue to evidence.

[Ed. Nota.—For other cases, see Discovery, Cent. Dig. § 115; Dec. Dig. § 89.*]

Appeal from Special Term, Westchester County.

Action by Rose Falco, as administratrix of Andrew Falco, deceased, against the New York, New Haven & Hartford Railroad Company. From the part of an order compelling an inspection of papers in the possession of defendant, it appeals. Reversed.

See, also, 145 N. Y. Supp. 1122.

The action is brought by the administrator of a servant against a master to recover damages for the death of the servant. The plaintiff complained that the defendant is a foreign Connecticut state railroad corporation; that her intestate was struck by part of the appliances of the defendant's locomotive engine, sustaining fatal injuries; and that the casualty was due to defects in the defendant's ways, works, plant, appliances, locomotive, and the appliances thereof and equipment, and by the negligent acts of the defendant's agents, officers, and employés, and by the negligence of the defendant's employés, exercising superintendence, control, and command over said plaintiff's intestate, and by the defendant's failure to formulate, promulgate, and enforce proper rules and regulations for the safety of said intestate and his coemployés, and that said defendant conducted its work by unsafe and dangerous methods and by unsafe and dangerous locomotives and appliances thereof, as a result of all of which, as this plaintiff's intestate was upon defendant's right of way in the performance of his duties, part of the appliances of one of said defendant's locomotives was violently blown therefrom and struck and killed said plaintiff's intestate. The defendant admits its status as a corporation, and makes otherwise general denial. The Special Term made an order, after issue was joined, that granted plaintiff's motion for an open commission and for the inspection of the written reports made by the defendant's employés to the defendant, and further ordered that the defendant produce for inspection and examination of the plaintiff's attorney

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at a trial term on a day and hour specified, the original of each and every report which any and all employes of the defendant made to the defendant, its agents or officers, as to what they observed or discovered with reference to the happening of the occurrence in which the intestate was killed, including all such reports as may have been made to the defendant, its agents or officers, by the defendant's employes, as to any cylinder head, step, or fragment or detached part of the locomotive or train which may have come from the said locomotive and train and which was found in proximity to the body of the plaintiff's intestate, including such reports as the said employes made to the defendant as to what disposition they made of such cylinder head, step, or fragment, and including such reports as were made to the defendant, its agents or officers, by the defendant's employes as to the said cylinder head, step, or fragment being missing from the said locomotive or train, likewise ordered that the plaintiff, her attorney, or his representative, shall be then and there afforded a full opportunity to make copies of said reports, and further ordered that, if it shall appear from said testimony and inspection that there is in the defendant's possession, or under its control, a fragment or detached part which came from the locomotive and train and caused the death of the plaintiff's intestate, another application can be then made by the plaintiff for its inspection. The defendant appeals from so much of the order as requires the defendant to give to the plaintiff an inspection of the written reports made by the defendant's employes to the defendant, and the original of each and every report which any and all employes of the defendant made to the defendant, its agents or officers, as to what they observed or discovered with reference to the happening of the occurrence in which the intestate was killed, including all such reports as may have been made to the defendant, its agents or officers, by the defendant's employes as to any cylinder head, step, fragment, or detached part of a locomotive or train, including such reports as the said employes made to the defendant as to what disposition they made of such cylinder head, step, or fragment, and that the plaintiff, her attorney, or his representative, shall be then and there afforded a full opportunity to make copies of such reports.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

William L. Barnett, of New York City, for appellant.

Thomas J. O'Neill, of New York City, for respondent.

JENKS, P. J. The power of the court is prescribed and regulated by sections 803-809, inclusive, of the Code of Civil Procedure, and by the fourteenth, fifteenth, and sixteenth General Rules of Practice. *Walsh v. Press Co.*, 48 App. Div. 333, 62 N. Y. Supp. 833; *Matter of Ehrich v. Root*, 134 App. Div. 437, 119 N. Y. Supp. 395. The procedure contemplates evidence. *Woods v. Figaniere*, 25 How. Prac. 522; *Merguelle v. Continental Bank Note Co.*, 30 N. Y. Super. Ct. 77; *Davis v. Dunham*, 13 How. Prac. 425; *Ahlymeyer v. Healy & Bigelow*, 12 N. Y. St. Rep. 677; *Matter of Ehrich v. Root*, supra; *Hallenbeck v. Parr*, 65 App. Div. 167, 72 N. Y. Supp. 488. The documents sought to be discovered are not evidence, within the purview of the statute or the rules. It is not enough that the documents suggest or may furnish a clew to evidence. *Woods v. Figaniere*, supra; *Morrison v. Sturges*, 26 How. Prac. 177; *Walsh v. Press Co.*, supra. The burden was upon the plaintiff to establish a condition that would have justified the order. *Beyer v. Transit Development Co.*, 139 App. Div. 724, 124 N. Y. Supp. 463. The fact that the plaintiff is a representative of the deceased does not afford to her

any further or additional rights. *Merguelle v. Continental Bank Note Co.*, supra.

The order, in so far as appealed from, is reversed, with \$10 costs and disbursements. All concur.

(84 Misc. Rep. 565)

In re KERNOCHAN.

(Supreme Court, New York County, Special Term. March 28, 1914.)

1. **INSANE PERSONS (§ 64*)—ALLOWANCE FROM ESTATE TO RELATIVE—NECESSARY SHOWING.**

Before an allowance may be granted from an incompetent's estate to one to whom the incompetent owes no duty of support, as a nephew of full age and under no disability, having a mother and another aunt, competent and no less well circumstanced, it must be shown, beyond a reasonable doubt, that the incompetent, if sane, would assume the duty; and it must be shown there is a real need or necessity of applicant to be provided for; and this though incompetent is incurable, advanced in years, has a large surplus income, and her presumptive heirs and next of kin are applicant's mother and aunt.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 107; Dec. Dig. § 64.*]

2. **INSANE PERSONS (§ 64*)—APPLICATION FOR ALLOWANCE FROM ESTATE—FEES OF ATTORNEYS.**

The fees of an attorney for an unsuccessful competent applicant of independent means for an allowance from an incompetent's estate will not be allowed from the estate, but those of the counsel for the incompetent's committee will be so allowed.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 107; Dec. Dig. § 64.*]

Application of Marshall R. Kernochan for an allowance from the estate of Marie Marshall, an incompetent. Denied.

Nash & Jones, of New York City, for petitioner.

Henry F. Miller, of New York City, for committee of the estate of the incompetent.

COHOLAN, J. Application of Marshall R. Kernochan for an order directing the committee of the estate of Marie Marshall to pay him out of the incompetent's income the sum of \$12,000 per annum. The questions raised by the petition were referred by an order entered herein on the 26th day of August, 1913, to a referee to take proof of the facts and to report with his opinion in regard to the propriety of granting such an allowance. The referee's report was filed on the 4th day of February, 1914. He found that the facts set forth in the petition were true, and he was of opinion that the young man, for a period of five years, was entitled out of this incompetent's estate to an annual allowance of \$9,000. The referee was not appointed to hear and determine; his duty was to take proof of the facts, and with his opinion to make his report.

The recommendation of the referee in no sense meets the approval of the court. The application is unusual and extraordinary, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

testimony elicited in support of the petition discloses a peculiar state of facts. It shows a young man, 33 years of age, who has lived an idle and luxurious life, now attempting, on the plea that he desires to further a taste for music, to increase his income by obtaining an allowance out of his aunt's estate of the sum of \$12,000 per year. The petitioner, an only son, was born into and is now surrounded by large wealth. His mother's estate was summarized as of January 1, 1913, in the sum of \$1,154,534.22; her gross annual income in 1913 was \$39,660.17. In her city home 12 servants are employed, and in her country home at Pittsfield, Mass., there are 25. Martha M. Wysong, another of his aunts and a widow 67 years of age, is without issue and is possessed of an estate of \$2,525,000, which produced an annual gross income of \$81,000. Upon attaining his majority the petitioner received from the estate of his father about \$101,000. A portion of this money was lost in speculation, but a gift of \$50,000 from his mother so made up the loss that his estate at the present time is practically intact. He resides with his mother, contributes nothing to the household expenses, and derives from his own property an income of about \$3,750 per year. The petitioner in 1900 took up musical composition, and has made extensive studies in New York and Germany. His average income from this source has not exceeded \$30 per year, although his expenses for advertising his songs and his one cantata amount to \$175 per year. He belongs to twelve clubs, as follows: The Union, Brook, Racquet, Knickerbocker, Grolier, Players, Tuxedo, Lenox, Pittsfield Country Club, Stockbridge, the Tennis Club, and the Automobile Club. He has an automobile and pays his chauffeur \$100 per month. He has followed no occupation other than his diversion for music. In brief, this healthy and athletic young man, from an environment of luxury, wealth, and position, declares that since neither his mother nor his aunt, Mrs. Wysong, will give him an allowance, this court should decree him one from the estate of his incompetent aunt—a woman who became insane eight years prior to his birth and whom he never saw but once, and that time some eight years ago. He seeks to persuade the court to this conclusion by the statement that if this allowance is not granted he will be relegated to this position: (1) He will be compelled to resign from all his clubs except the Union and Knickerbocker; (2) he will be restricted in the entertainment of his friends; (3) his forms of recreation will not be as expensive as they are at the present time; and (4) he will be compelled to abandon his automobile. Another reason assigned for an allowance is that with it there will be a reasonable prospect of his marriage. His testimony on this point is of interest:

"Q. Mr. Kernochan, is it your wish and desire to marry? A. It certainly is. Q. And is it the wish of your mother that you should marry? A. Yes; very much so. Q. And has your mother said to you that in view of her financial situation she could not give you any adequate allowance to enable you to marry? A. Yes. Q. And you feel that you are not able to marry with your present income? A. I do; it is impossible. Q. Does the fact that your income is so small prevent you at the present time from making an offer of marriage? A. Yes, it does. Q. And if the allowance asked for should be granted to you would you make an offer of marriage with the fair hope of receiving an acceptance? A. I should think I might. Q. Well, you would

make the offer? A. I probably should. Q. And if you do not receive the allowance will your mode of life continue as it has been in past? A. No, I will have to change it very radically."

[1, 2] The power of the court to make direction, under proper circumstances, in respect of the disposition of the incompetent's estate is conceded. Sections 2320-2322, Code Civ. Pro. The court, however, must preserve the incompetent's property from waste or destruction, and the jurisdiction of the court must be exercised by means of a committee of the person or a committee of the property of the incompetent. In the last analysis and in its essence the court's power is one founded in its sound discretion, and its exercise is guided and controlled by the welfare of the incompetent. It is scarcely conceivable that the incompetent herein will ever be restored to sound mind. However, if she ever does reason, it is possible that, situated as she is, surrounded by every comfort, her physical health might enable her to outlive both her sisters and her nephew, the petitioner. Upon her death thereafter without a will and a resident of Virginia, her property would pass to relatives who are not parties to this proceeding; that there are such relatives is shown by the testimony of Frederick C. Kernochan, one of the committee. The incompetent is under no duty to support the petitioner. If the application had been presented by the son or wife of an incompetent or an indigent person, who stood in such relationship to the incompetent that the incompetent would be under an obligation to support the petitioner, the duty and the power of the court, limited only by the amount involved, would be obvious. *Ex parte Whitbread*, 2 Meriv. 99. However, this condition does not here exist. The petitioner is the nephew of the incompetent. He is of full age, of ripe experience, sound mind, and under no disability. His mother is living, and he has another aunt who is perfectly competent and no less well circumstanced. There is nothing in the relationship of the petitioner to the incompetent which would cast upon her the duty or the obligation of supporting him. There is no duty on the incompetent to maintain the petitioner in his "social position" or to enable him to reach a "station in life." In this country, with its free institutions, rank and position are not recognized. *Gould v. Gould*, 61 Misc. Rep. 120, 114 N. Y. Supp. 331; *Matter of Brown*, 80 Misc. Rep. 4, 141 N. Y. Supp. 193.

It is to the credit of the committee that they have opposed this application, and there is no lack of authority to sustain their position. The law may be briefly stated. Before an allowance may be granted from an incompetent's estate to one to whom the incompetent owes no duty of support, it must be established that the incompetent if sane would make the allowance. The proof required is that the incompetent should have known the applicant and should have indicated while sane by acts or words that he or she had such an intention to support the applicant; or that such facts and circumstances be made to appear as would show beyond a reasonable doubt that the incompetent, if sane, would assume such a burden. The courts are required to scrutinize the evidence submitted upon such an application with caution, recognizing that such applications should be narrowed and

discouraged rather than extended or encouraged. There must exist a real need or a necessity upon the part of the applicant to be provided for, the court being mindful that it does nothing wantonly or unnecessarily; and, finally, it is not the duty of the court to deal benevolently or charitably with the property of the incompetent. In *re Evans*, Law Reports, Chan. Div., vol. 21, p. 297; In *re Darling*, Law Reports, Chan. Div., vol. 39, p. 208; *Matter of Heeney*, 2 Barb. Ch. 326; *Matter of Willoughby*, 11 Paige, 257; *Shelford on Lunacy*, 156, 160.

It has been urged that the allowance should be granted so as to stimulate the petitioner to achieve greatness and success as a musician, and that if the incompetent were sane she would be so disposed to aid him in his ambition. The referee in this respect has been led to make this observation: The petitioner "should be encouraged to work and to attain to a proficiency entitling him to a place in the ranks of musicians, and that if Marie Marshall could know of the work he had done that she would willingly grant him such help as would enable him to live properly in his environment and move up in his profession." If the petitioner has musical talent—and the returns do not require this conclusion—his mother and his competent aunt, who have his welfare at heart and must know of his talent and desire, are immediate and proper persons to whom he can appeal for largess and sympathy. I do not deem the increase of musical renown as being the substantial object of the application. At most, it is a mere pretext to the exclusion of the real reason, which is that this young man may have additional means to maintain or to accentuate the luxurious living to which he considers that he is entitled and which has ever been his environment. The referee apparently has so found. Yet his conclusion does not justify the finding. He says:

"The application in this case is urged upon several grounds which, in my opinion, are without weight and weaken rather than strengthen the claim. These are that the petitioner has been brought up under a liberal and handsome expenditure of money in the method of life of his family; that he has been brought up to belong to many clubs and to give entertainments and to maintain what is called a 'station in life.' These are all sufficient to deny the application in my opinion, and whether he becomes the ultimate heir of a large fortune or not, he is in no need of the money of this incompetent to prepare himself for a life of intelligent comprehension of the duties of an American citizen and the preparation for the care of that estate, should it come to him, by entertaining or joining clubs or trying to reach some so-called 'station.'"

I am in accord with this well-expressed statement, but disagree and fail to understand the conclusion reached from it. The recommendation of the referee appears to be "a mere impulse of benevolence." It matters not that the incompetent is incurable, 65 years of age, without issue, never having been married, and has been insane since 1872; that her surplus income annually amounts to \$100,000; that her presumptive heirs at law and next of kin are her two sisters, Martha M. Wy-song and the petitioner's mother, Louise M. Pollock. The mere facts that an incompetent has an ample fortune, that her income is large, and that it greatly exceeds her personal requirements afford, per se, no ground for giving away her property. The facts in the Fol-

som Case (no opinion filed) and Flagler Case (no opinion filed) do not apply to this situation. The applicants therein were shown to be in need or necessity, and in addition in the Flagler Case the incompetent had during her competency evinced kindly feelings and contributed by gift and income to the support of the applicant.

This motion is in all respects denied. There is no legal ground to warrant the expenditure of the incompetent's money for the payment of counsel for competent persons of independent means, hence the application of the petitioner for an allowance for his attorneys is not approved. As counsel for the committee appeared for the benefit and protection of the incompetent, he is entitled to an allowance for services rendered. Settle order accordingly and upon notice.

In re CLARKE et al.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

ATTORNEY AND CLIENT (§ 44*)—DISBARMENT.

The senior partner of a firm of attorneys deposited moneys belonging to a special client into his personal account from which the junior partners drew their compensation. *Held*, that junior partners, who only had a power of attorney to draw checks, were not subject to discipline under Judiciary Law (Consol. Laws, c. 30) § 88, because they received their monthly allowances out of the account without ascertaining whether the acceptance of such allowances would deprive the client of the senior partner of her money.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 55, 58, 62; Dec. Dig. § 44.*]

Motion to discipline Theodore G. Clarke and Edward L. Frost, attorneys. Proceedings dismissed.

Argued before JENKS, P. J., and BURR, CARR, STAPLETON, and PUTNAM, JJ.

Mortimer W. Byers, of New York City, for the motion.

John H. Corwin, of New York City, opposed.

PER CURIAM. We think that no case is presented for action towards the discipline of Messrs. Clarke and Frost. Their relations to Mrs. Hitchings have been considered in a summary fashion both in the civil and the criminal court. In our opinion In the Matter of the Application of Maria D. Hitchings to compel William F. Wyckoff et al., copartners, etc., to pay over certain moneys, decided June 6, 1913 (157 App. Div. 392, 142 N. Y. Supp. 339), we determined that the moneys in question were given to Mr. Wyckoff for investment in bond and mortgage at his discretion and judgment, that the investment made accordingly was paid off and the money again and likewise invested, again paid off, and that such moneys were received by the law firm of Wyckoff, Clarke & Frost, and by it turned over to Mr. Wyckoff in his individual capacity. The present proceeding reveals nothing new except certain features as to the bank account into which the moneys

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were paid and were kept. It appeared heretofore that the said account stood in the name of Mr. Wyckoff personally. It now appears that from it was paid monthly to the partners the specified sums which they were entitled to draw under their partnership articles. The proposition now is that as Mrs. Hitchings' money was paid into that account, therefore it must have gone into the pockets of Messrs. Clarke and Frost, who are consequently liable to discipline under section 88 of the Judiciary Law.

This account was not only in the personal name of Mr. Wyckoff, but it seems that it was generally controlled by him or by the book-keeper of the firm. Mrs. Hitchings had been for years the particular client of Mr. Wyckoff; she had no dealings with the other members of the firm, and was practically a stranger to them. It does not appear that they, or either of them, had any knowledge, even, of her transactions or of her dealings with the senior partner. She was but one of the large clientage of the office.

The "new" matter, so far as this court is concerned, is largely presented by the testimony of Mr. Frost before the magistrate. We shall consider the excerpts made in the moving papers. Mr. Frost testified that the running expenses were paid out of that account, and all the fees went in it so far as the "Brooklyn business" of the firm was concerned; that this custom included fees and commissions when interest was remitted; that he had a power of attorney, as had also the book-keeper; that there were times when Mr. Wyckoff would be absent from the office for days and weeks at a time; that he (the witness) would be there; that all the moneys that came into the firm, with the exception of Mr. Frost's personal clients, went into that account; that he drew therefrom \$300 a month; that he never made inquiry when he drew that amount whether the money in that account belonged to a client of Mr. Wyckoff or to the firm; that he knew that in the account were moneys of a client of Mr. Wyckoff, that is, he knew the money went in there; that every six months there would be a division of the so-called profits; that on the division made in July, 1912, he received a check out of this account. On the other hand, even in the excerpts made it appears that all Mr. Frost knew was what sums had gone into this account on account of his own clients; that he never looked into the account; that he never filled out the body of any check against the account; that while he knew the moneys of Mr. Wyckoff's clients went in, he did not know whether there was any of such moneys in the account, how much was there, or how long it remained; that the moneys were divided, as he was told, according to the firm books and their showing of fees and disbursements; that the last division was on January 1, 1913, when the firm was dissolved; that the money then paid came from the Jamaica office of the firm, from an account in the name of the firm, but that the division of July, 1912, came from the said personal account of Mr. Wyckoff, into which the moneys of Mrs. Hitchings had been paid; that he did not then investigate the account, and that he never knew that Mrs. Hitchings' money (some \$1,500) was put in the account; and that he never knew that "he took her money."

The firm had been, and at that time was, engaged in a large business,

which comprised dealings for investments in real estate, and stood high in the community. The business was of long standing, apparently prosperous even to the junior partners. The dividends paid to them were modest, and, for aught that appears, warranted in their eyes by the professional activity of the firm. The downfall of the firm was not due to any fault of Mr. Clarke or Mr. Frost. Mrs. Hitchings, as we have said, was one of many clients, and dealt entirely with the senior partner, in whom she apparently placed peculiar trust.

With the question of civil liability we have no present concern, and therefore we refrain from any expression of opinion upon that subject. No one pretends that these gentlemen were guilty of any direct wrongdoing as to Mrs. Hitchings in any way, and the whole front of their offending as now presented seems to be that they did not personally examine this account of the senior partner, whenever they received their monthly dividends, to ascertain whether at that time there was in that account any moneys of any client of Mr. Wyckoff, so that they might compute whether the amount then paid out to them could be met from that account exclusive of any such moneys received by Mr. Wyckoff and kept by him in that account. Under all the circumstances of this case, there is not sufficient proof to indicate that either was derelict in professional duty or guilty of any wrong that would justify discipline or punishment. Weeks on Attorneys, § 314, note citing *Porter v. Vance*, 82 Tenn. (14 Lea) 629. But these proceedings afford opportunity for the expression of an opinion that it is, to say the least, an unwise and a precarious policy for a lawyer to keep the money of his client in a personal bank account; that the safe practice is to keep such moneys in a separate account which upon its face shows that it is devoted exclusively to moneys received in a fiduciary or a quasi fiduciary capacity. In this very case it appears that Mr. Frost pursued this policy, in that he kept in one trust company such an account, wherein he deposited the moneys of such clients as particularly relied upon him, and in a different bank he kept his personal account.

And we think it but justice to Mr. Frost to state that, so far as all records that have passed under our scrutiny show, he has demeaned himself as an honest and an upright lawyer, seeking to rise above misfortunes which have visited him without his fault, and evincing no disposition to shrink from or to evade any liability which the law of partnership might ultimately cast upon him. And we have no reason to doubt that the same could be said of Mr. Clarke, and should be said, as far as the record shows, which, however, is not as full as to him, inasmuch as he has not been pressed as hard as has his partner.

The proceedings are dismissed.

BARNES et al. v. MIDLAND R. TERMINAL CO.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

1. DAMAGES (§ 40*)—INTERFERENCE WITH BUSINESS—EVIDENCE.

Where a business is wrongfully interrupted and a loss is sustained, evidence of the falling off in business with loss of income shows the injury to the usable value of the property damaged, and is proper in estimating the damages recoverable.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 72-88; Dec. Dig. § 40.*]

2. COSTS (§ 9*)—POWER OF REFEREE.

Where a referee, under a reference of all the issues, filed a report without awarding costs, an interlocutory judgment thereon terminated the referee's power to grant or withhold discretionary costs under Code Civ. Proc. §§ 1018, 1022, and his subsequent appointment as referee to ascertain damages only did not empower him to award such costs, but his authority to award costs was limited to those arising in the ascertainment of the damages.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 7-15; Dec. Dig. § 9.*]

3. COSTS (§ 57*)—POWER OF COURT.

The court in confirming the report of a referee, appointed, after interlocutory judgment, to ascertain damages only, may, in confirming his report on damages, review his recommendation as to costs incurred in ascertaining the damages, and only the court which imposes costs on the losing party may grant an extra allowance, authorized by Code Civ. Proc. §§ 3252, 3253.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 229-249, 257-260; Dec. Dig. § 57.*]

Appeal from Special Term, Richmond County.

Action by Sarah H. Barnes and others against the Midland Railroad Terminal Company. From a final judgment for plaintiff entered on the report of a referee, and from the costs allowed, defendant appeals. Modified and affirmed.

See, also, 158 App. Div. 944, 143 N. Y. Supp. 1106.

Argued before JENKS, P. J., and CARR, RICH, STAPLETON, and PUTNAM, JJ.

Alfred G. Reeves, of New York City (Alexander S. Rowland and William P. Dalton, both of New York City, on the brief), for appellant.

John Brooks Leavitt, of New York City (Stuart G. Gibboney, of New York City, on the brief), for respondents.

PER CURIAM. Plaintiffs' right to injunction and damages has been finally determined (193 N. Y. 378, 85 N. E. 1093, 127 Am. St. Rep. 962).

The issues went to a referee to hear and determine, who reported in plaintiffs' favor. The referee recommended a perpetual injunction, with recovery of damages to be ascertained by a subsequent reference. No disposition was then made, or expressly reserved, as to costs. By the interlocutory decree the ascertainment of damages was referred to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the same referee. No question of costs was referred, or mentioned in this order of reference. On the basis of the receipts and earnings before the plaintiffs' business had been interfered with, the referee reported plaintiffs' damages at \$30,753.43 and directed judgment for that amount. He also recited that he had not before passed upon the matter of costs, and by this last report awarded plaintiffs the costs and disbursements of the action.

[1] On this appeal, defendant urges that the damages found were excessive, and that the referee proceeded on an erroneous theory in estimating the same. A careful examination of the testimony as to the damages supports the conclusion of the learned referee. Where a business is interrupted and loss sustained, evidence as to the falling off in business, with loss of income, all goes to show the injury to the usable value of the property damaged. *St. John v. Mayor*, 13 N. Y. Super. Ct. 315; *Bates v. Holbrook*, 89 App. Div. 548, 85 N. Y. Supp. 673; *Laufer v. Boynton Furnace Co.*, 84 Hun, 311, 32 N. Y. Supp. 362; *Sedgwick on Damages*, §§ 182-184.

[2] The matter of costs is more difficult. The learned referee felt this, saying in his last report that he doubted his power at that stage to pass on the question of costs, but concluded to give plaintiffs the benefit of the doubt as to his jurisdiction. This court carefully reserved the question of costs "upon any further judgment that may be entered." 144 App. Div. 796, 129 N. Y. Supp. 680. The original reference was of the whole issues. The referee's report, when made, stood as the judgment of the court. Code Civ. Proc. §§ 1018, 1022. Hence it was the only tribunal empowered to grant or to withhold discretionary costs (Code Civ. Proc. § 1022), as they are part of the merits to be passed on by such a referee. When he made and filed his first report (which, as to him, was a final report), and interlocutory judgment had been entered thereon, the referee's power ended, as he became *functus officio*. *Stevens v. Weiss*, 25 Misc. Rep. 457, 55 N. Y. Supp. 562. His subsequent authority under the second order of reference was to ascertain damages only. By accident the same referee was again designated, but for a specific purpose of reporting a question of damages, and that only. He, therefore, could not thereafter award those costs, which he might have previously given under the original order of reference. *Osborn v. Cardeza*, 208 N. Y. 131, 134, 137, 101 N. E. 806.

[3] The subsequent costs of ascertaining damages, however, are not exclusively within the province of the referee. In confirming his report on damages and passing upon exceptions taken, the court reviews the proceedings before this referee, and may regard the referee's recommendations as to such subsequent costs. In dealing with the report on damages, the court, and not the referee, imposes on the losing defendant the costs incident to the ascertainment of these damages. Here the damages were substantial, and the expense of the reference rightly fell on the defendant. If the costs of the trial of the issues be not awarded, the court is unable to give any extra allowance under Code of Civil Procedure, § 3253. Such allowances under sections 3252,

3253, are "in addition to the costs prescribed," or as "a further sum." *Kahn v. Schmidt*, 83 Hun, 541, 32 N. Y. Supp. 33.

We conclude, therefore, that the findings of the learned referee as to damages should be sustained, but the judgment should be modified by striking out therefrom the provision awarding an extra allowance and the costs and disbursements of the action from the beginning thereof, and instead that there be allowed to the plaintiffs their costs and disbursements only as incurred by them in the suit since the entry of the interlocutory judgment of March 7, 1911, and that, as so modified, the final judgment be affirmed, without costs of this appeal to either party.

PEOPLE ex rel. LYON v. NELSON et al., Board of Trustees of Village of Peekskill, et al.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

1. EMINENT DOMAIN (§ 131*)—COMPENSATION—AMOUNT OF AWARD.

An award of damages for land appropriated to widen a street cannot be for less than the value of the property actually condemned.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 353; Dec. Dig. § 131.*]

2. EMINENT DOMAIN (§ 205*)—AMOUNT OF COMPENSATION.

Peekskill Village Charter (Laws 1883, c. 117, tit. 7, § 6) authorizes commissioners to award to the owners of land taken for public improvements such damages as are sustained after making allowance for benefits, and requires them at the same time to apportion the damages upon all the improvements on the real estate benefited, but if the whole of the damages cannot be equitably assessed, they shall only assess such part as is equitable, and the balance shall be paid by a general tax upon the village. In proceedings to condemn land for street widening, the owners' witnesses valued one parcel at from \$1,734 to \$2,082, and another parcel at from \$1,675 to \$2,010, while the village's witnesses valued the parcels, respectively, at from \$550 to \$2,000 and from \$670 to \$1,500. There was evidence that the cost of removing parts of the buildings necessitated by the improvements was \$167 and \$396, respectively. The commissioners awarded the owner \$1 for each parcel, and the report stated that that amount represented his damages after making due allowance for benefits, and that the whole of the damages awarded should be assessed against the village at large, together with the expenses of the proceeding. *Held*, that the commissioners exercised their powers in an unlawful manner so as to result in taking the property without just compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 544; Dec. Dig. § 205.*]

Certiorari by the People, on relation of E. De Motte Lyon, against Thomas Nelson and others, to review a determination of the board of Trustees of the Village of Peekskill. Determination annulled, and matter remitted.

Argued before JENKS, P. J., and BURR, CARR, STAPLETON, and PUTNAM, JJ.

James W. Husted, of Peekskill, for relator.

Leverett F. Crumb, of Peekskill, for respondents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

STAPLETON, J. We are hearing a cause instituted by a writ of certiorari to review the determination of the trustees of the village of Peekskill, a municipal corporation, which confirmed the award of commissioners appointed by the county court of the county of Westchester to ascertain and assess the damages claimed by owners of lands appropriated for the purpose of widening South street in that village, and to assess and apportion the damages on real estate to be benefited by the improvement. No question is raised as to the propriety of this proceeding, and no fault is found with the regularity of the proceedings to widen South street, down to the point where the commissioners made their determination. Among the lands to be acquired for the public improvement were two parcels belonging to the relator. One parcel contains 138.8 square feet, and has a frontage on South street of 40 feet and an average depth of 3.47 feet. The other parcel contains 134 square feet, has a frontage on South street of 33.88 feet, and an average depth of 3.90 feet. South street is the main thoroughfare of the village, and the widening proposed was of one block. The buildings on the block are devoted to business purposes. With the exception of the relator and the Peekskill Savings Bank, a corporation, all the owners of property on the block ceded to the village corporation the land for street purposes. The property of the Peekskill Savings Bank was acquired for \$1,200; the area acquired was 127.5 square feet. In the condemnation proceeding the relator called witnesses to prove the value of the parcels sought to be taken. On one parcel they placed valuations ranging from \$1,734 to \$2,082, and on the other parcel from \$1,675 to \$2,010. Witnesses for the corporation placed valuations ranging from \$550 to \$2,000 on one parcel, and from \$670 to \$1,500 on the other. As to one parcel, testimony was received by the commissioners that the actual cost of removing a bay window and of restoring the front of the building after the removal would be at least \$167; and as to the other parcel testimony was received that the actual cost of removing the front of the building and of restoring it would be not less than \$396.50. For each parcel of property the commissioners awarded the relator \$1, and, over the objection and against the protest of the relator, the trustees confirmed that award. The report contains the declaration that that amount represented the damages that the relator would sustain "after making due allowance for any benefit which the said E. De Motte Lyon might derive therefrom." In discharging the duty of making an assessment for the improvement, they made this report:

"We do further report that in our judgment the whole of the damages awarded herein should be assessed, and become a charge upon the village of Peekskill at large, together with the costs and expenses of this proceeding."

The defendants defend the report upon the ground that the charter of the village of Peekskill (chapter 117, Laws of 1883, tit. 7, § 6) authorized the commissioners to—

"determine and award to the owner or owners so claiming damages as aforesaid such damages as in their judgment such owner or owners will sustain by such improvement, after making due allowance for any benefit which such owner or owners may derive therefrom; they shall at the same time

assess and apportion the said damages, if any, of such improvement on the real estate benefited thereby, as nearly as may be in proportion to the benefit resulting therefrom; but, if the whole of such damages cannot justly and equitably be assessed on the real estate as above provided, then the said commissioners shall only assess such portion thereon as, in their opinion, will be equitable and just; and the balance thereof they shall assess to be paid by a general tax upon the village, and such balance shall thereupon become a charge upon said village, and shall be added to and raised with the next general assessment or tax levy for village purposes, and the same shall be payable to the persons entitled thereto, as soon as the same shall be collected as above provided. The said commissioners shall briefly describe the real estate upon which any assessment is made by them, and shall designate the owners of the several parcels thereof; and what parcels, if any, are owned by nonresidents, according to the best information they can obtain, which assessments shall be collected by the trustees from such owners under a warrant for that purpose to the receiver of taxes in said village in the same manner as taxes in said village are collected."

[1] It is now settled that in no case shall an award be made for less than the value of the property actually taken by condemnation. *Matter of City of New York*, 190 N. Y. 350, 360, 83 N. E. 299, 16 L. R. A. (N. S.) 335. And in construing the provisions of a statute similar in import to the statute involved here, we have had occasion to say:

"Unless the provisions of the Village Law (Consol. Laws, c. 64 [Laws of 1909, c. 64], § 152), relating to compensation, are limited to consequential damages resulting to a portion of a tract not taken, and are not applied to actual damages for land actually taken, such act would be unconstitutional." In the *Matter of the Widening of a Portion of Pondfield Road*, in the Village of Bronxville, 156 App. Div. 890, 141 N. Y. Supp. 1143.

That the powers of eminent domain and taxation were blended by law in the same commissioners does not affect this rule.

"The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual, or class of individuals. * * * Taxation operates upon a community, or upon a class of persons in a community, and by some rule of apportionment." *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 424 (55 Am. Dec. 266).

[2] The commissioners whose determination was confirmed undertook to exercise their dual powers in an unlawful manner, with the result of taking the private property of the relator for public use without just compensation.

The determination of the defendants, confirming the report of the commissioners, should be annulled, with \$50 costs and disbursements, and the matter remitted to the trustees for action in accordance with chapter 117 of the Laws of 1883. All concur.

HYDE PARK TERRACE CO. v. JACKSON BROS. REALTY CO. et al.
(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

1. CORPORATIONS (§ 30*)—RIGHTS OF STOCKHOLDERS.

A number of persons signed an agreement "with each and all the others to purchase such fractional interests" in certain land as were indicated opposite their names and the total subscriptions were \$125,000, of which only \$48,000 was paid in, which amount was delivered to a realty com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany. Thereafter a corporation was formed by some of the subscribers and the land was conveyed to the corporation subject to five mortgages, one of which was for \$141,515, and was held by the realty company, such mortgage in fact representing a secret profit to the realty company, which had fraudulently represented to the subscribers that the land would be purchased without any advantage to it or any particular subscriber. Subscribers of \$67,000 were privy to such fraud, while subscribers of \$48,000 were innocent thereof and damaged therefrom. Action was brought by the corporation to cancel such mortgage on the ground of the realty company's fraud. *Held*, that it would be inequitable to permit the corporation to sue to cancel the mortgage generally for the fraud and have the entire \$141,515 adjudged to it for the benefit of the subscribers who had participated in the fraud as well as those who had not; but in order to do justice the mortgage could be canceled and the amount of damages to each subscriber defrauded adjudged to the corporation to be held by it in trust for their benefit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97-100; Dec. Dig. § 30.*]

2. MORTGAGES (§ 260*)—ASSIGNMENT—EQUITIES BETWEEN ORIGINAL PARTIES—ESTOPPEL.

Where the assignee of a mortgage made advances and took the assignment, relying on the promise of the mortgagee that an estoppel certificate from the corporate owner of the property would be furnished, as was afterwards done, and not on the certificate itself, the assignee cannot set up the certificate as an estoppel against the suit of the corporation to cancel the mortgage as a fraud on the stockholders; the certificate itself having been procured by fraud of the mortgagee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 692; Dec. Dig. § 260.*]

Appeal from Special Term, Nassau County.

Action by the Hyde Park Terrace Company against the Jackson Bros. Realty Company and others. From an interlocutory judgment at Special Term canceling a mortgage, defendants appeal. Modified and affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and PUTNAM, JJ.

John H. Corwin, of New York City (David B. Ogden, of New York City, on the brief), for appellants.

Abram I. Elkus, of New York City (Frederic E. Mygatt, of New York City, on the brief), for respondent.

PER CURIAM. [1] In the year 1907, persons subscribed an agreement "with each and all the others to purchase such fractional interests" in land on Long Island, N. Y., "as are indicated opposite our names respectively and do agree to pay therefor at the rate of \$2,900 per acre \$404,900 upon the following terms": Cash August 1, 1907, \$62,500; upon taking title \$62,500, balance on mortgages. The total subscriptions by 17 persons were \$125,000, of which only \$48,000 was paid in by 12 persons and delivered to Jackson Bros. Realty Company. In October, 1907, a corporation was formed under the laws of this state by two of the persons who did pay in subscriptions to the amount of \$10,000, and four subscribers to the amount of \$67,000, who did not pay, for the general purpose of dealing in land and chattels, under

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the name of the Hyde Park Terrace Company, with authorized capital of \$150,000, of which \$125,000 was issued to the incorporators and distributed to the subscribers. The deed of the land was made to the corporation under date of October 5, 1907, subject to five mortgages, of which one was for \$141,515.90, stated to be held by "Jackson Brothers Realty Company," which in February, 1910, was assigned to Libbey & Dingley of Maine, who took it for value and without knowledge that it was subject to any defenses, and who thereafter were paid, without protest, the interest thereon, until this action was brought to cancel it upon the ground that it represented a secret profit to the Jackson Company, and that it was fraudulent as to the subscribers who made cash payments or as to some of them to whom, as now asserted, there had been representation by Jackson, president of the Jackson Company, or persons in privity with him, that the land would be bought of farmers without any advantage in which all subscribers did not share. The trial court found:

"That not all the subscribers to the capital stock of the Hyde Park Terrace Company were deceived and defrauded in the manner alleged in the complaint."

The representations were somewhat diverse and did not affect similarly all the paying subscribers. Indeed, it is urged that some of them received or relied upon fraudulent representations, or would be entitled to relief by reason of fraudulent concealment of facts which they were entitled to know. That is a matter for further inquiry at the trial court. For present purposes it must be assumed that some purchasers were wronged. The question then is: What remedy shall be afforded? Subscribers in the sum of \$67,000 were privy to the fraud, and subscribers in the sum of not more than \$48,000 were damaged thereby. It has been adjudged that the assignees of the mortgage surrender \$141,515.90 to the corporation for the benefit of the holders of the \$67,000 interest, as well as the \$48,000 interest. Hence the principal of the mortgage to the extent of \$82,448.30 would inure to the benefit of the tort-feasors, while \$59,067.50 thereof would inure to paying subscribers—a result that is abhorrent to every conception of equity. When it is considered that the subscription paper provides for interests that should make the subscribers tenants in common without suggestion of a corporation, that it contemplated a purchase at a sum that included the amount of the mortgage, that the conveyance was made to the corporation subject to the mortgage, that the assignees of the mortgage purchased it, relying upon Jackson's statement that an estoppel certificate was forthcoming, and that one was prepared under the seal of the corporation and delivered, whatever effect it may have, it is most inequitable to enable the corporation to avail itself of a cause of action which some of the subscribers may have for fraud and deceit, and by virtue of it collect \$82,448.30 for those who committed the fraud or were privy to it—the very persons against whom the cause of action exists. There is something abnormal in a judgment that allows the persons who did the fraudulent thing to share in the recovery for their guilt. The plaintiff, in any case, could take only such cause of action as the subscribers had and so far as they had it. Indeed, each

subscriber, having a cause of action for the deceit, may recover his damages, in his own behalf, and, if the wrongdoers were financially responsible, exact justice would be done to leave the remedy to the subscribers as each may show himself entitled, and it would be correspondingly unjust to permit the persons perpetrating the fraud to recover, or share in the compensation for their own wrong.

The case is peculiar in the fact that the wrongdoers themselves would not suffer, as in *Midwood Park Co. v. Baker* (Sup.) 128 N. Y. Supp. 954; *Id.*, 144 App. Div. 939, 129 N. Y. Supp. 1135; *Id.*, 207 N. Y. 675, 100 N. E. 1130. But they would recover the larger part of the securities which they sold to innocent purchasers. However, in this action, the same end can be reached by ascertaining the persons who signed the subscription paper and paid their subscriptions, relying upon false and fraudulent representations alleged in the complaint, as made by the Jackson Realty Company, any of its officers or any person in privity with them, and by directing that such innocent subscribers have their remedy through the medium of the plaintiff. The interlocutory judgment should direct the taking of further proofs as to the status and equities of the subscribers, and the proportion that such aggregate subscriptions fraudulently obtained bears to the whole sum subscribed, \$125,000. It should then be adjudged that such damages should be paid to the plaintiff within six months after the entry of final judgment herein, subject to such extension of time as the court should make, upon due notice, and that such bond and mortgage should be adjudged to be canceled of record and surrendered to the plaintiff, unless such payment be made, to be evidenced by amendment of the judgment at the foot of the decree. Upon receiving such money, plaintiff should be declared to hold it as trustee for distribution to the persons herein found to have been defrauded, or their representatives, or the assignees of their claims or causes of action therefor, less such allowance as the court may grant the plaintiff for the expenses of this action, and that, pending such payment, the enforcement of such bond and mortgage should be enjoined.

[2] The estoppel certificate of March 1, 1910, was obtained by fraud; but, although appellants Libbey and Dingley did not know of this fraud, they made their advances without having seen the certificate and in ignorance of its terms. Mr. Jackson informed Mr. Libbey that he had such a certificate, and in effect promised that it should be furnished with the mortgage. But the advance was on the faith of Mr. Jackson's promise, not in reliance on the certificate, so as to raise a good estoppel. *Payne v. Burnham*, 62 N. Y. 69; *Assets Realization Co. v. Clark*, 205 N. Y. 105, 109, 98 N. E. 457, 41 L. R. A. (N. S.) 462.

We therefore modify finding of fact No. 21 to read: Defendants Libbey and Dingley did not make their advances and take the assignment of this mortgage relying on the representations of the estoppel certificate. They were informed of such a certificate, but it was not shown to, or delivered to, them at or before the time they made advances to purchase this mortgage.

The interlocutory judgment should be modified in accordance with this opinion, and, as so modified, affirmed, without costs in this court.

MARTIN v. CAMP et al.

(Supreme Court, Appellate Division, Second Department. April 3, 1914.)

1. ATTORNEY AND CLIENT (§ 76*)—RELATION—DISSOLUTION.

The relation of attorney and client may be dissolved by either party for cause, and the client may dissolve it without cause.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 120-131; Dec. Dig. § 76.*]

2. ATTORNEY AND CLIENT (§ 68*)—RELATION—CONTINGENT FEE.

A contract for attorney's services to secure awards for certain land and to reduce assessments thereof for 10 per cent. of the awards and one-quarter of the amount of the reduction in the assessments, with a further provision that nothing should be paid in case no award should be obtained or assessment reduced, created the same relation that would arise from a general retainer.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 85, 87; Dec. Dig. § 68.*]

3. ATTORNEY AND CLIENT (§ 134*)—CONTRACT FOR SERVICES—DISCHARGE OF ATTORNEY—QUANTUM MERUIT.

Where defendant's testator employed an attorney to perform certain legal services for a contingent fee, and after the attorney had performed part of the services he was discharged, his right of action was on the contract and not on a quantum meruit.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 301-304; Dec. Dig. § 134.*]

4. ATTORNEY AND CLIENT (§ 184*)—CONTRACT FOR SERVICES—DISCHARGE OF ATTORNEY—RECOVERY—AMOUNT.

Where testator employed an attorney to secure awards for certain lands and to reduce assessments thereof with promised compensation of 10 per cent. of the awards and one-quarter of the amount of the reduction in assessments, and it was further provided that nothing should be paid in case no award was obtained or assessment reduced, the attorney having been discharged before the service was completed, he was entitled to wait until the awards had been made and the assessments reduced by his successor and then recover contract compensation.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 301-304; Dec. Dig. § 134.*]

5. LIMITATION OF ACTIONS (§ 46*)—ACCRUAL—ACTION FOR ATTORNEY'S SERVICES.

Where an attorney contracted to render services for a contingent fee, and before the services were finished he was displaced and the proceeding continued by his successor, limitations did not begin to run against the attorney's right to recover compensation until the recovery had been had by the client, so that the amount the attorney was entitled to recover under his contract could be ascertained.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. § 46.*]

Stapleton and Putnam, JJ., dissenting.

Appeal from Trial Term, Westchester County.

Action by James G. Martin against Hugh N. Camp, Jr., as executor, etc., of the will of Frederic E. Camp, deceased, impleaded with others. From part of a judgment in favor of plaintiff, the defendant Camp appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, RICH, STAPLETON, and PUTNAM, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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Geo. Ed. Joseph, of New York City (John F. Valieant, of New York City, on the brief), for appellant.

Barclay E. V. McCarty, of New York City, for respondent.

THOMAS, J. Frederic E. Camp, who was the executor of the estate of Hugh N. Camp, made a written contract with McCarty & Baldwin, lawyers, whereby they were employed to secure awards for certain lands and to reduce assessments thereon, with the promised compensation of 10 per centum of awards and one-quarter of the amount of reduction in assessments, with a further provision that they should be paid nothing "in case no award shall be obtained or assessment reduced." The lawyers conveyed their interest in the contract to the plaintiff, and the defendant is the executor of the will of Frederic E. Camp. After the lawyers had made material progress, they were without cause dismissed, and others retained, and in the end there was an award for land and a reduction of assessment. The plaintiff has recovered the full compensation reserved by the contract and by virtue of it.

The essential question is whether an action on the contract may be maintained. The appellant insists that, although the contract was lawful and bound the lawyers, it bound the client only to such time as he saw fit to discharge them, to whom he would, in that case, owe a sum equal to the value of services rendered. In that view the contract continues at the will of the client, and may be terminated by the latter at any instant preceding the completion of the entire work, and thereupon the lawyer must, gathering such data as he may, carry the burden of proving the value of his services. What, if any, is the primary reason that peculiarly excludes members of one profession from the usual rule that a legally existing contract binds the parties to it? The contract is lawful. If it be executed, it is respected. It binds the attorney in duration of service to the full quantity of required achievement, and limits him to the stipulated compensation, whatever the magnitude of the labor.

[1] But undoubtedly, for good cause, either party may dissolve the relation, and the client may do it without cause. But what rational conclusion depends upon the admitted premise?

[2] The contract creates the same relation that arises from a general retainer. It is immaterial that a formal contract more precisely sets bounds to the service. In either case the law permits the client to revoke the duty imposed on the lawyer and confide it to another. The lawyer, properly mindful of the spirit of his profession, may not accuse the client even of erring judgment, and, if there be no stipulation to the contrary, must accept such compensation as he has earned, for he knew that his client's whim might dissociate him in whole or in part from the matter in hand. The vicissitudes and shifting phases of litigations require lawyers of varied capacities and aptitudes, and it may be well that the client should have discretion in making use of men and opportunities. And so the law permits the client to retain and to dismiss his lawyer without reason given, and to pay him for services rendered. That is a full protection

to the client, and needs and merits nothing more. But may not the client waive his right to pay as for the value of the service?

[3] Shall he, as well as the lawyer, be prevented from fixing the compensation? The law gives the client the right to retain a lawyer and to pay him upon a quantum meruit. But, from prudence or necessity not pursuing that course, he makes a contract to pay a gross sum for the lawyer's services, for instance \$100 for trying a case or 10 per cent. on the amount of a favorable verdict. By what assumption of overlying privilege may the client assert that, although he did not stipulate for payment for services upon quantum meruit and did agree to pay an exact amount therefor, he may repudiate what he agreed to pay and adopt a method of payment that is the opposite of and wholly inconsistent with that for which he contracted? For agreement to pay an exact sum cannot coexist with an agreement expressed or implied to pay upon quantum meruit. So the dismissal is not a breach of the contract, and action upon quantum meruit does not lie. The lawyer recovers pursuant to his contract or not at all. There is a consideration for the client's agreement to pay the fixed sum.

[4] The attorney foregoes his right to sue on quantum meruit, and agrees rather to accept a sum in liquidation, and in the case at bar he agreed that he should receive payment only from the money obtained. And how, theoretically, could he sue on quantum meruit? The client could answer that he agreed to pay him a percentage of the recovery. What answer could the lawyer make to that? That the client had broken the contract? No. For the client has not broken the contract, but has, according to his right, dissolved the relation. The contract is that the client may hold the lawyer to the entire service or may dismiss him at will, but that the compensation shall depend upon recovery. But it may be urged that, if the plaintiff may use the contract for recovery, the value of the client's right to change his lawyer is lost or valueless. That is an erroneous conception. He may substitute another lawyer. His right to do so is not abrogated. But he must pay the first lawyer in the way he agreed to pay him, and not in the way he agreed not to pay him. He has by contract put the lawyer in the predicament that he may recover only in case his client recovers, whether he keeps him or discharges him, as he may rightfully do without any breach of the contract. For it is not in derogation of a contract to substitute another lawyer. But it is an impairment of it to refuse the superseded lawyer the payment the contract provides. The client's error is that he would exercise his right at the expense of the lawyer's right to be paid as the contract requires. The lawyer must abide the contract, not only as to services, but also as to compensation for them. The client may of right preclude rendition of the service, but he should not be permitted to preclude payment as the contract exacts of him and the lawyer. This conclusion is in accord with *Carlisle v. Barnes*, No. 1, 102 App. Div. 573, 580, 581, 92 N. Y. Supp. 917. Upon an application for leave to appeal to the Court of Appeals, the Chief Judge of that court denied the same. *Carlisle v. Barnes*, 183 N. Y. 272, 76 N. E. 27. Why

deny it if the decision was erroneous? The case, decided in 1905, was considered approvingly in discussion in *Matter of Albers Realty Co.*, 140 App. Div. 277, 279-281, 125 N. Y. Supp. 179. It was followed by Mr. Justice Bischoff in *Keller v. Faber*, N. Y. Law Journal, Oct. 30, 1908, p. 464. The principle was enunciated in *Marsh v. Holbrook*, 3 Abb. Dec. 176, where the agreement was that the attorney should have, as compensation for his services, a gross sum if he succeeded in the case. The client settled for a sum less than that involved, and it was decided that the agreement was valid, and a recovery upon the basis of the contract was sustained, although the amount was abated in accord with the sum received by the client. It was said that the client was not debarred by the agreement from settling the case; that thereby the litigation was terminated; but that did not put an end to the contract. The client took the matter from the lawyer, thereby preventing the lawyer from going forward and essaying the recovery of the whole sum. Two members of the court considered that the plaintiff was entitled to recover the whole contract price, and such seems to be the thought in the opinion of James, J., although Woodruff, J., stated that it was not necessary to decide it as the plaintiff had not appealed. But the action was sustained as distinctly one to recover the value of the contract and not on quantum meruit.

In *Barney v. Fuller*, 133 N. Y. 605-608, 30 N. E. 1007, 1008, it is said with reference to the admissibility of evidence of the value of legal services:

"The defendants seem to rely for the exclusion of such evidence mainly upon the case of *Marsh v. Holbrook*, 3 Abb. Dec. 176, where the plaintiff claimed a special agreement whereby the defendants agreed to pay him for legal services the sum of \$5,000, 'if he got the case.' Upon the trial, the defendants did not dispute the special agreement, and in fact admitted it. Under such circumstances, the court did not err in excluding evidence as to the value of the services."

Reference is made to *Matter of Dunn*, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536, where the question was whether an attorney, declining to continue his service to receivers of his client, could, in deprivation of compensation and lien, be required to deliver papers to substituted attorneys. In the course of the argument the right of a client to discharge his attorney was stated with a reference to *Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263, wherein issue was the right of an attorney to recover for services in a proceeding from which he had withdrawn upon the introduction of counsel objectionable to him. The client sought to continue him. The essential question was whether the lawyer was in the wrong. It was said, and said necessarily, that the contract was entire as to him, and it was stated unnecessarily that the contract was not entire as to the client. The contract was not for a stipulated sum, and the action was to recover for services rendered. So, when Judge Earl said that a "client may discharge his attorney, arbitrarily, without any cause, at any time, and be liable to pay him only for the services which he has rendered up to the time of his discharge," the statement was not relevant to the question under consideration, nor was it subject of

comment in *Matter of Dunn*. While any observation of Judge Earl is entitled to careful consideration, its materiality to the matter under discussion must determine its authority. There was citation to decisions. *Ogden v. Devlin*, 45 N. Y. Super. Ct. 631; *Trust v. Repoor*, 15 How. Prac. 570; *Gustine v. Stoddard*, 23 Hun, 99. Those decisions sustain the power to dismiss an attorney, but do not, so far as appears, relate to the question under discussion.

In *Johnson v. Ravitch*, 113 App. Div. 810, 100 N. Y. Supp. 1123, this court passed upon the amount for which an attorney should have a lien, where he was superseded by another attorney. The first attorney had an agreement that his compensation should be 50 per cent. of the recovery, but the "fixing of such compensation was voluntarily submitted to the court by both sides." It appears that upon the appeal the attorney asked that his lien and contract "be in no wise impaired by this order, but remain in full force and effect." That was inconsistent with the invitation to the court to fix the compensation. The compensation could not be fixed and at the same time be left dependent on recovery. But Justice Gaynor did write in effect that the client could dismiss him, and that in such case the compensation would be for services actually rendered, and that the contract was subject to that rule. But the statement, even if necessary to the decision, is not in accord with current judicial thought.

In *Andrewes v. Haas*, 160 App. Div. 421, 144 N. Y. Supp. 1060, recently decided by this court, there was no recovery by the client whereby the attorney's compensation could be computed.

[5] It is objected that the statute of limitations precludes maintenance of the action. If the action may be based on the contract, the terms of it must be observed. Obviously plaintiff could not prove a percentage of the recovery until the amount of it should be known. And, since such knowledge came, the statute has not run.

The judgment, in so far as appealed from, should be affirmed, with costs. All concur, except STAPLETON and PUTNAM, JJ., who dissent.

STAPLETON, J. I dissent, upon the authority of *Johnson v. Ravitch*, 113 App. Div. 810, 100 N. Y. Supp. 1123. In that case the attorney had an express contract for a fixed percentage of any sum recovered by settlement or judgment. The court there affirmed an order fixing the compensation upon the basis of the reasonable value of services actually rendered up to the time the order was made, upon the client's motion for the substitution of another attorney. This court then said:

"Every attorney enters into the service of his client subject to the rule that his client may dismiss or supersede him at will; and, if he makes a contract for future services to his client, it is necessarily subject to such rule, and made with full knowledge that he may never perform such service, for the reason that his client may not keep him, and that in that event he will not be paid therefor, but will be entitled to compensation only for the services he has actually rendered."

The prevailing opinion questions the necessity of the observation quoted, proclaims it to be discordant with current judicial thought, and

asserts that both the parties voluntarily submitted the controversy to the court. My view is that the observation was essential to the decision, because, if the ordinary rule of damage relating to breach of contract prevailed, the court had no power to limit the damage to the reasonable value of the services actually rendered. This it did, and in doing so it decided the only question presented. The last expression of the judicial thought of the highest court is:

"That the relationship of attorney and client, which has been given a peculiar and confidential character, is subject to principles and rules which do not apply to an ordinary contract." *Matter of Dunn*, 205 N. Y. 398, 405, 95 N. E. 914, Ann. Cas. 1913E, 538.

See, also, *Andrewes v. Haas*, 160 App. Div. 421, 144 N. Y. Supp. 1060.

I think the rules and principles which are peculiar were stated in *Johnson v. Ravitch*, supra. Why, in a contract between attorney and client, is the right of the client to break the contract emphasized if the consequences are the same as attend the breach of an ordinary contract? Does the making of an express contract for compensation, fixed or contingent, destroy the reason for the rule which the courts have formulated with a peculiar relationship for its foundation? The attorney in *Johnson v. Ravitch* did not submit his rights voluntarily. He was haled to court by his client, seeking a substitution, and asking for a fixation of his compensation, which the attorney had the right to believe would be fixed according to legal principles which would be applied alike either in an action or a special proceeding. Unless we were in error in the case discussed, it is a precise authority for the defendant here.

In *Carlisle v. Barnes*, No. 1, 102 App. Div. 573, 92 N. Y. Supp. 917, while the chief question litigated was the existence of a contract, it must be conceded that the question of the proper measure of damage on a breach was decided according to principles applicable to the breach of an ordinary contract. We decided *Johnson v. Ravitch* the other way, presumably with that authority before us. All that it was necessary to decide in *Matter of Albers Realty Co.*, 140 App. Div. 277, 125 N. Y. Supp. 179, was that an attorney's lien did not attach to a client's claim until the commencement of a proceeding to enforce or adjudicate it.

In *Marsh v. Holbrook*, 3 Abb. Dec. 176, all that was decided was that when an attorney did all the work he engaged to do, and his client accepted a satisfactory sum in settlement of his claim, the attorney could recover that proportion of the agreed compensation which the amount accepted in settlement bore to the amount claimed.

PUTNAM, J., concurs.

WEINSTOCK v. HALLENBECK et ux.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

FRAUDULENT CONVEYANCES (§ 208*)—WHAT CONSTITUTES.

A conveyance by a husband to his wife cannot be attacked by subsequent creditors as fraudulent, unless it caused insolvency upon the part of the husband as to his existing creditors, or was made with the intent of defrauding subsequent creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 631, 633; Dec. Dig. § 208.*]

Appeal from Special Term, Kings County.

Action by Leon C. Weinstock against Emanuel Hallenbeck and wife. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and RICH, JJ.

J. W. Van Gordon, of New York City (William S. Evans, of New York City, on the brief), for appellants.

John H. Regan, of New York City, for respondent.

PER CURIAM. The conveyance of the property on Sixtieth street and Third avenue in the borough of Brooklyn was made by Emanuel Hallenbeck to his wife, Marie Hallenbeck, by deed dated May 31, 1911, and found to have been recorded on June 1st of that year. The debt upon which plaintiff recovered his judgment against Emanuel Hallenbeck is alleged to have arisen between December 1, 1911, and January 15, 1912. The allegation of the complaint that plaintiff has exhausted his legal remedy by the due issuing of an execution upon said judgment and its return unsatisfied is denied in the answer and unsupported by any proof whatever. Without passing upon the sufficiency of the alleged consideration for such conveyance, the evidence fails to clearly establish that its effect was to produce insolvency upon the part of Emanuel Hallenbeck as to his then existing creditors, or that as to subsequent creditors the fraudulent intent was clearly and satisfactorily established. *Todd v. Nelson*, 109 N. Y. 316, 16 N. E. 360. We think that the judgment must be set aside. Upon a new trial it may be that further and more satisfactory evidence respecting the issues herein may be produced.

Judgment reversed, and new trial granted; costs to abide the final award of costs.

VILLA PARK ASS'N OF GREAT NECK v. TOWN OF NORTH HEMPSTEAD et al.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

WATERS AND WATER COURSES (§ 183½*)—PUBLIC WATER SUPPLY—WATER DISTRICTS—POWERS OF OFFICERS.

Under Transportation Corporations Law (Consol. Laws, c. 63) § 81, authorizing town boards to establish water supply districts within their towns outside of cities or incorporated villages and contract for water supply, and declaring that in the case of an incorporated village the con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tract shall be made by the board of trustees, or under Village Law (Consol. Laws, c. 64) § 89, by the board of water commissioners, if in existence, a town board establishing a water supply district of territory including no incorporated village and contracting for a water supply may not, after the incorporation of a village in the territory, make a contract for water supply for the territory including the village, and a contract so far as it includes the village is void, and any assessment imposed or tax levied on property within the village for the expenses incurred is invalid.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 183½.*]

Submission of controversy on agreed statement of facts between the Villa Park Association of Great Neck as plaintiff and the Town of North Hempstead and others as defendants. Judgment for plaintiff.

Argued before JENKS, P. J., and BURR, CARR, RICH, and STAPLETON, JJ.

William R. Conklin, of New York City (John Reid, Jr., of New York City, on the brief), for plaintiff.

George B. Stoddart, of Mineola, for defendants.

BURR, J. The parties to this controversy have agreed upon a case containing a statement of the facts on which it depends, and have submitted the same pursuant to the provisions of section 1279 of the Code of Civil Procedure.

On July 14, 1902, certain taxpayers of the town of North Hempstead presented to the town board a petition for the formation of a water supply district to be known as the Great Neck Water Supply District, and on the 23d day of the same month a certificate, executed by the proper officers of said board in accordance with the provisions of the then existing Transportation Corporations Law (General Laws, c. 40 [Laws of 1890, c. 566] § 81, and the acts amendatory thereof), was filed in the office of the town clerk, which certificate described the boundaries of such district. On July 20, 1905, said town board entered into a contract in writing with the Manhasset Water Company, by which the latter agreed, upon certain terms therein specified, to furnish a supply of water for fire purposes within said district, for a period of five years. On July 13, 1906, the Manhasset Water Company became duly merged with the defendant the Citizens' Water Supply Company of Newtown, a domestic corporation, organized and existing under the transportation corporations laws of this state, and said Citizens' Company became possessed of all the property, rights, privileges, and franchises of said Manhasset Water Company, including said contract. On April 28, 1911, a portion of the territory included within the boundaries of the Great Neck Water Supply District was set apart and incorporated as a village, known as the village of Great Neck Estates. Thereafter and about the 6th day of July, 1911, the town board of defendant the town of North Hempstead assumed to enter into and did execute a contract in writing with defendant the Citizens' Water Supply Company, for a period of five years from the 1st day of July, 1911, to furnish a supply of water for the purpose of extinguishing fires during the entire territory original-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ly included in the Great Neck Water Supply District, including that portion thereof within the boundaries of the village of Great Neck Estates. Plaintiff is a domestic corporation, and is the owner of improved real estate situated within the confines of said village. All of the real property in said village, together with the real property situated in the said water supply district, has been assessed and a tax levied thereon for the rental or expense provided to be paid under said contract for the years 1911, 1912, and 1913. The tax for 1911 and 1912 has been paid by plaintiff, and it seeks no relief on account thereof in this proceeding. On October 27, 1913, a petition was presented to the town board, asking that said assessment for the year 1913 be canceled as against all property in the village of Great Neck Estates, and upon its refusal so to do this proceeding was brought by plaintiff in its own behalf, and in behalf of all others similarly situated, to determine liability to assessment, and to have the tax levied upon the property in said village for expenses incurred under said contract set aside.

We think that the contract of July 6, 1911, made by the town board of the town of North Hempstead with the water supply company was invalid, at least so far as it assumed to affect territory lying within the then incorporated village of Great Neck Estates. The Transportation Corporations Law then in force (Consolidated Laws, c. 63 [Laws of 1909, c. 219] § 81) provided that in the case of an incorporated village such contract shall be made by its board of trustees. Under the Village Law (Consolidated Laws, c. 64 [Laws of 1909, c. 64] § 89), unless the village has a separate board of water commissioners, the powers and duties of such commissioners devolve upon its board of trustees, and among such specified duties is to contract in the name of the village with an individual or corporation for supplying water to the village for extinguishing fires, or for other purposes (*Id.* § 220). Under the Transportation Corporations Law (*supra*, § 81), the power of the town board to establish a water supply district within such town is restricted to such portion of its territory as lies outside of a city or incorporated village therein. It is true that when the Great Neck Water Supply District was originally established there was no incorporated village included within its boundaries. Whether the subsequent incorporation of the village of Great Neck Estates automatically operated to change the boundary of said district, leaving the residue of the territory included therein still in existence as such district, or whether it is necessary for the town board, by affirmative action, to establish a new district, we need not now determine. The fact that it had established such district would certainly not prevent subsequent incorporation of a part of the territory included therein as a village or city.

It seems to us quite clear, therefore, that the town board, after the incorporation of the village of Great Neck Estates, had no power or authority to make contracts for water supply as to the territory lying within the limits of said village. If so, so much at least of said contract was void, and any assessment imposed or tax levied growing out of expenses incurred in connection therewith is invalid. People ex

rel. Tupper Lake Water Co. v. Sisson, 75 App. Div. 138, 77 N. Y. Supp. 376, affirmed on opinion below 173 N. Y. 606, 66 N. E. 1115; Suburban Electric Light Co. v. Town of Hempstead, 38 App. Div. 355, 56 N. Y. Supp. 443; Matter of Rhinehart v. Redfield, 93 App. Div. 410, 87 N. Y. Supp. 789.

Plaintiff is entitled to judgment upon the submitted case, canceling the assessment and tax for the year 1913, but, under the terms of the submission, without costs. All concur.

PEOPLE ex rel. MACNISH v. WALDO, Police Com'r.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

1. MUNICIPAL CORPORATIONS (§ 189*)—POLICE—THREE PLATOON LAW—DRILLING.

Under the Three Platoon Law (Laws 1911, c. 360) § 1, providing for the sergeants, roundsmen, and patrolmen of a city police force, who may be on duty in the open air, being divided into three platoons; that no one of such platoons, or any member thereof, shall be assigned to more than one tour of duty, such tour of duty not to exceed 8 hours of each successive 24 hours, nor more than 8 hours of reserve duty of each consecutive 72 hours, excepting that in enumerated emergencies (none of which have anything to do with drills), they may be continued on duty for such hours as may be necessary; and section 3, providing policemen while on reserve duty, as mentioned in section 1, shall not be required to render any service, and shall be free to retire for sleep, except in case of an emergency—one of such policemen may not be required to drill during his 16 hours a day of time off, or while on reserve duty.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 487, 523, 524; Dec. Dig. § 189.*]

2. MUNICIPAL CORPORATIONS (§ 185*)—POLICE—DISCHARGE—DISOBEYING ORDER VIOLATING LAW.

A policeman may not be dismissed for disobedience of an order violating the Three Platoon Law (Laws 1911, c. 360).

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 492-509; Dec. Dig. § 185.*]

Putnam, J., dissenting.

Certiorari, by the People, on the relation of Robert MacNish, to review the determination of Rhinelander Waldo, as Police Commissioner of the City of New York. Determination annulled.

Argued before JENKS, P. J., and THOMAS, RICH, STAPLETON, and PUTNAM, JJ.

Florence J. Sullivan, of New York City, for relator.

James D. Bell, of Brooklyn (Frank Julian Price, of Brooklyn, on the brief), for respondent.

STAPLETON, J. The relator was a member of the police department of the city of New York. His rank was that of patrolman. At about 12:15 a. m. on May 9, 1913, he was ordered by the lieutenant at the 174th precinct, where he was stationed, to report for drill instructions at the Thirteenth Regiment Armory at 3 p. m. of the same day.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The drill consisted of marching, and during the drill the men were under the directions of their superior officers. The relator did not report for drill as directed, and for his failure so to do he gave the following written reason:

"I did not attend drill this P. M., the same being my time off and in [sic] the same being in violation of law."

He was put on trial for disobedience of orders, found guilty as charged, and dismissed the force on June 4, 1913. He brings this writ of certiorari to review the determination in that proceeding. The facts are admitted, but the relator contends that the order was not a lawful order, and that he was therefore free to ignore it. He submits that the order was void, inasmuch as it was violative of chapter 360 of the Laws of 1911, entitled, "An act to promote the health and efficiency of policemen in cities of the first and second class," and popularly known as the Three Platoon Law. The sections of that law which have particular relation to this case are:

"Section 1. * * * The commissioner of police, * * * or other officer or officers, having the management, control or direction of the police force of any city of the first or second class in this state, shall divide the sergeants, roundsmen, and patrolmen of such force * * * who may be on duty in the open air, on the streets or other public places of the city, into three platoons. No one of such platoons nor any member thereof shall be assigned to more than one tour of duty; such tour of duty shall not exceed eight hours of each consecutive twenty-four hours, nor more than eight hours of reserve duty of each consecutive seventy-two hours, excepting only that in the event of strikes, riots, conflagrations, or occasions when large crowds shall assemble, or other similar emergency, or on a day on which an election authorized by law shall be held, or for the purpose of changing tours of duty, so many of said platoons, or of the members thereof, may be continued on duty for such hours as may be necessary. * * *

"Sec. 3. Policemen, while on reserve duty as mentioned in the first section of this act, shall not be required to render any service except in case of an emergency, and shall be free to retire for sleep during reserve duty in their station house, subject to call in case of an emergency. For the purpose of this act, an emergency shall be defined as enumerated in section number one of this act."

[1] So far, this law has not been the subject of judicial interpretation; but on March 2, 1912, the Attorney General gave an official opinion in which he said:

"Beyond all doubt it is the evident and clear purpose of section 1 of the statute under examination to limit the active service or duty of such sergeants, roundsmen, and patrolmen to only 8 hours in each consecutive 24 hours. There is no substance in the suggestion that the forced performance of drill duty within the 24 hours in which such sergeants, roundsmen, and patrolmen have already performed their regular 8-hour tour of duty is not active or service within the provisions of section 1 of chapter 360 of the Laws of 1911. If such policemen are not on active duty, they must be deemed on reserve duty, but, according to section 3, * * * 'while on reserve duty' they 'shall not be required to render any service except in case of an emergency and shall be free to retire for sleep during reserve duty in their station house, subject to call in case of emergency.' * * * Under section 1 emergencies are defined as 'strikes, riots, conflagrations or occasions when large crowds shall assemble, or other similar emergency, or on a day on which an election authorized by law shall be held.' This compulsory drilling is clearly not an emergency provided for in section 1 of this law, nor is such compulsory drilling permitted or authorized by section 2 of the law

under consideration. I am therefore of the opinion that officials * * * are without authority to require any sergeant, roundsmen, or patrolmen of such force to perform drill duty or to go to certain designated places in order to receive instructions in drilling in addition to and within the 24 hours in which such policemen have already performed their regular 8-hour tour of duty."

This opinion is in accord with the intendment of the statute, which clearly meant, by the provisions of section 1, to limit the active duty of the designated officers to 8 hours in every 24 consecutive hours, except in the event of certain specified emergencies, of which drilling was not one. The exemption from active work applied to the remaining 16 hours; but lest, because of the physical presence of the men in the station, there should be any uncertainty as to their rights while on reserve duty, it was provided by section 31 that while on reserve duty, they shall be free to retire to sleep, subject to call in the event of the emergencies specified.

The respondent, in a supplemental memorandum, calls attention to the case of *People ex rel. Gallagher v. Waldo*, decided in the First Department, a memorandum of which appears in 144 N. Y. Supp. 1138. The memorandum reads:

"Writ dismissed, and proceedings affirmed, with \$50 costs and disbursements. No opinion."

That case is distinguishable from the present one. There the relator, who was a police sergeant, was relieved from active duty at midnight. He was then free until 8 a. m., and could have gone home if he cared to; but as he lived out of town he slept in the station instead of going home. Around 12:20 a citizen complained of having been insulted by a police sergeant in the toilet of the station, and Gallagher, who at this time was upstairs in his nightshirt, was directed by the lieutenant to come down to the desk to be confronted by the accuser. He refused to do so, saying, "They can see me on my tour at 8 o'clock." He was tried for insubordination and dismissed from the force. The charge against him was not that he refused to perform extra duty, but that he refused to appear at the desk to be confronted with a person who had accused a police sergeant of an offense, he being the only one of the three sergeants who had not appeared before the accuser.

With the policy of this legislation or the effect of it upon the administration of the police department, we have no official concern. We are to decide the law as it is written, and when it is written plainly, as in the case of this statute, our sole guide is the statute itself. The commissioner and the commanding officer of the department are creatures of the written law, and they have no authority except that expressly conferred by the law or necessarily incidental to the proper discharge of the powers expressly conferred.

The first impression is to recoil from the suggestion that a subordinate in a department, for the proper management of which discipline is essential, may construe a statute, and, if his construction is correct, disobey with impunity an order of a superior given in violation of the statute. But the law is on the books and must be given effect. It is not sufficient to say that a penalty is prescribed for its vio-

lation, and that its life must be preserved solely by that means. Those concretely interested in its enforcement are not required to wait until some jury agrees with the policy of the Legislature. They may, as good citizens, refuse everywhere, at any time, to aid in its violation by obeying orders given in defiance of its provisions.

[2] We are constrained to hold that a member of the police force may not be dismissed for disobedience of an order which violates the provisions of chapter 360 of the Laws of 1911.

The determination of the police commissioner is annulled, with \$50 costs, and the relator reinstated.

THOMAS and RICH, JJ., concur. JENKS, P. J., concurs in the result in a separate memorandum. PUTNAM, J., reads for confirmation.

JENKS, P. J. I agree with my Brother PUTNAM in his interpretation of the statute, but I am against affirmance because as a result the relator is dismissed the force. As I read the record, his action was to make a test case in order that his duties and his rights as prescribed by a statute in direct regulation of the police force would be determined by the court. The question is substantial, and our difference indicates it is serious. Under the circumstances, I think that the relator should not be dismissed the force for disobedience of orders. My opinion is limited to the peculiar facts of this case, and does not involve the general proposition that a policeman may refuse obedience to orders or to regulations perforce of his personal view of the law.

PUTNAM, J. (dissenting). Patrolmen have as "time off" the intervals that may come between the tour of duty on patrol and the period of reserve, or between two successive tours upon patrol. If between patrol tours there come 8 hours on reserve, which may be once in 72 hours (section 1), the "time off" may be but four consecutive hours; if no reserve duty intervenes, the patrolman may have 16 running hours as "time off." A clear distinction is made between "reserves" and men off all duty, enjoying "time off." "Reserve duty" is for those patrolmen who once in three days are not in the open air or on streets or public places, but are held at the station houses for emergencies. Section 3 declares that such policeman "while on reserve duty"—a condition not left vaguely—but "as mentioned in the first section of this act," that is, such men held for duty at the station houses, "shall not be required to render any service, except in case of an emergency, and shall be free to retire for sleep during *reserve* duty in their station house, subject to call in case of an emergency." The relator was not on *reserve* duty when he was ordered to report for drill. This Three Platoon Law did not relieve him from obedience to the rules of the department. Section 6. Not being one of those within the exemption of section 3, who are those held on reserve duty, he was not justified in refusing to report for drill. Such seems to me the literal construction. It allows a needed rest to the men held on duty at the stations. It is also designed to prevent the reserves from being

depleted by details to outside work. I think this act did not discharge from obedience all policemen during their "time off." Seven hours of drill in a year seems reasonable, in order to maintain police discipline and efficiency.

Hence I vote to confirm.

(84 Misc. Rep. 557)

SWEENEY v. NASSAU ELECTRIC R. CO.

(Supreme Court, Special Term, Kings County. March, 1914.)

1. STATUTES (§ 47*)—STATUTORY PROVISIONS—COMPLETENESS.

While in Judiciary Law (Consol. Laws, c. 30) § 480, added by Laws 1913, c. 603, providing that "if in an action * * * for a personal injury * * * an attorney having or claiming to have a lien * * * who shall have appeared for the person" having or claiming the right of action no settlement or adjustment shall be valid unless consented to by the attorney or approved by the court, the conditional clause is incomplete, the legislative intent is sufficiently indicated, and the defect may be remedied by inserting "there is" before "an attorney" in the quoted portion.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.*]

2. CONSTITUTIONAL LAW (§ 276*)—DEPRIVATION OF LIBERTY TO CONTRACT.

The right of a plaintiff of full age and sound mind, however ignorant, to settle an action as he pleases, is a property right protected by the Constitution, of which the Legislature cannot deprive him by making its exercise subject to the approval of his attorney or the court, though it may limit his power to settle the action for the protection of his attorney's claim for services.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 845, 846; Dec. Dig. § 276.*]

3. COMPROMISE AND SETTLEMENT (§ 2*)—STATUTORY REGULATION.

Judiciary Law (Consol. Laws, c. 33) § 480, added by Laws 1913, c. 603, relative to settlements of actions for personal injuries without the consent of plaintiff's attorney or an order of the court, was not intended to protect ignorant plaintiffs from settlements induced by unscrupulous defendants, but to protect attorneys from collusive settlements by their clients, and did not apply where it did not appear that the attorney had or claimed any lien, that defendant had notice of any such claim, or that plaintiff was not willing to satisfy his attorney's claim.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 1-4; Dec. Dig. § 2.*]

Action by Patrick Sweeney against the Nassau Electric Railroad Company. On demurrer to a defense in the answer. Demurrer overruled.

Joseph F. Maguire, of Brooklyn, for plaintiff.

George D. Yeomans, of Brooklyn, for defendant.

SCUDDER, J. Plaintiff, by an attorney, commenced an action against defendant to recover damages for personal injuries. Defendant in its answer pleaded as a defense that subsequent to the service of the summons the plaintiff, for valuable consideration, executed an instrument releasing and discharging defendant from liability upon

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the cause of action set up in the complaint, and that such settlement or adjustment was made without the consent of plaintiff's attorney. To this defense plaintiff, by his attorney, demurred, on the ground that it was insufficient in law.

[1] The demurrer is based upon section 480 of the Judiciary Law, a new section added to the Judiciary Law by Laws 1913, c. 603. This section reads as follows:

"Sec. 480. Settlement of Actions for Personal Injury. If, in an action commenced to recover damages for a personal injury, or for death as the result of a personal injury, [there is] an attorney having or claiming to have a lien for services performed or to be performed who shall have appeared for the person or persons having or claiming to have a right of action for such injury or death, no settlement or adjustment of such action shall be valid, unless consented to in writing by such attorney and by the person or persons for whom he shall have appeared, or approved by an order of the court in which such action is brought."

The conditional clause which constitutes the first portion of the sentence of which this section is composed is defective in that the predicate is omitted. The language employed, however, sufficiently indicates the legislative intent to enable the court to remedy the defect by construction. The words "there is" in brackets in the above quotation have been inserted by me to indicate my understanding of what the Legislature intended.

[2, 3] It was not the purpose of the Legislature in passing this act to protect ignorant plaintiffs from being prevailed upon by unscrupulous defendants to settle meritorious causes of action for inadequate amounts. A plaintiff of full age and sound mind, however ignorant he may be, cannot be deprived of his right to settle an action as he pleases. Such right is incident to his absolute ownership of the cause of action. It is a property right protected by the Constitution, and the Legislature is without power to deprive him of such right by making its exercise subject to the approval of his attorney or of the court.

It is within the power of the Legislature, however, to protect the claim of plaintiff's attorney for services performed, or to be performed, in such an action by limiting plaintiff's power to settle the action.

Both the common law and the courts in the exercise of their equitable powers seek to secure to an attorney his fees and costs. By the common law an attorney by commencing an action acquires no lien on the cause of action. The lien only arises after judgment. But where before judgment the parties make a settlement of the action collusively for the purpose of defrauding the attorney out of his costs, the courts have been accustomed to intervene and to protect the attorney by permitting him to proceed with the action, and, if he is able to establish a right to recover on the cause of action as it originally stood, to permit such recovery to the extent of his costs in the action. *Randall v. Van Wagenen*, 115 N. Y. 527, 532, 22 N. E. 361, 12 Am. St. Rep. 828; *Coughlin v. N. Y. C., etc., R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75. The courts, however, recognize the plaintiff's right to control the management of his own cause, and to

determine when the litigation shall cease, provided he is willing and able to satisfy his attorney's just claims. *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 27 N. E. 1018.

Section 480 of the Judiciary Law is to be construed in the light of the law as it stood at the time of its enactment. It is apparent from language of this statute that its purpose is to protect attorneys who conduct personal injury and death cases from collusive settlements by their clients. By its terms it is only when the attorney has or claims to have a lien that his consent in writing or the approval of the court is necessary to the validity of the settlement.

This construction of the statute disposes of plaintiff's demurrer. It does not appear from the defense demurred to that the settlement which it sets up is within the statute. It is not alleged therein that plaintiff's attorney has, or claims to have, a lien for services, or that defendant had notice of any such claim, or that plaintiff is not willing and able to satisfy his attorney's just claims.

Demurrer overruled, with costs.

BARRETT v. JOHN V. SCHAEFER, JR., & CO., et al.

(Supreme Court, Appellate Division, Second Department. April 10, 1914.)

1. MECHANICS' LIENS (§ 146*)—NOTICE OF LIEN—VALIDITY.

Under Lien Law (Consol. Laws, c. 33) § 3, giving contractors, subcontractors, laborers, or materialmen a lien, and section 9, requiring the notice of lien to state the name and residence of the parties, the labor performed or to be performed, or materials furnished or to be furnished, and the agreed price or value thereof, and section 10, authorizing the filing of notice of lien during the progress of the work or furnishing of the materials, or within 90 days after the completion of the contract, a notice of lien by a materialman, which shows that he furnished millwork for a building for a specified value or agreed price, and which recites "the time when the first item of work was performed or materials furnished" and "the time when the last item of the work was performed or materials were furnished," was valid as a notice of a lien for materials, though in the alternative form, and the averments therein as to items of work must be ignored as surplusage.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 246-252; Dec. Dig. § 146.*]

2. MECHANICS' LIEN (§ 139*)—NOTICE OF LIEN—VALIDITY.

A notice of lien, which sets forth the labor performed and to be performed, and the materials furnished and to be furnished, and the agreed price and value of the labor and material, and a total agreed price and value of the labor and material and the amount unpaid, with a statement when the first and last items of work were performed and the first and last items of material were furnished, showed that the amount due the lien claimant was stipulated, justifying the inference that there was an entire agreement to furnish the material and do the work for the aggregate amount, of which amount the sum specified as unpaid was due, and was sufficient under the lien law (Consol. Laws, c. 33).

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 234-236; Dec. Dig. § 139.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MECHANICS' LIENS (§ 202*)—ASSIGNMENTS—VALIDITY—STATUTORY PROVISIONS.

An instrument, whereby a building contractor assigned to a third person all his rights, to the extent of a specified sum, in the balance and final payments, as per statements attached, which would become due under a contract for the erection of buildings and which authorized and directed the owner to pay the third person the specified sum and to deduct the same from the final payments and balance on contract when due, and appointed the assignee attorney in fact with power to collect from the owner the specified sum and to execute a proper receipt, does not give the assignee the right to assert a lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 375; Dec. Dig. § 202.*]

4. MECHANICS' LIENS (§ 202*)—ASSIGNMENTS—VALIDITY—STATUTORY PROVISIONS.

The instrument may not be sustained as a valid assignment under Lien Law (Consol. Laws, c. 33) § 15, authorizing assignments of contracts when there was a failure to file the contract or a statement of the substance thereof or a copy of either, and the instrument, if deemed an equitable assignment, as being an order for payment of money, is not enforceable because still subject to section 15.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 375; Dec. Dig. § 202.*]

Jenks, P. J., and Rich, J., dissenting in part.

Appeal from Special Term, Westchester County.

Action to foreclose a mechanics' lien by Edward P. Barrett against John V. Schaefer, Jr., & Co., and others. From a part of the judgment plaintiff appeals, and from the whole of the judgment certain of the defendants appeal. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, RICH, and STAPLETON, JJ.

Henry R. Barrett, of White Plains, N. Y. (Henry W. Eaton, of New York City, and Floyd M. Grant, on the brief), for plaintiff.

Victor E. Whitlock, of New York City, for defendant Hudson Trust Co.

Norbert Heinsheimer, of New York City, for defendant Traitel Marble Co.

Wilson R. Yard, of Pleasantville, for defendants Marshall & Hufcutt and others.

William A. Moore, of New York City, for defendants Mezullo and others.

Otto A. Samuels, of New York City, for defendants Craig & Brown.

PER CURIAM. This is an action to foreclose a mechanic's lien. The controversy presents attack and counter attack by various of the alleged lienors upon the ground of fatal defects in many of the liens. There are four liens which we will discuss, because upon the question of their validity the court is not in agreement. Two are filed by the plaintiff Barrett, one by the White Plains Trim Company, and one by the Lieberman & Sanford Company. All the liens save these are valid.

[1] The defect asserted to exist in the two notices of lien filed by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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the plaintiff Barrett arises from the statement contained in the notices that:

"The time when the first item of work was performed or materials furnished was on the 20th day of May, 1910, and the time when the last item of such work was performed or materials were furnished was on the 7th day of February, 1912."

The corresponding requirement of the Lien Law (section 9, subd. 6, c. 38, Laws of 1909, constituting chapter 33 of the Consolidated Laws) reads:

"The notice of lien shall state: * * * The time when the first and last items of work were performed and materials were furnished."

The criticism is that the statement in the notice is in the disjunctive. The authority for the condemnation is the line of cases beginning with *Bradley & Currier Co. v. Pacheteau*, 71 App. Div. 149, 75 N. Y. Supp. 531; *Id.*, 175 N. Y. 492, 67 N. E. 1080, in which liens were condemned because, owing to statements made in the alternative, facts which the statute required to be stated were not definitely stated. The reason for the rule declared in those cases has no application to the question in this case.

"The statute requires the lienor to state explicitly or by plain inference the value or the agreed price of the labor performed or materials furnished at the time of the filing of the lien. *Finn v. Smith*, 186 N. Y. 465 [79 N. E. 714]. Hence a statement in the alternative of the labor performed or to be performed, etc., is not an affirmation of any fact required to be stated. The fact may be either the one or the other, whereas the statute requires an explicit statement of what the fact is." *Abelman v. Myer*, 122 App. Div. 470, 471, 106 N. Y. Supp. 978, 979.

The information as to the labor performed or the materials furnished, and the agreed price or value thereof, is for the purpose of apprising the owner so that he may, upon inquiry, ascertain whether the materials have been actually furnished or not, and the value of the same. *Vogel v. Luitwieler*, 52 Hun, 184, 189, 5 N. Y. Supp. 154. The object of the provision requiring the notice to state the time when the first and last items of work were performed and materials were furnished is, so far as the latter requirement is concerned, to establish whether the labor was performed or the materials were furnished during the progress of the work, or whether 90 days had elapsed since the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or of materials furnished. Section 10, Lien Law, *ut supra*.

A lien is available to four classes: Contractors, subcontractors, laborers, or materialmen. Section 3, Lien Law, *ut supra*. Section 9 of the Lien Law requires what the notice of lien shall state, irrespective of the class to which the person making and filing the notice belongs.

In the notices filed it appears that the lienor was a materialman and that what he furnished was trim—sash, door, trim, and other building material and millwork—and any reference in his notice to labor should be considered as labor incidental to the manufacture of his material. *Felgenhauer v. Haas*, 123 App. Div. 75, 76, 108 N. Y. Supp. 476; *Martin v. Gavigan Co.*, 107 App. Div. 279, 283, 95 N. Y. Supp. 14; *Clarke*

v. Heylman, 80 App. Div. 572, 576, 80 N. Y. Supp. 794. The entire notice may be considered in construing any particular part of it, and where it appears in the notice that the lienor is a materialman, and that what he asserts is a lien for the principal and interest for the value or agreed price of materials, he is not required to state separately the time when the first and last items of work were performed, and any reference to items of work contained in his statement, made in an attempted compliance with subdivision 6 of section 9 of the Lien Law, may be ignored as surplusage. *Vitelli v. May*, 120 App. Div. 448, 450, 104 N. Y. Supp. 1082; *Schwartz v. Lewis*, 138 App. Div. 566, 568, 123 N. Y. Supp. 319; *Felgenhauer v. Hass*, *ut supra*.

"As to the time and dates of work done and materials furnished for which a lien is claimed, all that is required is such certainty as will enable those interested to discover during what period the materials were delivered or the work [was] done so as to individuate the transaction." 27 Cyc. 182, cited with approval in *Hurley v. Tucker*, 128 App. Div. 580, 588, 112 N. Y. Supp. 980, 985, affirmed 198 N. Y. 534, 92 N. E. 1087.

We determine that the two notices of lien filed by the plaintiff Barrett are free from defect; and, as the only objection against the lien filed by defendant White Plains Trim Company is a similar alleged defect, we pronounce it valid also.

[2] The Lieberman & Sanford Company notice provides:

"(4) The labor performed was setting iron and glass doors, iron stair, bronze saddles, iron lamps, iron ladder. The labor to be performed is to set wrought iron grilles, and quarter-inch plate glass indoors. The material furnished was iron entrance doors, iron stairs, bronze saddles, iron lamps and iron ladder. The material to be furnished is quarter-inch plate glass in entrance doors. The agreed price and value of said labor is ten hundred seventy and 63/100 dollars. The agreed price and value of said material is eighteen hundred seventy-eight 37/100 dollars or total for labor and materials twenty-nine hundred fifty dollars.

"(5) The amount unpaid to the lienor for such labor and material is seven hundred and fifty dollars.

"(6) The time when the first items of work were performed was April 11, 1911, and the time when the first items of material were furnished was April 11, 1911. The time when the last items of work were performed was December 5, 1911, and the time when the last items of material were furnished was February 27, 1912."

The contract as to the labor was entire, as was the contract for the material, and it is exactly stated when the first items of work were done and the first items of material were furnished, and when the last item of work was done and the last item of material furnished. The items of labor to be performed and the items of material to be furnished are clearly stated. The statute (section 9, subd. 4) requires that the notice shall state "the labor performed or to be performed, or materials furnished or to be furnished and the agreed price or value thereof." In *Toop v. Smith*, 87 App. Div. 241, 84 N. Y. Supp. 326, the notice did not state what materials were furnished or what work was done. No specifications or drawings appeared in or in connection with the notice of lien. Attention is not directed to the omission to state the price. The decision was affirmed in 181 N. Y. 283, 73 N. E. 1113, where, after a reference to the contents of the notice, Judge Werner wrote:

"We think this recital will be scanned in vain, either (1) for any statement of labor performed, (2) or to be performed, (3) or materials furnished, (4) or to be furnished."

Then the opinion tends to the concession that, if the specifications and drawings had been attached to the notice, there would have been a substantial compliance with the statute. *Finn v. Smith*, *ut supra*, held that:

"Under the statute any notice of lien must state either explicitly or by plain inference the value or the agreed price of the labor performed or materials furnished at the time of filing thereof."

A notice is not to be denounced as defective if under certain circumstances it may be declared valid. The lien is restricted by express provision of statute to the principal and interest of the value or agreed price or labor performed and materials furnished. Lien Law, art. 2, § 3; *Doll v. Coogan*, 48 App. Div. 121, 62 N. Y. Supp. 627, affirmed 168 N. Y. 656, 61 N. E. 1129; *O'Reilly v. Mahoney*, 123 App. Div. 275, 108 N. Y. Supp. 53. A state of facts may exist where, during the progress of the work and before the entire work is done or all the materials furnished, one entitled to a lien may file his notice for the whole contract price and assert a lien therefor, provided the balance of the contract is thereafter fully completed according to its terms. Lien Law, § 10; *Heinlein v. Murphy*, 3 Misc. Rep. 47, 48, 22 N. Y. Supp. 713. See *Firth v. Rehfeldt*, 30 App. Div. 326, 331, 51 N. Y. Supp. 980, affirmed 164 N. Y. 588, 58 N. E. 1087. The notice sets forth the labor performed and to be performed, and the materials furnished and to be furnished, the agreed price and value of the labor, the agreed price and value of the material, and a total agreed price and value of the labor and material, and the amount unpaid, together with a statement when the first and last items of work were performed and the first and last items of material were furnished. Inasmuch as the amount due the lienor was stipulated, we have no knowledge except that that comes from the lien itself, and it is inferable therefrom that there was an entire agreement to furnish the material and do the work for the sum of \$2,750, of which the amount of \$750 is unpaid. The notice shows that there was one agreement, one transaction, a statement of the gross price for all the labor and of a gross price for all the material, and the union of the two prices in a gross sum for both labor and material. Where the contract is entire both as to labor and material, and there is a gross sum, and the notice shows it, and what has been done and what has been left undone, and the amount unpaid, the demand of the statute has been met. In such case it is not necessary, nor is it generally practicable, that the agreed price should be disregarded and that the person furnishing the labor and material should preserve data of the labor and material furnished and make an estimate of the value of labor or material undone or unfurnished, for the purpose of stating the value of such labor and such material. Full information is furnished by showing the transaction between the parties. The notice is without defect, and the lien of *Lieberman & Sanford Company* is valid. *Felgenhauer v. Haas*, *ut supra*; *Martin v. Gavigan Co.*, *ut supra*; *Woelf*

v. Schaefer, 103 App. Div. 567, 571, 573, 93 N. Y. Supp. 184; Clarke v. Heylman, *ut supra*.

[3, 4] The defendant Hudson Trust Company makes a claim on the moneys due, which constitute the fund out of which the liens are payable. The amount of its claim would practically exhaust the fund. The validity of its claim is presented for adjudication by virtue of an assignment which reads:

"For and in consideration of the sum of twenty-five thousand (\$25,000.00) dollars, lawful money of the United States, paid by the Hudson Trust Company, Thirty-Ninth St. & Broadway, Manhattan borough, city of New York, to John V. Schaefer, Jr., & Co., the said John V. Schaefer, Jr., & Co., hereby assigns all rights, title and interest to the extent of twenty-five thousand (\$25,000.00) dollars in the balance and final payments as per statement herewith attached which will become due under contract between said John V. Schaefer, Jr., & Co., and the Hebrew Sheltering Guardian Society of New York (Orphan Asylum) for the erection of twenty-eight (28) buildings at Pleasantville, New York, and hereby authorizes and directs the said Hebrew Sheltering Guardian Society of New York (Orphan Asylum) to pay the said Hudson Trust Company the said sum of twenty-five thousand (\$25,000.00) dollars and to deduct the said amount from the said final payments and balance of contract when same becomes due and owing to the said John V. Schaefer, Jr., & Co. from said Hebrew Sheltering Guardian Society of New York (Orphan Asylum) under the terms of said contract, and the said John V. Schaefer, Jr., & Co. does hereby make, constitute and appoint the said Hudson Trust Company its attorney in fact with full power and authorizes it to collect and receive from the said Hebrew Sheltering Guardian Society of New York (Orphan Asylum) said sum of twenty-five thousand (\$25,000.00) dollars to execute and deliver a proper receipt of said amount in the name of the said John V. Schaefer, Jr., & Co.

"John V. Schaefer, Jr., & Co.,

"John V. Schaefer, Jr., President."

In the first place, we think that as assignee the Hudson Trust Company could not assert a lien. *Rollin v. Cross*, 45 N. Y. 766; *Tisdale Lumber Co. v. Read Realty Co.*, 154 App. Div. 270, 138 N. Y. Supp. 829. In the second place, the law specifically provides that no such assignment shall be valid until the contract or a statement containing the substance thereof, and such assignment, or a copy of each, be filed in the office of the county clerk. *Lien Law*, *ut supra*, § 15. It is not disputed that neither the contract nor a statement containing the substance thereof, nor a copy of either, was filed. The contention of the trust company, however, is that the language contained in the assignment was sufficient to constitute "a statement containing the substance" of the contract. A reading of the assignment does not indicate that there was any attempt to comply with the statute by including such a statement in the assignment, but the expressions therein relied upon to support this contention are but simply in the barest identification of the contract which is the basis of the assignment. This is not a statement containing the "substance" of the contract, but merely a description of the contract. Not even the purchase price is given. It does not appear, even, that there was even a statement "herewith attached." Here is a plain omission of an explicit provision of the statute, which requires the filing of the assignment and the contract or a statement. There is a long and labored discussion as to the liberal construction and substantial compliance required by the statute itself,

but this does not mean that we can disregard omissions even to comply with the requirement of the statute, when there is no attempt at compliance. As was said in *Mahley v. German Bank*, 174 N. Y. at page 501, 67 N. E. at page 118:

"But under the most liberal rule of construction we cannot find anything in the notice that even attempts to state when the first item of work was done or anything from which that time may be inferred. It is true that the particular advantage or object of requiring this fact to be stated is not readily apparent, but the statute has expressly required it. Errors in the notice may be disregarded, and it is not necessary that the precise verbiage of the law should be followed. But the provision of the statute that the law shall be construed liberally does not authorize the courts to entirely dispense with what the statute says the notice shall contain. We are therefore constrained to hold the notice of lien insufficient."

In *Bradley & Currier Co. v. Pacheteau*, ut supra, it is said:

"The liberal construction provided for in the statute assumes that the statute has, at least in form, been complied with, and that was not done here. To give this notice any other construction would in effect be holding that a lien might be acquired by the filing of a notice, no matter how defective, and irrespective of whether or not it complied with the statute at all."

See, too, *Bradley & Son v. Huber Co.*, 146 App. Div. 631, 131 N. Y. Supp. 388; *Schwartz v. Lewis*, ut supra.

"A liberal construction is that by which the letter of the statute is enlarged or restrained so as more effectually to accomplish the purpose intended." *Weltman v. Posenecker*, 44 N. Y. Supp. 406.

See *Sutherland on Statutory Construction*, § 430.

If this is an equitable assignment, as is contended, it was subject to the same section 15 of the *Mechanic's Lien Law*. *Harvey v. Brewer*, 178 N. Y. 7, 70 N. E. 73.

But this appellant also contends that this assignment may be read as an order. The purpose of this contention is to avoid the necessity of filing the contract. See *Brace v. City of Gloversville*, 167 N. Y. 457, 60 N. E. 779. Of course, it never was intended as an order, but the effort is to twist it into one. It is an "order" in the sense that perforce of the assignment, and naturally in furtherance of it, it authorizes and directs the debtor to pay. The "order" is regarded by the appellant as an equitable assignment (not in the nature of a bill of exchange; there is no acceptance), e. g., *Parker v. City of Syracuse*, 31 N. Y. 379, *Foster v. Dayton*, 10 Daly, 228. Thus on page 13 of his points this appellant says:

"That an order such as is contained in the instrument given by the contractor to the Hudson Trust Company is sufficient as an equitable assignment is also established in the following authorities."

But suppose it is an equitable assignment; it is still subject to section 15, ut supra.

We hold the assignment not to be a valid claim against the fund.

The judgment appealed from should be affirmed, without costs.

JENKS, P. J., and RICH, J., dissenting in part.

JENKS, P. J. I dissent in part. I think that the controlling policy of consideration was well expressed by Bartlett, J., in *Lemmer v. Morison*, 89 Hun, at page 279, 35 N. Y. Supp. 624:

"As these are matters of purely statutory creation and regulation, it seems to me that a strict adherence to the letter of the law is more conducive to justice than a looser construction with the uncertainties which it would necessarily involve."

The express requirement of a statute cannot be dispensed with because "the particular advantage or object" of a requirement is not "readily apparent." See *Mahley v. German Bank*, 174 N. Y. 501, 67 N. E. 118. And liberal construction prescribed even by the terms of the very statute itself does not, to my mind, authorize the entire dispensation of an express provision thereof. *Id.*

I think that the first notice of lien filed by the plaintiff is bad. The provision thereof "that the time when the first item of work was performed or materials furnished was on the 20th day of May, 1910, and the time when the last item of such work was performed or materials were furnished was the 7th day of February, 1912," is defective for the reason that the alternative expression is indicated by the word "or" state neither one fact nor the other. *Bradley & Currier Co. v. Pacheteau*, 71 App. Div. 148, 75 N. Y. Supp. 531, affirmed as to this feature 175 N. Y. 492, 67 N. E. 1080, and approved in *Finn v. Smith*, 186 N. Y. 465, 79 N. E. 714, *Abbott v. Easton*, 195 N. Y. 375, 88 N. E. 572. See, too, *New Jersey Steel & Iron Co. v. Robinson*, 85 App. Div. 512-516, 83 N. Y. Supp. 450, affirmed 178 N. Y. 632, 71 N. E. 1134, and approved in *Finn v. Smith*, *supra*. This objection obtains in the plaintiff's second notice and in the notice of the White Plains Trim Co. In *Bradley & Currier Co. v. Pacheteau*, *supra*, it is said:

"The liberal construction provided for in the statute assumes that the statute has, at least in form, been complied with, and that was not done here. To give this notice any other construction would in effect be holding that a lien might be acquired by the filing of a notice, no matter how defective, and irrespective of whether or not it complied with the statute at all."

I think that the notice of the Lieberman & Sanford Company is defective in that it fails to separate the labor done and to be done, likewise the materials, and states one total agreed price and value. See *Finn v. Smith*, *supra*; *Toop v. Smith*, 87 App. Div. 241, 84 N. Y. Supp. 326, affirmed 181 N. Y. 283, 73 N. E. 1113.

I am authorized by Mr. Justice RICH to state that he concurs with me.

NAHOUM V. N. E. MARCOGLOU & CO., Inc.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

CORPORATIONS (§ 448*)—ORGANIZATION—ADMISSIONS PRIOR TO INCORPORATION.

Admissions of corporate liability, made prior to the completion of the incorporation, are not binding on the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789-1792; Dec. Dig. § 448.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from City Court of New York, Trial Term.

Action by Julius Nahoum, doing business as the Western Trading Company, against N. E. Marcoglou & Co., Incorporated. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Frank E. Hipple, of New York City (William G. Phlippeau, of New York City, of counsel), for appellant.

Siegeltuch & Silverman, of New York City, for respondent.

BIJUR, J. This action was brought to recover the agreed price of certain tobaccos. Defendant, as appears from its name, is a corporation duly organized under the law of the state of New York. Its incorporation was not completed until August 25, 1913. Whatever admissions of liability were sought on the trial to be charged against it in respect of the transactions sued upon were made prior to that date, and were therefore manifestly not binding upon it. There is no claim that subsequent to its incorporation it adopted these admissions expressly or impliedly. There is not a scintilla of testimony as to anything done by or said on behalf of the company after its incorporation, nor is there any evidence that it received the goods sued for.

It is elementary, therefore, that the judgment must be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

BREIDBART et al. v. EMPIRE CITY SUBWAY CO.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

MUNICIPAL CORPORATIONS (§ 845*)—BROKEN WATER MAIN—INJURY TO ADJOINING PREMISES—EVIDENCE.

In an action for injuries to plaintiffs by water flowing onto premises occupied by them from a broken water main, evidence held insufficient to warrant a finding that the main was cut by the negligence of defendant's servants.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1796-1802; Dec. Dig. § 845.*]

Seabury, J., dissenting.

Appeal from City Court of New York, Trial Term.

Action by Isidor Breidbart and others, as copartners doing business as I. Breidbart & Co., against the Empire City Subway Company. From a judgment for plaintiffs and from an order denying defendant's motion for a new trial, it appeals. Reversed, and new trial granted.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Charles T. Russell, of New York City (Alexander Cameron, of New York City, of counsel, and Benj. F. Briggs, of New York City, on the brief), for appellant.

I. Gainsburg, of New York City, for respondents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & *Rep'r Indexes*

LEHMAN, J. The plaintiffs have recovered a judgment for damages suffered through the percolation of water into premises leased by them. It was shown at the trial that this water came from a leak in a small water main in the street in front of plaintiffs' premises. The leak was caused by a hole evidently cut in the water main by some sharp instrument. Obviously to sustain a recovery, the plaintiffs have the burden of showing that this hole was cut by one of defendant's servants.

Upon this point the plaintiffs produced no direct evidence, but they showed that about two weeks before the leak was discovered the defendant had opened a trench in the street before their place of business, and closed it up again; that when the leak was discovered the defendant's servants opened up the trench again, and one of the plaintiffs testified that the broken water main was in the trench where they had previously worked.

Inasmuch as this testimony, if true, would show that the defendant's servants were the last persons who had access to the water main, and that no other person could have caused the break after the trench was closed, I think that the trial justice correctly held that the plaintiffs had established a *prima facie* case.

To meet this testimony the defendant produced five witnesses, including a plumber employed by the plaintiffs' landlord, who all testified that the defendant had failed to find any leak in the original trench, and had then torn up the pavement for several feet in addition, and had found the break in the pipe over two feet away from the part of the street originally excavated, and several of these witnesses testify without contradiction that the edges of the break show that the break was old, and that a wooden plug was found near the break. This testimony to my mind so clearly outweighs the testimony produced by the plaintiffs that the verdict should be set aside.

Judgment reversed, and a new trial ordered, with costs to appellant to abide the event.

BIJUR, J. (concurring). Plaintiffs sue to recover damages to their stock of goods caused by water escaping from a pipe which leaked. Plaintiffs' claim was that this water pipe, which ran across the street on which plaintiffs' premises were situated, had been pierced by workmen employed by defendant in digging a trench on the street some ten days before the damage was caused.

At the close of plaintiffs' case, defendant moved for a dismissal stating his grounds adequately. To sustain the denial of this motion plaintiffs appeal to the doctrine of *res ipsa loquitur*. It is substantially conceded by both sides that the mere fact that defendant's workmen had previously dug a trench in the street would afford no justification for the application of this doctrine unless the hole in the pipe was shown to have been either within the line of the trench so dug or in so close proximity to it as to amount substantially to the same thing. A careful search of the record discloses no intelligible testimony to that effect, but only the vaguest intimation in that regard in the testimony of one of the plaintiffs. Indeed, at the best, it

could not be regarded as more than a scintilla of evidence. Defendant's testimony was to the effect that the hole was two feet seven inches from the line of the old trench.

Under these circumstances, the judgment must be reversed, and a new trial granted, with costs to appellant to abide the event.

SEABURY, J., dissents.

LINDER v. FEIER.

(Supreme Court, Appellate Term, First Department. March 16, 1914.)

EXECUTION (§ 443*)—EXECUTION AGAINST PERSON—VACATION—APPLICATION OF STATUTE.

Code Civ. Proc. § 572, provides that, except where an order of arrest can be granted only by the court if plaintiff unreasonably delays trial or neglects to issue execution against defendant's person within 10 days after the return of execution against the property, and in any event neglects to issue the same after entry of judgment, or when it appears that plaintiff in an action or the judgment creditor in a judgment delays the enforcement of his remedies by collusion, or to allow the debtor to remain in prison under the mandate in any other action before the issuing of the mandate in favor of such creditor, so as to produce a continued and extended imprisonment by virtue of the separate mandates in the different actions, defendant must upon his application be discharged from custody if he has been taken under the mandate against him in such action, or if he has not yet been imprisoned must be relieved from imprisonment by virtue of such mandate, unless reasonable cause be shown why the application be not granted. *Held*, that the statute was only applicable to discharge from an order of arrest, and did not refer to execution against the person, so that failure to comply therewith was not a ground for vacating an execution against the person of defendant in a breach of promise action.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1255; Dec. Dig. § 443.*]

Appeal from City Court of New York, Special Term.

Action by Lena Linder against Isidore Feier. From an order vacating an execution against defendant's person in an action for breach of promise of marriage, plaintiff appeals. Reversed, and motion denied.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Nathaniel H. Kramer, of New York City (Carl Nathanson, of Brooklyn, of counsel), for appellant.

BIJUR, J. The learned judge below wrote a short memorandum to the effect that the motion was granted "for failure to comply with section 572 of the Code of Civil Procedure," citing *Perry v. Kent*, 88 Hun, 407, 34 N. Y. Supp. 843, affirmed 157 N. Y. 710, 53 N. E. 1130. Section 572, however, both in terms and by reason of the context, is plainly applicable only to discharge from an order of arrest, and has no reference to execution against the person. It was so held in *Sweet*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

v. Norris, 12 Civ. Proc. R. 175, and that case is cited as authority for reversing an order similar to the one herein appealed from in Perry v. Hughes, 82 Hun, 614, 33 N. Y. Supp. 1133. See, also, People ex rel. Harris v. Gill, 85 App. Div. 192, 83 N. Y. Supp. 135.

The decision in Perry v. Kent has no bearing on the question at issue. It held merely that where an order to vacate an execution had been made at Special Term, although reversed by the General Term in 82 Hun, 614, 33 N. Y. Supp. 1133, supra, the release of the defendant by the sheriff from detention in the jail limits did not render the sureties on defendant's bond liable as for an escape, because, although the Special Term order was erroneous, it was, nevertheless, an order within the jurisdiction of the court to make, and until its reversal the sheriff was bound to obey it.

Order reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs. All concur.

SILVERMAN v. CHARLES JACOBS CO.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

JUDGMENT (§ 126*)—DEFAULT—INQUEST.

A judgment for plaintiff on defendant's default will be reversed, where the testimony on the inquest did not disclose a cause of action, without reference to the merits of defendant's motion to open its default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 223, 224, 228-230; Dec. Dig. § 126.*]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Julius Silverman against the Charles Jacobs Company. From a Municipal Court order denying defendant's motion to open its default, and from a judgment in favor of plaintiff on an inquest taken by the court without a jury, defendant appeals. Appeal from judgment dismissed, and order reversed.

Argued March term, 1914, before SEABURY, LEHMAN, and BILJUR, JJ.

Engel Bros., of New York City, for appellant.

Henry Salant, of New York City, for respondent.

PER CURIAM. It is unnecessary to pass upon the merits of the motion to open defendant's default, as the order must be reversed, and a new trial ordered, with costs to appellant to abide the event, because the testimony on the inquest did not disclose a cause of action against the defendant. Appeal from judgment dismissed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MONARCH MINING CO. v. LAUGHLIN et al.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

COURTS (§ 190*)—MUNICIPAL COURTS—APPEAL—ACTION ON UNDERTAKING—SUFFICIENCY OF COMPLAINT.

Judgment on the pleadings should be rendered for defendant in an action against a surety on an undertaking on appeal from the Municipal Court to the Appellate Term, where the complaint does not allege compliance with Code Civ. Proc. § 1309, prohibiting such an action until 10 days have expired since the service upon appellant's attorney and the surety of a written notice of entry of judgment or order affirming the judgment appealed from or dismissing the appeal and providing the manner of such service, etc.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 190.*]

Municipal Court, Borough of the Bronx, Second District.

Action by the Monarch Mining Company against William Laughlin and Edward T. Mulligan. From a judgment for plaintiff, defendant Mulligan appeals. Reversed, and new trial granted.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Philip J. Dunn, of New York City, for appellant.

Clarence A. Appleton, of New York City, for respondent.

BIJUR, J. This action was brought against a surety on an undertaking on appeal from the Municipal Court to this court. As the complaint does not allege compliance with section 1309 of the Code of Civil Procedure, the judgment on the pleadings should have been for the defendant, instead of the plaintiff.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

SCHWARTZ v. SILL

(Supreme Court, Appellate Term, First Department. April 2, 1914.)

EXECUTION (§ 419*)—SUPPLEMENTARY PROCEEDINGS—CONTEMPT—FINE.

Under Judiciary Law (Consol. Laws, c. 30) § 773, which limits the court to the imposition of a fine of not more than \$250 for a contempt, unless the misconduct constituting the contempt caused an actual loss or injury to the other party to the action, in which case a fine sufficient to indemnify the aggrieved party may be imposed, a fine of \$410 cannot be imposed upon a judgment debtor because he failed to appear for examination in proceedings supplementary to execution, upon the theory that, during the 41 weeks between the date of the order for examination and the order punishing for contempt, the debtor had been receiving a weekly salary of \$100, and that if it had been disclosed on his examination plaintiff might have obtained a garnishee order for 10 per cent., because the obtaining of the garnishee order was not a necessary result of the examination and the actual loss provided for by the statute must be one which flows out of the misconduct.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1202, 1204; Dec. Dig. § 419.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from City Court of New York, Special Term.

In the matter of the supplementary proceedings of Edward S. Schwartz against William Raymond Sill. Defendant appeals from an order granting plaintiff's motion for reargument on motion to punish for contempt. Order reversed and motion denied.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Katz & Sommerich, of New York City (Maxwell C. Katz and Otto C. Sommerich, both of New York City, of counsel), for appellant.

Benjamin S. Catts, of New York City (Charles Trosk, of New York City, of counsel), for respondent.

SEABURY, J. Without detailing the numerous steps which have been taken in this proceeding, it is sufficient to point out that the only question which we deem it necessary to discuss is whether the order of the court below, increasing the fine imposed upon the defendant for contempt from \$50 to \$410, is authorized.

On April 3, 1913, the defendant failed to appear in response to an order for examination in proceedings supplementary to execution, which had been duly served upon him. On October 3, 1913, the plaintiff obtained an order to show cause why the defendant should not be punished for contempt because of his failure to appear and submit to examination on April 3, 1913. It is now claimed that on April 3, 1913, and at all times since that date, the defendant has been in receipt of a weekly salary of \$100. The court below, assuming this claim to be correct, increased the fine from \$50 to \$410 on the theory that if the defendant had appeared for examination on April 3, 1913, and had disclosed the fact that he was in receipt of this weekly salary, the plaintiff could then have obtained a garnishee order under section 1391 of the Code of Civil Procedure, which would have entitled the plaintiff to recover 10 per cent. of that sum each week, and that, therefore, 41 weeks having intervened, the actual loss or injury to the plaintiff from the defendant's failure to appear and submit to examination amounted to \$410.

It is clear that under section 773 of the Judiciary Law (Consol. Laws, c. 30) the court is limited to the imposition of a fine of \$250 for a contempt, unless the misconduct constituted such contempt as caused an actual loss or injury to the other party to the action. If such actual loss or injury has been produced, a fine sufficient to indemnify the party aggrieved must be imposed. The actual loss or injury contemplated by the statute is the damage which results from the misconduct of the person adjudged in contempt. The misconduct must be the proximate cause of the loss. It is not enough that the loss might possibly result, or even that it may probably result. The loss or injury contemplated must be such as necessarily results from the misconduct in order that the misconduct may be said to be its proximate cause. The appearance of the defendant and submission to examination would not necessarily have resulted in the creditor obtaining the garnishee order under section 1391 of the Code of Civil Procedure. If the facts were as the plaintiff claims, and if such facts had been disclosed upon the examination, the creditor might have obtained such an order or he

might not. All that can be said is that upon ascertaining the amount of the defendant's weekly salary, the creditor would have a legal right to such an order, and it may be said that he might have applied for and obtained it. The garnishee order was not, however, a necessary consequence of the appearance of the defendant and his submission to examination. It was a bare possibility. Certainly it was not a necessary consequence. The benefits that would have been obtained by the creditor, if the garnishee order had been made, cannot, therefore, it seems to me, properly be said to constitute the actual loss or injury which the creditor sustained by reason of the failure of the defendant to appear and submit to examination. Moreover, it does not appear that the plaintiff could not have obtained a garnishee order even if the defendant had not been examined in supplementary proceedings. It was open to the plaintiff to obtain an order for the examination of the employer of the defendant to ascertain the amount of the salary which the defendant was receiving. No such application appears to have been made.

The statutes rendering one punishable for contempt are not to be amplified by construction, and I think it is reasonable to hold that the words "actual loss or injury" as used in the statute were intended to refer to such loss or injury as was the proximate or necessary result of the misconduct complained of by the party feeling himself aggrieved. A different interpretation would render one liable in contempt proceedings for speculative or remote losses which might or might not flow from such misconduct. The connection between the misconduct of the defendant in failing to appear for examination and the loss which the creditor claims to have sustained is entirely uncertain. The actual loss or injury which the statute contemplates is that which necessarily follows the misconduct of the debtor, and not such as would follow if the court assumes that the creditor would have taken action different from that which he did take.

If these views are correct, it follows that the order of the learned Special Term, increasing the fine from \$50 to \$410, should be reversed, with \$10 costs and disbursements, and the motion denied, leaving the original decision which imposed a fine of \$50 upon the defendant in full force and effect.

LEHMAN, J., concurs. BIJUR, J., concurs in result.

BONAGUR v. PURIFICATO et al.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

EVIDENCE (§ 264*)—ACTIONS—ADMISSIONS.

In an action for work, labor, and materials furnished in the reconstruction of a dumb-waiter shaft, plaintiff, who held himself out as competent and agreed to erect a shaft which would not be unlawful, erected it with two-inch blocks. At the close of the case plaintiff conceded "that the Tenement House Department requires that the outside of the dumb-waiter shaft shall be four-inch blocks." *Held*, that the concession was an ad-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mission that the rules of the Tenement House Department had not been complied with, and hence there can be no recovery.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1028; Dec. Dig. § 264.*]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by Ernest Bonagur against Salvatore Purificato and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Fancis X. Mancuso, of New York City, for appellants.

Menken Bros., of New York City, for respondent.

LEHMAN, J. The plaintiff has recovered a judgment for \$202 upon a claim for work, labor, and materials furnished, and money loaned to the defendant. The principal item of plaintiff's claim is the sum of \$150, the agreed price of tearing down an old elevator shaft, and of building a new shaft. It is claimed by the defendant that he told the plaintiff that the shaft must be built according to law. While the plaintiff denies the details of the conversation, his own version is that defendant said—

"that he had violations and he wanted to remove these violations, and at the same time he talked about tearing down this shaft to put in a new dumb-waiter shaft, and in regard to the violation I told him to get an architect, but I said about the dumb-waiter shaft that I could do that myself; that I could tear down the old wooden one."

It seems to me, therefore, that even accepting the plaintiff's story as true, he did the work according to his own views, and that he held himself out as competent and agreed to erect a dumb-waiter shaft which would not be unlawful. The plaintiff then proceeded to erect the shaft with two-inch blocks.

At the end of the plaintiff's case the record shows:

"It is conceded by the plaintiff that the Tenement House Department requires that the outside of the dumb-waiter shaft shall be four-inch blocks."

In view of this concession I fail to see how the plaintiff can recover the agreed price of the shaft. The defendant manifestly relied upon the plaintiff to erect a dumb-waiter shaft which would not violate the law, and the plaintiff's concession shows that it has not been done. It is true that there is a great deal of vague testimony upon the question of whether the shaft in question is an inside or outside shaft, and as to the removal of a ventilator or skylight which it would seem the plaintiff considers material upon this question, but aside from the fact that there is absolutely no testimony as to what constitutes an "inside" or "outside" shaft, the concession itself is open to no other interpretation than that the rules of the Tenement House Department have not been complied with in regard to this particular shaft.

Since under these circumstances we must in any event grant a new

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

trial, it becomes unnecessary to consider whether there is sufficient testimony to hold the defendant Eugenia Purificato, the wife of and co-owner of the premises with the defendant Salvatore Purificato. No motion to dismiss was made at the trial as to either defendant, and this issue was apparently never actually contested.

Judgment should therefore be reversed, and a new trial ordered, with costs to appellants to abide the event. All concur.

PATERNO BROS., Inc., v. FRAZEE.

(Supreme Court, Appellate Term, First Department. March 16, 1914.)

PLEADING (§ 165*)—REPLICATION—STATUTE.

Under Code Civ. Proc. § 516, declaring that, where an answer contains new matter constituting a defense by way of avoidance, the court may, in its discretion, require plaintiff to reply to the new matter, it is improper to direct plaintiff to reply only to the new matter set up in one paragraph of a special defense urged by defendant, where several affirmative matters were joined, as plaintiff was entitled to reply to them as a whole.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 321, 323; Dec. Dig. § 165.*]

Appeal from City Court of New York, Special Term.

Action by Paterno Bros., Incorporated, against Harry H. Frazee. From an order directing plaintiff to serve a reply to the new matter, contained in a paragraph of one of the affirmative defenses, plaintiff appeals. Order reversed, and motion denied.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Ernst, Lowenstein & Cane, of New York City (Melville H. Cane, of New York City, of counsel), for appellant.

Nathan Burkan, of New York City, for respondent.

LEHMAN, J. The plaintiff has brought an action for rent reserved in a lease alleged to have been assigned to the defendant, and which the defendant is alleged to have covenanted to pay. The answer attempts to set up three separate affirmative defenses. These affirmative defenses are somewhat curiously pleaded. In the first defense the defendant attempts to set up a surrender and acceptance, but combines with this defense a reiteration of all his previous denials. In the second defense he attempts to set up that the assignment of the term was not in writing, and therefore void, since the term assigned was for more than a year, but he combines with this defense a reiteration of surrender and acceptance. In the third defense he attempts to set up that the covenant to pay rent was not to be performed within one year, but he combines with this defense a reiteration of the surrender and acceptance and the parol nature of the assignment. After the service of this answer the defendant moved to compel the plaintiff to reply to the allegation contained in the paragraphs setting up that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

assignment was not in writing, and that the covenant to pay rent was parol. His motion was granted to the extent of requiring a reply to the "second defense," and from this order the plaintiff appeals.

Section 516 of the Code provides that:

"Where an answer contains new matter, constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter."

Obviously the court can require a reply only to the whole affirmative defense; it cannot require a reply to the new matter contained in one paragraph of a defense, for the plaintiff might have no reply to the new matter contained in the single paragraph, but expect to meet the whole defense by denial of the other paragraphs entering into the defense. It follows that the order requiring the plaintiff to reply to the paragraph setting up that the assignment was not in writing can be sustained only if that paragraph is in itself a complete defense to the action.

Without intimating in any way that the fact that the assignment was not in writing could constitute a complete defense, if properly pleaded, since the defendant has seen fit to combine it with allegations of surrender, he is clearly not entitled to an order requiring a reply to part of the defense pleaded.

Order should be reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs. All concur.

POPIEL v. MANHASSET MORTGAGE CO.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

LANDLORD AND TENANT (§ 129*)—ACTION BY TENANT—EXCLUSION FROM POSSESSION—RECOVERY OF DEPOSIT.

Though the tenant did not prove damage from the landlord's failure to put him in possession of the leased premises, he could recover a money deposit made with the landlord when the lease was executed; such amount not having been tendered or paid in court by the landlord.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 450-457; Dec. Dig. § 129.*]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Abraham Popiel against the Manhasset Mortgage Company. From a judgment of the Municipal Court for defendant, plaintiff appeals. Reversed, and judgment ordered for plaintiff.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Haskel Corenthal, of New York City, for appellant.

Thomas J. Brady, of New York City, for respondent.

PER CURIAM. The plaintiff did not prove satisfactorily any damage for the failure on the part of the defendant landlord to put

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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him into possession of the premises leased by him, but it was conceded that he paid the defendant a deposit of \$23 at the time the lease was made. No sufficient tender of this amount was shown, nor was it paid into court by the defendant. The plaintiff should therefore have had judgment for this amount.

Judgment reversed, without costs, and judgment ordered for the plaintiff in the sum of \$23 and disbursements in the court below.

GOLDSTEIN v. MALTINSKY et al.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

MONEY RECEIVED (§ 18*)—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action to recover the proceeds of a note which plaintiff claimed to have transferred to defendant for safe-keeping, and which she also claimed she lent defendant to collect and keep the proceeds as a loan, evidence held insufficient to support a judgment for plaintiff.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 70-72; Dec. Dig. § 18.*]

Seabury, J., dissenting.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Bache (Schecht) Goldstein against Morris Maltinsky and others. From a judgment for plaintiff, defendant Jennie Miller appeals; and plaintiff likewise appeals from an order denying a motion to amend the judgment. Plaintiff's appeal dismissed, and judgment reversed and remanded on defendant's appeal.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Emil P. Korkus, of Brooklyn, for appellant.

Joshua S. Shapiro, of New York City, for respondent.

BIJUR, J. Plaintiff sues appellant for the proceeds of a note of \$400, made by an ice cream company, which note plaintiff testified she had given defendant for safe-keeping, but which she had collected and refused to pay over the proceeds to plaintiff. Had this alone appeared from plaintiff's case, the mere fact that defendant denies the transaction and is in part corroborated by her witnesses would not call for a reversal; but, unfortunately for the recovery, plaintiff has herself presented two versions of the transaction, both of which cannot be true. In addition to her story as above outlined, she also testified that a few days before the note fell due she met the appellant at the house of Sarah Maltinsky; that appellant said she was short of money for the purpose of purchasing a mortgage, and at Mrs. Maltinsky's suggestion, plaintiff loaned appellant this note to collect and keep the proceeds thereof as a loan. That also is the version of Mrs. Maltinsky, who was offered by plaintiff as a witness. Appellant's version of the transaction is that she had never previously heard or known of this note, but that Mrs. and Mr. Maltinsky owed her some \$500 or \$600 on ac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

count of a mortgage on their house, that she had been trying to collect it for months, and that one day when she met the plaintiff at Mrs. Maltinsky's house, Mrs. Maltinsky and plaintiff went into another room, and shortly thereafter Mrs. Maltinsky handed appellant this note as part payment on the mortgage. Appellant also claims that the defendants Maltinsky delivered the ice cream company's note to the plaintiff in a transaction which has no bearing on the present issues, and got that note back from plaintiff upon giving her their own note for the same amount. This version is significantly confirmed by a number of salient facts. In the first place, in the verified complaint, plaintiff made appellant and the two Maltinskys joint defendants, alleging that she had loaned \$400 to the defendants, and asked for judgment against them. In her bill of particulars this is amplified by a further allegation that the defendant Morris Maltinsky, as evidence of the indebtedness, delivered to plaintiff his note for \$400. At the opening of the trial plaintiff discontinued as against the two Maltinskys. Plaintiff's attorney, called on behalf of defendant, admitted also that the Maltinsky note to plaintiff had been destroyed.

The issue is so narrow, and the difference between the two versions so marked, that plaintiff cannot recover without maintaining one consistent theory of the transaction. Having proved two which are inconsistent, and one of which accords very closely with the theory of the defense, the judgment must be reversed, and a new trial granted, with costs to abide the event. Plaintiff's appeal dismissed without costs.

LEHMAN, J., concurs. SEABURY, J., dissents.

HEYMAN et al. v. ROBERTSON.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

1. LANDLORD AND TENANT (§ 116*)—LEASE—TERMINATION—NOTICE.

Where a lease for a year contained a clause extending it from year to year until and unless one party should notify the other prior to June 1st of intention to surrender on the 1st of the following October, the tenancy from year to year could be terminated only by the giving of the notice prescribed.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 382-388, 395-400; Dec. Dig. § 116.*]

2. LANDLORD AND TENANT (§ 116*)—RELEVANCY.

Where a lease provided for extension from year to year unless one party gave the other written notice by registered mail prior to June 1st of his intention to terminate the lease on the following October 1st, evidence of parol notice, alleged to have been given by the tenant and his wife in conversations with persons claimed to represent the landlord subsequent to June, that they intended to move in October following was irrelevant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 382-388, 395-400; Dec. Dig. § 116.*]

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by David M. Heyman and others as trustees under the will of Simon Heyman, deceased, against Donald Robertson. From a judgment for defendant, plaintiffs appeal. Reversed, with directions.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Lawrence S. Greenbaum, of New York City, for appellants.
Thomas J. Meehan, of New York City, for respondent.

BIJUR, J. [1] Plaintiffs sued defendant for rent of an apartment for the months of October and November, 1913. Plaintiffs and defendant originally entered into a written lease running from October 1, 1911 to October 1, 1912, and containing a clause which plainly extended the lease in force from year to year until and unless one party should notify the other prior to the 1st day of June of intention to surrender on the 1st of the following October. This notice, it was also expressly stipulated, should be by United States registered mail. The tenant makes no pretense that such a notice was given. Consequently the judgment must be reversed.

[2] The tenant offered some irrelevant and incompetent testimony: (1) As to a conversation in September, 1912, with a person in the employ of the plaintiffs' agents to the effect that he, the tenant, desired to move out in October, 1912, and that this person told him that he could not do that because the lease had been already automatically renewed, whereupon the tenant replied that he would at all events move out on the following October, and would stay only from month to month in the meantime, to which the alleged representative of the plaintiffs made no reply. (2) The tenant's wife also testified to a conversation with some unidentified person who was said by the hall boy to be employed by plaintiffs' agents, in which conversation she said something about intending to move out. (3) Finally, there was introduced in evidence a postal card addressed to plaintiffs' agents, making complaint about the operation of the elevator in the building, and remarking incidentally, "Even if we are leaving the house." To all this evidence counsel for the plaintiff clearly and correctly took due exception, and moved to strike it out on the respective grounds, which naturally suggest themselves as elementary.

Judgment reversed, with costs, and judgment directed for the plaintiffs, with costs. All concur.

BOZZONE v. STAFFORD.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

1. CONTRACTS (§ 10*)—MUTUALITY.

A written agreement by which defendant "agrees to hire the employé, beginning November 26, 1912, from month to month at the monthly wage of \$60," and which provides that the employé may terminate it by giving certain notice, and is signed by defendant and the employé, was not lack-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing in mutuality, though the employé does not expressly bind himself to the employment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21–40; Dec. Dig. § 10.*]

2. MASTER AND SERVANT (§ 8*)—CONTRACT OF EMPLOYMENT—TERM.

Such a contract is not an indefinite employment at a certain rate per month, but is an employment for a full month; other provisions providing for its automatic renewal from month to month.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 8–10, 17; Dec. Dig. § 8.*]

3. MASTER AND SERVANT (§ 80*)—EMPLOYMENT—BREACH OF CONTRACT.

Upon breach by the employer of a written contract by an employé to work for a month at a certain monthly wage, the employé may bring action either on the express contract or for quantum meruit or adopt both methods.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107–127; Dec. Dig. § 80.*]

4. WORK AND LABOR (§ 14*)—CONTRACT OF EMPLOYMENT—ACTION FOR BREACH—DEFENSES.

An employé cannot recover, in an action on an express contract of employment, by which he agreed to work for a month, either in an action on the contract or on quantum meruit, unless he has himself performed the contract, and hence cannot recover on quantum meruit, where he breached his agreement to serve an entire month by quitting without just cause or his employer's consent.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29–33; Dec. Dig. § 14.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Louis Bozzone against Jennie K. Stafford. From a judgment of the Municipal Court for plaintiff, defendant appeals. Affirmed as modified.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Campbell & Boland, of New York City, for appellant.

Jacob Panken, of New York City, for respondent.

BIJUR, J. This action was brought by plaintiff for work, labor, and services performed by him for a period of 14 days, ending December 30, 1912, as cook in defendant's hotel. By the written agreement of employment, the hotel "agrees to hire the employé, beginning November 26, 1912, from month to month at the monthly wage of \$60." On December 30, 1912, plaintiff left of his own accord in connection with a strike which then took place.

[1] The validity of the agreement is not attacked on the score of lack of mutuality, nor can it well be. It is signed by both parties, and, although the employé does not expressly engage himself to the service, the provision that he may terminate the agreement by a certain notice in writing indicates plainly his intention to so bind himself.

[2] Consequently, by the terms of the contract, plaintiff is hired and agrees to serve a full month, which by other terms of the agreement

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is automatically renewed from month to month. It is not an indefinite employment at a certain rate per month. *Watson v. Gugino*, 204 N. Y. 532, 541, 98 N. E. 18, 39 L. R. A. (N. S.) 1090, Ann. Cas. 1913D, 215; *Martin v. N. Y. L. Ins. Co.*, 148 N. Y. 117, 42 N. E. 416.

[3, 4] Under these circumstances, although his action may be brought either on an express contract or for quantum meruit, or both (*Rubin v. Cohen*, 129 App. Div. 395, 113 N. Y. Supp. 843; *Byrne v. Gillies*, 144 App. Div. 677, 129 N. Y. Supp. 602), he cannot recover on either theory, unless he has performed his agreement. *Lawson v. Hogan*, 93 N. Y. 39, 44; *Robinson v. Chinese Association*, 47 App. Div. 69, 62 N. Y. Supp. 292; *Exeter Works v. Wonham Works*, 134 App. Div. 386, 387, 119 N. Y. Supp. 105.

It is not a case where plaintiff, although agreeing to work for a definite period, was entitled by the agreement to receive partial periodical payments of his wages during such period. See *Walsh v. N. Y. & Kentucky Co.*, 88 App. Div. 477, 85 N. Y. Supp. 83; *Mernagh v. Nichols*, 132 App. Div. 509, 118 N. Y. Supp. 59. Consequently plaintiff, having performed his agreement for the month of November 26th to December 26th, was entitled to be paid the balance of the \$60 for that month, and, having broken his agreement to serve for the month of December 26th to January 26th by leaving the employment on December 30th without just cause or the consent of his employer, can recover no part of his compensation for that month either on the theory of contract or quantum meruit.

Judgment modified by deducting therefrom the portion of the wages from December 26th to December 30th, namely, \$8, and, as so modified, affirmed, with \$15 costs to the respondent. All concur.

FERNBACH v. STEIN.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

1. COVENANTS (§ 121*)—EVIDENCE—JUDGMENT—CONCLUSIVENESS.

Where defendant sold certain property to plaintiff with a covenant against incumbrances, a judgment subsequently rendered, foreclosing a mortgage on the property in a suit to which defendant was not a party, was unavailable to show a breach of the covenant, in the absence of proof that defendant had notice of the action and an opportunity to defend.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 221-223; Dec. Dig. § 121.*]

2. COVENANTS (§ 121*)—EVIDENCE—JUDGMENT—CONCLUSIVENESS—NOTICE TO DEFEND.

Where defendant was not a party to a suit to foreclose a mortgage on certain property which she sold to plaintiff with a covenant against incumbrances, evidence that defendant's brother was a witness in such suit was insufficient to show that defendant had notice thereof and an opportunity to defend.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 221-223; Dec. Dig. § 121.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Max Fernbach against Rebecca Stein. From a Municipal Court judgment in favor of plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Charles Liebling, of New York City, for appellant.

Bernard H. Sandler, of New York City, for respondent.

LEHMAN, J. The defendant appeals from a judgment in favor of the plaintiff. Her first contention is that the plaintiff defaulted previous to the trial, and the default was opened only upon condition, and that the plaintiff did not comply with this condition. The record does not disclose the proof that was presented to the trial judge upon the motion to strike from the calendar, and upon this record I think that we are bound to presume that the case was regularly on the calendar.

Although the record states that the action is brought upon a verified complaint, no complaint or answer appears among the papers. At the trial, however, the trial justice asked the parties for a statement of their case. The plaintiff's counsel then stated:

"The defendant sold the plaintiff a store, and in the bill of sale there is a covenant that it is free and clear of all incumbrances. After the plaintiff took possession, an action was brought by a mortgagee, and the suit was defended in this court, and the judgment roll is here, and as a result of the suit plaintiff was compelled to pay the money for which he is now suing and seeks to recover."

[1] Obviously, if the plaintiff seeks to show that the defendant's covenant was broken merely by proof of the judgment roll of an action brought by the mortgagee, he must first show that the defendant is bound by that judgment. The defendant was not a party to the action, and is therefore bound by it only if she has received notice of the action, and an opportunity to come in and defend. In spite of the fact that no evidence of such notice and opportunity was presented, the trial justice admitted in evidence the judgment roll in the earlier action, and, when a brother of the defendant admitted that the plaintiff took him as a witness to court when the action was tried, the trial justice granted judgment for the plaintiff, stating:

"I find as a matter of fact that the defendant Stein knew all about this previous judgment and the action when it was tried."

[2] While it has been frequently held that where a person ultimately has notice of the commencement of an action, and an opportunity to defend the same, this is sufficient so far as notice is concerned, without any express notice to defend, to make the judgment binding upon him (*Prescott v. Le Conte*, 83 App. Div. 482, 82 N. Y. Supp. 411, and cases there cited, affirmed 178 N. Y. 585, 70 N. E. 1108), it has never been held that a judgment is binding upon the parties unless reasonable notice and reasonable opportunity to defend has been given (see *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola*, 144 N. Y.

663, 39 N. E. 360). For this purpose proof merely that a brother of defendant was taken to court as a witness seems to me palpably insufficient.

It follows that judgment in this action based upon a judgment roll, not binding on the defendant, should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

GASPAROWICZ v. OSHINSKY.

(Supreme Court, Appellate Term, First Department. April 14, 1914.)

SET-OFF AND COUNTERCLAIM (§ 57*)—JUDGMENT FOR PLAINTIFF.

In an action for wages, where defendant expressly admitted the claim, but interposed a counterclaim for a less amount, plaintiff was, at all events, entitled to a judgment for the difference between her claim and the counterclaim, and a dismissal of the complaint was erroneous.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. § 128; Dec. Dig. § 57.*]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by Tessie Gasparowicz against Isidor M. Oshinsky. From a judgment dismissing the complaint without prejudice, plaintiff appeals. Reversed and remanded.

Argued March term, 1914, before SEABURY, LEHMAN, and BIJUR, JJ.

Nathan April, of New York City, for appellant.

Charles S. Rosenberg, of New York City, for respondent.

BIJUR, J. The record of the case shows so irregular a course of practice, both previous to and at the trial, as alone to require a reversal; but, on what may be called the merits, plaintiff sued for \$17 wages, which claim defendant expressly admitted and interposed a counterclaim of \$12. In any view of the controversy therefore, plaintiff was entitled to a judgment for \$5.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

In re PFEIFFER'S ESTATE.

(Surrogate's Court, New York County. April 10, 1914.)

PRINCIPAL AND AGENT (§ 143*)—UNDISCLOSED PRINCIPAL.

As a rule an undisclosed principal may enforce a contract made by an undisclosed agent, unless it be inequitable to do so, so that, where claimant's father, who was formerly in the undertaking business, made over his business to him, but afterwards sometimes acted as his son's agent in receiving orders for funerals, etc., and so acted in contracting for dece-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dent's funeral, claimant could enforce his claim under such contract against the estate for such funeral expenses.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 392; Dec. Dig. § 143.*]

In the matter of the Estate of Joseph Pfeiffer. Application for payment of funeral expenses. Prayer granted.

Cornelius Huth, of New York City, for petitioner.

Kelley & Connelly, of New York City, for executors.

FOWLER, S. This is an application for payment of a reasonable expense for the burial and funeral of the deceased. The reasonableness of the bill is conceded, and that the estate is liable therefor to some one is also conceded. It is disclosed that there are funds applicable to the payment of the funeral expenses. It appears that the contract was made with an undisclosed agent who was treated as principal throughout. The father in this case acted as the agent of his son. The father had been an old undertaker known to the neighborhood, but before this funeral he had made over the business to his only son of the same name. Thereafter the father, who was in ill health, continued to act as agent of the son, sometimes receiving orders for funerals from his old customers and conducting the funerals as in this instance. But at the same time, in fact, the business had become the son's sole business. The father has since died intestate, leaving no estate or debts, and there is no need of an administration. Had there been any defense or set-off to the bill as against the father, another question would arise, as the estate of Pfeiffer would, under the circumstances, be entitled to such set-off as against the undisclosed principal (*Taintor v. Prendergast*, 3 Hill, 72, 38 Am. Dec. 618). But there is no claim of set-off. The only point here is the right of the undisclosed principal to payment. As a general rule an undisclosed principal may enforce a contract made by an undisclosed agent, unless it is inequitable so to do. *Anson on Contracts*, 425; *Pollock on Contracts*, 100. No authority to the contrary of this general common-law rule has been cited to me. Of course there may be a state of facts shown under which the real principal could not sue on a contract by an undisclosed agent. But nothing is shown here to take this matter out of the operation of the general rule. I am convinced that the son was the real principal in this matter. The father and son were evidently respectable people, and the arrangement between them was bona fide, and not in order to deceive or defraud any one. I think the estate will be protected by a payment to the son, in view of the son's uncontradicted testimony.

Prayer of petition granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MEMORANDUM DECISIONS

ABE BRILL CO., Appellant, v. PATTEE, Respondent, et al. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Appeal from Trial Term, New York County. Action by the Abe Brill Company against John G. Pattee, impleaded, etc. From a judgment dismissing the complaint at the close of plaintiff's case upon a trial, plaintiff appeals. Reversed, and new trial ordered. I. N. Jacobson, of New York City, for appellant.

PER CURIAM. We think the evidence offered by the plaintiff to prove the condition of the accounts at the time the representations were made, and excluded by the court, was competent, as tending to show the falsity of the representations made by the defendant which were directly connected with the purchase of the bill of goods in question. It follows that the judgment appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

McLAUGHLIN, J., dissents, upon the ground that the offer to prove on the 31st of December, 10 days after the letter in which it is claimed a false statement was made, did not establish that the statement was false at the time it was made.

AINSWORTH, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Appeal from Trial Term, Albany County. Action by Effie M. Ainsworth, as administratrix of William I. Ainsworth, deceased, against the New York Central & Hudson River Railroad Company. From a judgment on an assessment of damages in favor of plaintiff for \$20,345.50, and from an order denying a motion to set aside the award and assessment of damages and for a new assessment of damages, defendant appeals. Reversed, and new trial granted, unless plaintiff stipulates to reduce the recovery. See, also, 151 App. Div. 332, 135 N. Y. Supp. 474. Visscher, Whalen & Austin, of Albany (William L. Visscher, of Albany, of counsel), for appellant. Richard O. Bassett and Thomas Francis Woods, both of Albany, for respondent.

PER CURIAM. Judgment and order reversed, and new trial granted, with costs to appellant to abide event, unless the plaintiff stipulates to reduce the verdict to \$12,000, and if she so stipulates the judgment is modified, and, as so modified, judgment and order affirmed, without costs.

WOODWARD, J. (dissenting). I vote to affirm this judgment, and expressly dissent from that part of the decision which provides for a reduction of the amount of the recovery. In my judgment, this is not a case calling for any such action by this court. The plaintiff's intestate was a man 42 years of age, intelligent, fairly well educated, sober, and industrious, a respected member of society. He was actually

earning at the time of his death \$1,200 per annum, and had all the chances of a good American citizen to increase this amount indefinitely. He left a widow and two young children, the latter of the ages of 12 and 7 years, respectively. The breadwinner of this family is dead by the negligent act of the defendant. The actual financial loss possibly largely exceeds the recovery, and the loss to these children of the companionship, advice, counsel, and guidance of a good father is difficult to overestimate. A jury of 12 men has fixed what I regard as a reasonable sum. The litigation has been protracted and expensive, and I do not think the alternative should be forced upon the plaintiff of accepting a reduction or the burden of a new trial.

HOWARD, J., concurs.

ALLEN v. BECKER et al. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Horace G. Allen, as executor, etc., against Neal D. Becker, impleaded with others. No opinion. Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed.

ALLEN, Respondent, v. CITY OF NEW YORK, Appellant. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Robert L. Allen against the City of New York. No opinion. Motion for reargument (of 160 App. Div. 534, 145 N. Y. Supp. 1022) denied, without costs.

ALTHAUSE v. UNITED STATES STEEL CORPORATION. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Walter Althause against the United States Steel Corporation. With this case have been consolidated in this court cases bearing titles as follows: Walter Althause v. Richard Trimble; William Theile v. United States Steel Corporation; Same v. Richard Trimble. No opinions. Motions granted. Orders filed. See, also, 145 N. Y. Supp. 1111.

AMERICAN STONE RENOVATING & STUCCO CO. v. GARVER et al. (Supreme Court, Appellate Division, Second Department. April 8, 1914.) Action by the American Stone Renovating & Stucco Company against John A. Garver and others.

PER CURIAM. Judgment, in so far as appealed from, affirmed, with costs, on authority of *Toop v. Smith*, 181 N. Y. 283, 287, 73 N. E. 1113.

JENKS, P. J., taking no part.

ANDERSON et al. v. BRADY. ANDERSON v. SAME. (Supreme Court, Appellate Di-

vision, First Department. February 20, 1914.) Actions by Rasmus Anderson and others and by Rasmus Anderson against Frank G. Brady. J. H. Levy, of New York City, for appellants. J. H. Buck, of New York City, for respondent. No opinion. Order filed.

ANSON, Appellant, v. SAVINGS BANK OF UTICA, Respondent. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Albert N. Anson, as administrator, etc., against the Savings Bank of Utica. No opinion. Appeal dismissed, without costs, upon stipulation filed. See, also, 155 App. Div. 937, 140 N. Y. Supp. 1017.

ASHLEY, Respondent, v. ERIE R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Joseph Ashley against the Erie Railroad Company.

PER CURIAM. This case was submitted to the jury on the theories that they might find that either the defendant's engineer or the defendant's conductor was guilty of negligence in the handling of the train, and so caused plaintiff's injuries. We fail to find in the record any evidence of negligence on the part of either the engineer or the conductor. We are of opinion, therefore, that the judgment and order must be reversed, and the complaint dismissed, with costs. Judgment and order reversed, and complaint dismissed, with costs. See, also, 156 App. Div. 888, 140 N. Y. Supp. 1109.

AUERBACH, Respondent, v. NUSBAUM et al., Appellants. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Louis Auerbach against Aaron E. Nusbaum and others. F. C. Avery, of New York City, for appellants. E. J. Bernheimer, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

AUGUST R. OHMAN MAP CO., Respondent, v. MORRIS PARK ESTATES, Appellant. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by the August R. Ohman Map Company against the Morris Park Estates. R. Victor, of New York City, for appellant. M. W. Ehrich, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

BACHMAN et al., Respondents, v. PENDLETON, Appellant. (Supreme Court, Appellate Division, Second Department. April 3, 1914.) Action by Frank H. Bachman and others against Nathaniel G. Pendleton.

PER CURIAM. Orders affirmed, with \$10 costs and disbursements.

JENKS, P. J., taking no part.

In re BACON. (Supreme Court, Appellate Division, First Department. March 13, 1914.)

In the matter of the petition of Alexander S. Bacon, etc. No opinion. Order affirmed, with \$10 costs and disbursements, without prejudice to any action that the petitioner may bring to enforce his claim to a lien. Order filed.

In re BALL. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) In the matter of the accounting of John Oscar Ball, as trustee, etc., of Mary Caulfield, deceased. No opinion. Motion to dismiss appeal denied, on condition that the appellant perfect his appeal, place the case on the May calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs. See, also, 159 App. Div. 913, 144 N. Y. Supp. 1104.

BARKIN CONST. CO., Appellant, v. HERSHFELD et al., Respondents. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by the Barkin Construction Company against Henry G. Hershfield and others. J. A. Seidman, of New York City, for appellant. M. H. Cane, of New York City, for respondents. No opinion. Order modified, by requiring defendants to pay all costs of action to date, to be taxed, and that the amendment shall be without prejudice to the position of the case on the calendar, and, as so modified, affirmed, without costs. Settle order on notice.

BARNHART, Respondent, v. SHEA et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Harvey P. Barnhart against Sylvia L. Shea and others. No opinion. Appeal dismissed, without costs, upon stipulation filed.

BAUM v. MUTUAL LIFE INS. CO. (two cases.) (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Annie Baum, as administratrix, against the Mutual Life Insurance Company. No opinion. Applications denied, upon the ground that the motions were not made within two months after the determination of the Appellate Term, as required by rule 10 of the rules of this court. Orders signed. See, also, 145 N. Y. Supp. 740.

BECKER v. LEVIN. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Louis Becker against Hyman Levin. No opinion. Application denied, with \$10 costs. Order signed. Motion for stay denied, with \$10 costs. Order filed.

In re BELFORD. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) In the matter of the application of Edward J. Belford for a writ of mandamus directed to Alfred E. Steers, as president, etc. No opinion. Motion granted, without costs.

BENZ AUTO IMPORT CO. OF AMERICA, Appellant, v. FROELICH, Respondent. (Supreme Court, Appellate Division, First Depart-

ment. February 20, 1914.) Action by the Bens Auto Import Company of America against Jesse Froelich. C. Oakes, of New York City, for appellant. J. S. Epstein, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

BENZ AUTO IMPORT CO., Appellant, v. FROELICH, Respondent. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Action by the Benz Auto Import Company against Jesse Froelich. C. Oakes, of New York City, for appellant. J. S. Epstein, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

BENNETT, Respondent, v. MONARCH ROAD ROLLER CO., Appellant. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Clayton P. Bennett against the Monarch Road Roller Company. H. L. Delatour, of Brooklyn, for appellant. H. Remington, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

BERLIN et al., Respondents, v. PEARLBERG, Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Abraham J. Berlin and another against Morris Pearlberg. No opinion. Order affirmed, with \$10 costs and disbursements.

BERRIAN, Respondent, v. CITY OF NEW YORK, Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Action by Barbara Berrian against the City of New York. W. E. C. Mayer, of New York City, for appellant. S. S. Kogan, of New York City, for respondent.

PER CURIAM. Judgment reversed, with costs, and complaint dismissed, with costs. Settle order on notice.

LAUGHLIN, J., dissents.

BERTINI, Respondent, v. HEYMANN et al., Appellants. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Amadeo A. Bertini against Sidney Heymann and others. M. Horowitz, of New York City, for appellants. A. Rosenberg, of New York City, for respondent. No opinion. Order reversed, with \$10 costs and disbursements, and motion granted, in so far as to limit examination to allegations of complaint; the date of examination to be fixed on settlement of order. Settle order on notice.

BLACK v. FONDA et al. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by William H. Black against Bayard Fonda and others. No opinion. Application granted. Order signed.

BLOHM, Appellant, v. T. A. GILLESPIE CO., Respondent. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) Action by Lizzie M. Blohm, as administratrix, etc., of Rudolph D. Blohm, deceased, against the T. A. Gillespie Company. No opinion. Judgment and order unanimously affirmed, with costs.

BODENHEIM, Respondent, v. CITY OF NEW YORK, Appellant, et al. (Supreme Court, Appellate Division, First Department. April 8, 1914.) Appeal from Municipal Court of New York. Action by Julius Bodenheimer against the City of New York, impleaded with others. From a judgment for plaintiff, and an order denying new trial, defendant appeals. Reversed, and judgment directed for defendant. See, also, 144 N. Y. Supp. 1108. William E. C. Mayer, of New York City, for appellant. Anthony J. Romagna, of New York City, for respondent.

PER CURIAM. There was no evidence that the defendant was negligent. The determination of the Appellate Term and the judgment of the Municipal Court are therefore reversed, and judgment directed for the defendant, with costs in all courts.

BOHLING v. PRUDENTIAL INS. CO. OF AMERICA. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Bertha Bohling against the Prudential Insurance Company of America. No opinion. Motion granted, to extent stated in order. Order filed. See, also, 146 N. Y. Supp. 1084.

BOHLING v. PRUDENTIAL INS. CO. OF AMERICA. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Bertha Bohling against the Prudential Insurance Company of America. No opinion. Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed. See, also, 146 N. Y. Supp. 1084.

BOLAND, Respondent, v. NEW YORK TRANSP. CO., Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Action by Mary Boland against the New York Transportation Company. F. H. Gerrodette, of Brooklyn, for appellant. M. Feltenstein, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

BOLTON, Appellant, v. BOLTON, Respondent. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Bertha L. Bolton against Albert J. Bolton. No opinion. Judgment affirmed, without costs.

BOUCHARD, Respondent, v. BURGARD et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.)

Action by Alma Bouchard, as administratrix, etc., against Henry P. Burgard and another. No opinion. Appeal dismissed, without costs, upon stipulation filed.

In re **BOYER**. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) In the matter of the judicial settlement of the final account of William H. Boyer, as sole surviving trustee of the estate of Charles W. Darling, deceased. No opinion. Decree of the Surrogate's Court of Suffolk County affirmed, with costs payable out of the estate.

BRADY, Appellant, v. **CLARK**, Respondent. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Action by Mary Brady, as administratrix, etc., against John W. Clark. C. J. Earley, of New York City, for appellant. F. W. Sperling, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

BROADWAY CORPORATION v. GEORGE RECTOR, Incorporated. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by the Broadway Corporation against George Rector, Incorporated. No opinion. Motion denied, with \$10 costs. Order filed.

BROWN, Respondent, v. **BROWN**, Appellant (two cases). (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Charles A. Brown against Agnes Brown. No opinion. Orders affirmed, without costs. See, also, 83 Misc. Rep. 597, 145 N. Y. Supp. 471.

BROWN, Respondent, v. **BROWN**, Appellant. (Supreme Court, Appellate Division, Second Department. April 3, 1914.) Action by Charles A. Brown against Agnes Brown. No opinion. Motions for leave to appeal (from 148 N. Y. Supp. 1085) to the Court of Appeals denied, without costs.

BROWN v. PROTECTED HOME CIRCLE. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Charles R. Brown against the Protected Home Circle.

PER CURIAM. Plaintiff's exceptions sustained, and motion for new trial granted, with costs to plaintiff to abide event. Held, that the nonsuit was improperly granted, that the evidence presented questions of fact which should have been submitted to the jury as to payment and acceptance by defendant of dues after the expiration of the payment period, and defendant's waiver of the forfeiture and reinstatement clauses of the certificate.

KRUSE, P. J., and **FOOTE**, J., dissent.

In re **BUCHLER**. (Supreme Court, Appellate Division, First Department. March 27,

1914.) In the matter of William P. Buchler, an attorney. No opinion. Motion granted. Settle order on notice. See, also, 155 App. Div. 246, 140 N. Y. Supp. 324.

BURKE, Respondent, v. **PITTSBURG CONTRACTING CO.**, Appellant. (Supreme Court, Appellate Division, First Department. April 3, 1914.) Action by Albert Burke against the Pittsburgh Contracting Company. J. A. Goodwin, of White Plains, for appellant. B. W. Moore, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

BUTLER et al., Appellants, v. **ROBINSON**, Respondent, et al. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Action by Marvin F. Butler and others against Seth B. Robinson, individually, etc., impleaded. W. C. Prime, of New York City, for appellants. E. S. Clinch, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

CAFÉ GOLDMAN, Respondent, v. **MARGULES**, Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by the Café Goldman against Abraham Margules. No opinion. Motion denied, on condition that defendant perfect the appeal, place the case on the April calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

CAHILL, Respondent, v. **BABCOCK & WILCOX CO.**, Appellant. (Supreme Court, Appellate Division, First Department. April 3, 1914.) Action by Dennis P. Cahill against the Babcock & Wilcox Company. E. C. Sherwood, of New York City, for appellant. S. B. Stiles, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

CAHN, Respondent, v. **MORRIS et al.**, Appellants. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Ferdinand Cahn against Abram Morris and another. J. M. Herzberg, of New York City, for appellants. M. J. Cahn, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

CANDALA, Respondent, v. **SCHENECTADY ORPHEUM THEATRE CO.**, Appellant. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Anthony Candala against the Schenectady Orpheum Theatre Company.

PER CURIAM. Judgment and order reversed, and new trial granted, with costs to appellant to abide event, unless the plaintiff stipulates to reduce the damages to \$250, in which case the judgment, as so modified, and order, affirmed, without costs. The court dis-

approves of the finding of fact that the defendant had knowledge of the quarrelsome disposition of its employé; the court finding that no exemplary damages are warranted by the evidence.

WOODWARD, J., votes for affirmance.

CAPP, Respondent, v. JACKSON, Appellant. (Supreme Court, Appellate Division, Third Department. March 13, 1914.) Action by Sophia Capp against Meyer Jackson. No opinion. Order affirmed, with \$10 costs and disbursements.

CARDOS v. EDWARDS. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Henry Cardos against Wm. H. Edwards, as commissioner. No opinion. Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed. See, also, 152 App. Div. 945, 137 N. Y. Supp. 1114; 146 N. Y. Supp. 1086.

CARDOS, Respondent, v. EDWARDS, Commissioner, Appellant. (Supreme Court, Appellate Division, First Department. April 3, 1914.) Appeal from Special Term, New York County. Application by Henry Cardos against William H. Edwards, as Commissioner. From a final order directing the issuance of a pre-emptory writ of mandamus, and from an order denying a motion for a new trial, defendant appeals. Orders reversed. See, also, 146 N. Y. Supp. 1086. Charles J. Nehrbas, of New York City, for appellant. William E. Murphy, of New York City, for respondent.

PER CURIAM. The verdict of the jury was clearly against the weight of evidence, and the order entered on the 26th day of May, 1913, denying the motion to set aside the verdict of the jury in answer to the questions submitted to them, is reversed, the motion granted, and a new trial ordered. The final order granting the mandamus, entered on the 22d day of May, 1913, falls with the order setting aside the verdict, and that is also reversed, with costs to the defendant.

CARPENTER, Appellant, v. CARPENTER, Respondent. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Marianne Carpenter against William H. Carpenter. No opinion. Judgment unanimously affirmed, with costs.

CASE, Respondent, v. WALTER et al., Appellants. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Appeal from Special Term, New York County. Action by Frank M. Case, Jr., against Eugene Walter and others. From an order on a motion for examination before trial, defendants appeal. Modified and affirmed. See, also, 143 N. Y. Supp. 1110. Nathan Burkan, of New York City, for appellants. David Gerber, of New York City, for respondent.

PER CURIAM. Order modified, by striking out from the order the clause which allows an

examination in relation to the counterclaim referred to in the tenth and eleventh paragraphs of the amended answer, and, as so modified, affirmed, without costs.

CASTELLI, Respondent, v. BURNS, Appellant, et al. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Domenico Castelli against Alexander S. Burns, impleaded. G. E. Blackwell, of New York City, for appellant. L. O. Van Doren, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 156 App. Div. 937, 141 N. Y. Supp. 1112; 158 App. Div. 913, 143 N. Y. Supp. 765.

CHALMERS v. MURPHY et al. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Harry B. Chalmers against Franklin Murphy and others. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 159 App. Div. 810, 144 N. Y. Supp. 825.

In re CHALONER. In re MILLER. (Supreme Court, Appellate Division, First Department. March 13, 1914.) In the matter of John A. Chaloner. In the matter of Hugh G. Miller. H. G. Miller, of New York City, pro se. J. H. Choate, Jr., of New York City, for John A. Chaloner. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

CHISHOLM, Respondent, v. T. A. GILLESPIE CO., Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Anthony Chisholm against the T. A. Gillespie Company. No opinion. Judgment and order unanimously affirmed, with costs.

In re CITY OF NEW YORK. In re UNNAMED STREET. (Supreme Court, Appellate Division, First Department. March 20, 1914.) In the matter of the City of New York. In the matter of an Unnamed Street. No opinion. Order affirmed, with costs and disbursements. Order filed.

CLARKE v. MARSHALL et al. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by John T. Clarke against James G. Marshall and others.

PER CURIAM. Order affirmed, without costs.

BURR, J., dissents, on the authority of Leach v. Haight, 4 App. Div. 613, 33 N. Y. Supp. 886.

CLASS JOURNAL CO. v. VALVELESS INNER TUBE CO. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by the Class Journal Company against the Valveless Inner Tube Company. No opinion. Application denied, with \$10

costs. Order signed. See, also, 145 N. Y. Supp. 958.

CLEMENT et al. v. SARATOGA HOLDING CO. et al. (Supreme Court, Appellate Division, Third Department. March 13, 1914.) Action by John B. Clement and another, as executors, against the Saratoga Holding Company and others.

PER CURIAM. Order resettled, by modifying the thirty-eighth finding of fact, by adding thereto the following: "Except it had no knowledge or information that the bonds had ever been transferred or delivered to Mrs. Way, or that she ever had or claimed any interest therein." Finding No. 40 is modified, by adding thereto the words: "Except as appears by Exhibit No. 23."

CLICK, Respondent, v. ABENDROTH & ROOT MFG. CO., Appellant. (Supreme Court, Appellate Division, Second Department. April 3, 1914.) Action by William Click against the Abendroth & Root Manufacturing Company.

PER CURIAM. Judgment and order reversed, upon the ground that there was no evidence to establish the negligence of defendant, and judgment directed dismissing the complaint, with costs.

RICH, J., dissents.

CLUTSAM, Respondent, v. CHAPMAN, Appellant. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by H. Stanley Clutsam against Charles McC. Chapman.

PER CURIAM. Motion denied, without costs. See, also, 80 Misc. Rep. 675, 141 N. Y. Supp. 801.

PUTNAM, J., took no part.

COCHRANE v. CORNWELL et al. (Supreme Court, Appellate Division, Third Department. March 13, 1914.) Action by William Cochrane against Hannah W. Cornwell and others.

PER CURIAM. Order reversed, with \$10 costs and disbursements, and motion denied, without costs, upon the ground that upon the perfection of the appeal for a new trial the judgment of the justice's court ceases to be of any force, and the respondent's only remedy is to secure a judgment upon the new trial or a dismissal of the appeal, and to rely upon the undertaking given upon the appeal. *Miller v. City of Buffalo*, 129 App. Div. 833, 113 N. Y. Supp. 1056; *Burns v. Howard*, 9 Abb. New Cases, 324.

In re **COFFIN.** (Supreme Court, Appellate Division, First Department. March 27, 1914.) In the matter of Harriet E. Coffin, an incompetent. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 159 App. Div. 901, 143 N. Y. Supp. 1110.

COLEMAN, Respondent, v. McOLENAHAN, Appellant. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Matthew Coleman against James McClenahan. No opinion. Motion granted. See, also, 145 N. Y. Supp. 1118.

COLUMBIA MACHINE & STOPPER CORPORATION v. H. KOEHLER & Co. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by the Columbia Machine & Stopper Corporation against H. Koehler & Co. No opinion. Motion granted, with \$10 costs. Order filed. Memorandum per curiam. See, also, 146 N. Y. Supp. 1087.

COLUMBIA MACHINE & STOPPER CORPORATION, Appellant, v. H. KOEHLER & CO., Respondent. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by the Columbia Machine & Stopper Corporation against H. Koehler & Co. G. Hahn, of New York City, for appellant. J. A. Goerdeler, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 146 N. Y. Supp. 1087.

CONDON v. EXTON HALL BROKERAGE & VESSEL AGENCY. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Action by John T. Condon against the Exton Hall Brokerage & Vessel Agency. No opinion. Application denied, with \$10 costs. Order signed. See, also, 83 Misc. Rep. 130, 144 N. Y. Supp. 760.

CONTINENTAL SECURITIES CO. et al., Appellants, v. MICHIGAN CENT. R. CO. et al., Respondents. (Supreme Court, Appellate Division, Third Department. March 13, 1914.) Action by the Continental Securities Company and another against the Michigan Central Railroad Company and others. No opinion. Motion denied. See, also, 160 App. Div. 127, 145 N. Y. Supp. 725.

COTENIA v. BUFFALO & L. E. TRACTION CO. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Olympia Cotenía against the Buffalo & Lake Erie Traction Company. No opinion. Order granting new trial, upon the ground of newly discovered evidence, affirmed, with costs. Appeal from judgment dismissed, without costs.

In re **COUNTY CLERK OF QUEENS COUNTY.** (Supreme Court, Appellate Division, Second Department. March 13, 1914.) In the matter of the application of the County Clerk of Queens County for an order to destroy certain papers, deposited or filed in his office, which the court may deem to have become useless. No opinion. Motion denied, without prejudice to a renewal thereof upon further papers.

CROCKER-WHEELER CO., Appellant, v. **GENESEE RECREATION CO.**, Respondent. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by the Crocker-Wheeler Company against the Genesee Recreation Company. No opinion. Motion for reargument (of 160 App. Div. 373, 145 N. Y. Supp. 477) granted; reargument to be heard on the 11th day of March, 1914.

CROTTY, Respondent, v. **ERIE R. CO.**, Appellant. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) Action by Michael Crotty against the Erie Railroad Company. No opinion. Judgment and order unanimously affirmed, with costs. See, also, 153 App. Div. 902, 137 N. Y. Supp. 1102.

CROWE, Respondent, v. **MATTES**, Appellant. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Appeal from Special Term, New York County. Action by James J. Crowe against William F. Mattea. From an order denying a motion to vacate an order for examination of defendant before trial, defendant appeals. Reversed, and motion granted in part. Louis V. Ebert, of New York City, for appellant. Lloyd M. Howell, of New York City, for respondent.

PER CURIAM. Order appealed from reversed, and motion granted, to the extent that defendant's examination will be limited to the question whether or not the purchaser, Skaake, claimed to have been produced by plaintiff, was presented to the defendant by said plaintiff, and the question as to the price at which defendant sold and conveyed his café and saloon business to said Skaake, without costs to either party.

CUCCIO v. NASSAU ELECTRIC R. CO. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Giuseppe Cuccio against the Nassau Electric Railroad Company. No opinion. Motion to dismiss appeal granted, with \$10 costs. Order filed.

CURTIN, Appellant, v. **HEALY**, Respondent. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by John Curtin against Thomas Healy. No opinion. Motion for leave to appeal to the Court of Appeals denied, without costs. See, also, 144 N. Y. Supp. 1111.

DALY, Respondent, v. **WHITRIDGE et al.**, Appellants. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Action by Peter F. Daly against Frederick W. Whitridge, as receiver, and another. B. H. Ames, of New York City, for appellants. T. H. Lord, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

DARCEY, Appellant, v. **DARCEY**, Respondent. (Supreme Court, Appellate Division, Sec-

ond Department. March 27, 1914.) Action by Mary L. Darcey against Dennis J. Darcey.

PER CURIAM. The writing of October 4, 1906, being not payable on a day certain, and upon a contingency not inevitable, is invalid as a promissory note. The agreement that it represents, being one to release and surrender dower rights to the husband, is against public policy and the laws of the state. On both causes of action, the complaint, as amended, was insufficient. The order and judgment are affirmed, with costs.

In re DARLING. (Supreme Court, Appellate Division, First Department. February 27, 1914.) In the matter of Joseph F. Darling. No opinion. Referred to official referee. Settle order on notice.

DAVIDSON et al. v. HOWELL. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by John H. Davidson and another against Grace H. Howell. No opinion. Motion denied, with \$10 costs. See, also, 145 N. Y. Supp. 1119.

DAVIS, Respondent, v. **HIGGINSON**, Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Nathan W. Davis against William Higginson. No opinion. Judgment and order of the County Court of Kings County unanimously affirmed, with costs.

DEAN, Respondent, v. **GENESEE VALLEY TRUST CO.**, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Fred J. Dean against the Genesee Valley Trust Company, as executor, etc., of Sarah A. Bygrave, deceased.

PER CURIAM. Judgment and order reversed, and new trial granted, with costs to appellant to abide event. Held, that the verdict of the jury is contrary to and against the weight of the evidence.

FOOTE, J., not sitting.

DECKER, Appellant, v. **HARRISON et al.**, Respondents. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Gertrude Lewis Decker against Henry Harrison and another, the latter as trustee, etc. No opinion. Judgment affirmed, with costs.

DEICHES, Respondent, v. **WESTERN DEVELOPMENT CO.**, Appellant. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Maurice Deiches, as receiver, etc., against the Western Development Company. F. Bien, of New York City, for appellant. G. M. Mackellar, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 158 App. Div. 926, 143 N. Y. Supp. 1113.

DE MAURIAO v. BYRNES. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Guy M. De Mauriac against Ophelia A. Byrnes. No opinion. Motion granted, unless appellant complies with terms stated in order. Order filed.

DESSAR v. HIRSCH et al. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Leo C. Dessar, as executor, etc., against Charles S. Hirsch and others. No opinion. Application granted. Order signed. See, also, 145 N. Y. Supp. 51.

DICKEY, Appellant, v. GORTNER, Respondent. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Paul Dickey against Christopher A. Gortner. No opinion. Motion denied, without costs. See, also, 146 N. Y. Supp. 264; 146 N. Y. Supp. 1089.

DICKEY, Appellant, v. GORTNER, Respondent. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Paul Dickey against Christopher A. Gortner.

PER CURIAM. Motion denied, without costs. See, also, 146 N. Y. Supp. 1089.

CARR, J., took no part.

DILG, Appellant, v. STRAUSS, Respondent. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Action by Christian F. Dilg against Gustavus E. Strauss. H. A. Sperry, of New York City, for appellant. H. R. Limburg, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed. See, also, 158 App. Div. 718, 143 N. Y. Supp. 948.

DOELGER et al., Respondents, v. MEYER, Appellant. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Action by Charles A. Doelger and others against Herman H. Meyer. J. H. Koehler, of New York City, for appellant. C. E. Travis, of New York City, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 144 N. Y. Supp. 1112.

In re DOUGHERTY. (Supreme Court, Appellate Division, First Department. March 27, 1914.) In the matter of Thomas F. Dougherty, deceased. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

DOUTH, Respondent, v. WALDO et al., Appellants. (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Action by William Douth against Rhineland Waldo and others. No opinion. Order affirmed, with \$10 costs and disbursements. See, also, 157 App. Div. 895, 933, 142 N. Y. Supp. 1116.

DRUMMOND, Com'r, v. SCHLESSINGER. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Michael J. Drummond, Commissioner, etc., against Alexander Schlessinger. No opinion. Motion granted, unless appellant complies with terms stated in order. Order filed.

DUCK et al., Respondents, v. BROOKLYN TRUST CO. et al., Appellants. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Madeline M. Duck and others against the Brooklyn Trust Company, as trustee, and others.

PER CURIAM. Motions for leave to appeal to the Court of Appeals granted, and questions certified in the form proposed.

JENKS, P. J., took no part.

DWELLE-KAISER CO., Respondent, v. H. P. SICKELS CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by the Dwelle-Kaiser Company against the H. P. Sickels Company. No opinion. Judgment and order affirmed, with costs.

In re EARLEY. (Supreme Court, Appellate Division, First Department. March 27, 1914.) In the matter of Martin J. Earley, an attorney. No opinion. Referee's report approved, and respondent disbarred. Settle order on notice. See, also, 158 App. Div. 883, 142 N. Y. Supp. 1116.

ECKERT v. TRUMAN et al. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Claudine Eckert against Clara M. Truman and George D. Nowland. No opinion. Motions to dismiss appeals denied, upon the ground that respondent's proceedings are stayed for nonpayment of costs upon the previous appeal. If these costs are paid within five days, the appeals may be placed upon the April calendar, and heard upon one printed record. See, also, 159 App. Div. 916, 144 N. Y. Supp. 1113.

EDDERY, Respondent, v. INTERBOROUGH RAPID TRANSIT CO., Appellant. (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Action by Mary Eddery, as administratrix, etc., of Andrew Eddery, deceased, against the Interborough Rapid Transit Company.

PER CURIAM. Judgment and order reversed, and new trial granted, costs to abide the event, on the ground that the verdict was against the weight of the evidence. See same case, 150 App. Div. 761, 135 N. Y. Supp. 170.

BURR and PUTNAM, JJ., dissent.

EGERER, Appellant, v. MANUFACTURERS' NAT. BANK OF BROOKLYN et al., Respondents. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by August Egerer against the Manufacturers' National Bank of Brooklyn and others. H.

R. Lhowe, of New York City, for appellant. F. L. Gross, of Brooklyn, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

ELLIOTT, Respondent, v. **NILES** et al., Appellants. (Supreme Court, Appellate Division, Second Department. April 3, 1914.) Action by George F. Elliott against William W. Niles and another, copartners, etc.

PER CURIAM. Judgment reversed, and new trial granted, costs to abide the event, on the ground that the evidence does not warrant a finding that more than 10 days were necessarily spent in the business of the reference, unless within 20 days plaintiff stipulate to reduce the recovery of damages to the sum of \$200, in which event the judgment, as modified, is unanimously affirmed, without costs. See, also, 157 App. Div. 933, 142 N. Y. Supp. 1117.

EMMET v. SANITARY WATER STILL CO. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by William T. Emmet, Superintendent, etc., against the Sanitary Water Still Company. No opinion. Motion granted; question certified; order filed. See, also, 146 N. Y. Supp. 343.

EQUITABLE LIFE ASSUR. SOCIETY, Respondent, v. **SEINIGER**, Appellant, et al. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Action by the Equitable Life Assurance Society against Ella N. Seiniger, Impleaded. A. B. Nathan, of New York City, for appellant. C. W. Pierson, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

ESCHER, Respondent, v. **BUFFALO & L. E. TRACTION CO.**, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Edward L. Escher against the Buffalo & Lake Erie Traction Company.

PER CURIAM. Judgment and order affirmed, with costs.

MERRELL, J., dissents.

ETSHELLS v. FARGO. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Harry Etshells against James F. Fargo, as treasurer, etc. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 144 N. Y. Supp. 1069.

FABER, Respondent, v. **GREENE**, Appellant. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Leander B. Faber against Everett Greene.

PER CURIAM. Motion to dismiss appeal denied, on condition that defendant serve his proposed case on appeal on or before March 10, 1914, and, if the plaintiff serves his amendments within 10 days, defendant perfect the

appeal, place it upon the April calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

JENKS, P. J., taking no part.

FEARON DANIEL CO., Appellant, v. **LONDON GUARANTEE & ACCIDENT CO.**, Respondent. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by the Fearon Daniel Company against the London Guarantee & Accident Company. W. R. Dorman, of New York City, for appellant. W. E. Lowther, of New York City, for respondent. No opinion. Order affirmed with \$10 costs and disbursements. Order filed.

FEDERER, Respondent, v. **HARRIS**, Appellant. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Hans Federer against Joseph Harris. No opinion. Motion denied, without costs. See, also, 145 N. Y. Supp. 1123.

FERBER, Appellant, v. **INDIA WHARF BREWING CO.**, Respondent. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Blanche J. Ferber against the India Wharf Brewing Company. No opinion. Order affirmed, with \$10 costs and disbursements.

FIFTH AVENUE SHOP, Inc., Respondent, v. **FOX-STIEFEL & CO.**, Appellant. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by the Fifth Avenue Shop, Incorporated, against Fox-Stiefel & Co. A. K. Stricker, of New York City, for appellant. M. L. Heidenheimer, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 83 Misc. Rep. 127, 144 N. Y. Supp. 705.

FIRST NAT. BANK OF DETROIT, MICH., v. **HOLLINS** et al. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by the First National Bank of Detroit, Mich., against Harry B. Hollins, and others. No opinion. Order affirmed, with \$10 costs and disbursements. The question as to the acceptance of the pleading is academic, and the application for the stay should be denied. See *Gibbons v. Bush Co.*, 115 App. Div. 619, 101 N. Y. Supp. 721. See, also, 145 N. Y. Supp. 1123.

FIRST NAT. BANK OF PITTSBURGH v. STALLO. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by the First National Bank of Pittsburgh against Edmund K. Stallo. No opinion. Motion granted. Order filed. See, also, 145 N. Y. Supp. 747.

In re **FISCHER**. (Supreme Court, Appellate Division, Second Department. March 6,

1914.) In the matter of the application of Louis Fischer for writ of mandamus against the faculty of the New York University.

PER CURIAM. Motion for mandamus denied, without costs, on the ground that the faculty of the New York University, in passing on the qualifications of the petitioner, acts as a quasi judicial body, whose determination cannot be reversed by mandamus (*People ex rel. Jones v. N. Y. Homeopathic Medical College and Hospital*, 20 N. Y. Supp. 379); also in that this court has original jurisdiction to grant the writ of mandamus only to a judge or judges (section 2069, Code Civ. Proc.); and, further, that the remedy by alternative writ of mandamus has been passed upon by the Special Term, and denied by order of Mr. Justice Blackmar, February, 26, 1914. See, also, 146 N. Y. Supp. 1091.

In re **FISCHER**. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) In the matter of the application of Louis Fischer for a writ of mandamus against the faculty of the New York University. No opinion. Motion denied. See, also, 146 N. Y. Supp. 1090.

FITZGIBBON, Appellant, v. **ERIE R. CO.** Respondent. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Frank Fitzgibbon against the Erie Railroad Company. No opinion. Order affirmed, with \$10 costs and disbursements. See, also, 145 N. Y. Supp. 1123.

FITZPATRICK, Appellant, v. **NAUSHON CO.**, Respondent. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Charles F. Fitzpatrick against the Naushon Company. No opinion. Order affirmed, with \$10 costs and disbursements.

FLAITSZ, Respondent, v. **ELMIRA, C. & W. RY.**, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Ida Flaitsz against the Elmira, Corning & Waverly Railway. No opinion. Appeal dismissed, without costs, upon stipulation filed.

FLEMING, Respondent, v. **NEW YORK TRANSP. CO.**, Appellant. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Appeal from Trial Term, New York County. Action by Catherine J. Fleming, administratrix, against the New York Transportation Company. From a judgment on a verdict for plaintiff, and from an order denying a motion for new trial, defendant appeals. Reversed, and new trial ordered. Theodore H. Lord, of New York City, for appellant. William Rand, Jr., of New York City, for respondent.

PER CURIAM. The judgment and order appealed from should be reversed, and a new trial ordered, with costs to appellant to abide event, on the ground that the verdict is against

the weight of the evidence as to the lack of contributory negligence.

INGRAHAM, P. J., and HOTCHKISS, J., dissent, and vote for affirmance.

FLYNN, Respondent, v. **WHITNEY et al.**, Appellants. (Supreme Court, Appellate Division, Third Department. March 13, 1914.) Action by John H. Flynn against Charles L. A. Whitney and another. No opinion. Order affirmed, with \$10 costs and disbursements.

FORSTER v. OSBORNE. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Thomas H. Forster against William H. H. Osborne. No opinion. Defendant's exceptions overruled, motion for new trial denied, with costs, and judgment directed for the plaintiff upon the verdict, with costs.

FOX v. FOX. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Sigmund Fox against Henry E. Fox. No opinion. Application denied, with \$10 costs. Order signed. See, also, 145 N. Y. Supp. 949.

FOX et al. v. PROCTOR. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Hugh L. Fox and others against Frederick F. Proctor. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 145 N. Y. Supp. 709; 146 N. Y. Supp. 1091.

FOX et al. v. PROCTOR. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Hugh L. Fox and others against Frederick F. Proctor. No opinion. Motion granted. Order filed. See, also, 146 N. Y. Supp. 1091.

FRANK J. LENNON CO., Appellant, v. **NEW YORK MAIL CO.**, Respondent (five cases). (Supreme Court, Appellate Division, First Department. March 6, 1914.) Actions by the Frank J. Lennon Company against the New York Mail Company. B. L. Kraus, of New York City, for appellant. W. R. Wilder, of New York City, for respondent. No opinion. Determinations affirmed, with costs. Orders filed. See, also, 153 App. Div. 882, 142 N. Y. Supp. 1118.

FRIED, Respondent, v. **BECHER**, Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Annie Fried against Nathan Becher. No opinion. Order affirmed, without costs, with leave to defendant to withdraw his demurrer and answer within 20 days, upon payment of all costs, except the costs of this appeal, to be taxed on notice.

FROST, Appellant, v. **HAYWARD et al.**, Respondents. (Supreme Court, Appellate Division, First Department. March 20, 1914.)

sion, Fourth Department. March 4, 1914.) Action by Catherine P. Frost, as committee of the person and property of Uzarella Hayward, an incompetent person, against Edwin S. Hayward and another. No opinion. Motion granted, and appeal dismissed, with costs.

GARRISON, Appellant, v. THOMPSON, Respondent. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Action by Cornelius M. Garrison against Robert M. Thompson. S. J. Siegel, of New York City, for appellant. A. Stickney, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

GARRY, Respondent, v. RED HOOK LIGHT & POWER CO., Appellant. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by John F. Garry against the Red Hook Light & Power Company. No opinion. Judgment and order unanimously affirmed, with costs.

GLENDENING, Appellant, v. WESTERN UNION TELEGRAPH CO., Respondent. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by George O. Glendening against the Western Union Telegraph Company. J. W. Purdy, Jr., of New York City, for appellant. A. T. Benedict, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 159 App. Div. 909, 144 N. Y. Supp. 1117.

GOETZ, Appellant, v. DUFFY et al., Respondents. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Catherine Goetz, as administratrix, etc., against Jane E. Duffy, individually and as executrix, etc., and others. No opinion. Motion for leave to appeal (from 146 N. Y. Supp. 152) to the Court of Appeals granted.

GOLDSTEIN, Respondent, v. LAUFER, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Henry Goldstein against Jacob Laufer. No opinion. Interlocutory judgment affirmed, with costs.

In re GRADE CROSSING COM'RS OF CITY OF BUFFALO. In re SOMMER et al. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) In the matter of the application of the Grade Crossing Commissioners of the City of Buffalo for the appointment of commissioners, etc., in the matter of lands of August C. Sommer and others. Proceeding No. 96. No opinion. Order confirming report of commissioners as to parcel No. 1 vacated, and said report and proceedings as to parcel No. 1 sent back to the same commissioners for a new appraisal and report, in accordance with stipulation filed.

GRAY v. NEW YORK CENT. & H. R. R. CO. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Charles P. Gray against the New York Central & Hudson River Railroad Company. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 145 N. Y. Supp. 1125.

GRIFFING v. VANDERBILT et al. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Timothy M. Griffing against Edward Ward Vanderbilt and others.

PER CURIAM. Motion granted, on defendants giving a bond in the sum of \$2,000, within 10 days, to indemnify plaintiff against loss pending the hearing and determination of the case; otherwise, motion denied, with \$10 costs. Settle order before Mr. Justice CARR.

GRILLI, Appellant, v. DEL PAPA, Respondent. (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Action by Nicola Grilli against Michele Del Papa.

PER CURIAM. Order affirmed, with \$10 costs and disbursements.

BURR, J., dissents, upon the ground that none of the allegations of the complaint are made upon information and belief. If the words were uttered to the knowledge of plaintiff, it must be the case that he was present and heard them.

GRISWOLD, Appellant, v. NEW YORK STATE RYS., Respondent. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Charlotte C. Griswold against the New York State Railways. No opinion. Appeal dismissed, without costs, upon stipulation filed.

GROPP v. GREAT ATLANTIC & PACIFIC TEA CO. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Henry E. Gropp against the Great Atlantic & Pacific Tea Company. No opinion. Motion granted, on condition stated in order. Order filed. See, also, 83 Misc. Rep. 374, 145 N. Y. Supp. 959.

GROSSMAN, Respondent, v. BLUESTEIN, Appellant, et al. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Morris Grossman against Jacob Bluestein, impleaded. L. B. Cohen, of New York City, for appellant. B. E. Messler, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs. Order filed.

INGRAHAM, P. J., dissents.

HAAKENSON, Appellant, v. COVERING & SUPPLY CO., Respondent. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Daniel Haakenson against

the Covering & Supply Company. J. A. Bur-
 lean, for appellant. F. V. Johnson, of New
 York City, for respondent.

PER CURIAM. Judgment affirmed, with
 costs. Order filed.

LAUGHLIN, J., dissents.

HALLAHAN v. HALLAHAN. (Supreme
 Court, Appellate Division, First Department.
 February 13, 1914.) Action by Katherine V.
 Hallahan against Edward F. Hallahan. No
 opinion. Motion granted. Order filed. See,
 also, 151 App. Div. 934, 135 N. Y. Supp. 1116.

HANDWEILER v. CITY OF NEW YORK.
 Supreme Court, Appellate Division, First De-
 partment. February 27, 1914.) Appeal from
 Trial Term, New York County. Action by
 Pepi Handweiler against the City of New York.
 From a judgment entered on a verdict of the
 jury, and from an order denying a motion for
 a new trial, defendant appeals. Reversed, and
 complaint dismissed. William E. C. Mayer, of
 Brooklyn, for appellant. Hugo Levy, of New
 York City, for respondent.

PER CURIAM. The judgment and order
 appealed from are reversed, with costs to the
 appellant, upon the ground that there was no
 evidence to justify the finding of the jury that
 he defendant was negligent; and, on the same
 round, the motion made by the defendant at
 the close of the whole case to dismiss the com-
 plaint is granted. Judgment ordered accord-
 ingly.

HANDWEILER v. CITY OF NEW YORK.
 Supreme Court, Appellate Division, First De-
 partment. February 27, 1914.) Appeal from
 Trial Term, New York County. Action by
 Elias Handweiler against the City of New
 York. From a judgment entered on a verdict
 of the jury, and from an order denying a mo-
 tion for a new trial, defendant appeals. Re-
 versed, and complaint dismissed. William E. C.
 Mayer, of Brooklyn, for appellant. Hugo Levy,
 of New York City, for respondent.

PER CURIAM. The judgment and order ap-
 pealed from are reversed, with costs to the ap-
 ellant, upon the ground that there was no evi-
 dence to justify the finding of the jury that
 he defendant was negligent; and, on the same
 round, the motion made by the defendant at
 the close of the whole case to dismiss the com-
 plaint is granted. Judgment ordered accord-
 ingly.

HARPER, Appellant, v. BABCOCK et al.,
 respondents. (Supreme Court, Appellate Divi-
 sion, First Department. April 9, 1914.) Ap-
 peal from Special Term, New York County.
 Action by George W. Harper, Jr., in behalf of
 himself and other stockholders of the Gilbert
 Manufacturing Company, against Francis E.
 Babcock and others. From an order denying
 motion for a receiver of the assets of the
 Gilbert Manufacturing Company during the
 endency of the action, plaintiff appeals. Re-
 versed, and motion granted. George W. Harp-

er, Jr., of New York City, in pro. per. Ralph
 S. Rounds, of New York City, for individual
 respondents. Herbert Barry, of New York
 City, for respondent trustees.

PER CURIAM. The order should be re-
 versed, with \$10 costs and disbursements to the
 plaintiff, payable out of the fund, and the mo-
 tion granted, so far as to require the money
 now on deposit in banks in the city of New
 York to remain as deposited and not to be
 withdrawn, except on final judgment or the fur-
 ther order of the court.

**HART, Respondent, v. GENESEE VAL-
 LEY TRUST CO., Appellant.** (Supreme
 Court, Appellate Division, Fourth Department.
 March 4, 1914.) Action by William A. Hart
 against the Genesee Valley Trust Company, as
 executor, etc., of Sarah A. Bygrave, deceased.

PER CURIAM. Judgment and order revers-
 ed, and new trial granted, with costs to ap-
 ellant to abide event. Held that, the record be-
 ing silent as to proof that the river bank is
 included within the "Bygrave Homestead" con-
 tracted for, the trial court erred in submitting
 the consideration of such river bank to the
 jury as an element of damage to be considered
 by them.

FOOTE, J., not sitting.

**HARTMAN, Appellant, v. CARMAN, Re-
 spondent.** (Supreme Court, Appellate Division,
 First Department. March 20, 1914.) Appeal
 from Trial Term, New York County. Action by
 Regina Hartman against William W. Carman.
 From a judgment dismissing the complaint at
 the close of plaintiff's case for failure of proof,
 he appeals. Reversed, and new trial ordered.
 Gustavus A. Rogers, of New York City, for ap-
 ellant. Edward P. Mowton, of New York
 City, for respondent.

PER CURIAM. We think there was evi-
 dence to justify the submission to the jury of
 the question as to the defendant's negligence
 and as to the plaintiff's freedom from contribu-
 tory negligence. Judgment reversed; new trial
 ordered; costs to appellant to abide event.

**HATCH, Appellant, v. SMITH, Respond-
 ent.** (Supreme Court, Appellate Division, First
 Department. February 27, 1914.) Action by
 Edward Hatch, Jr., against Milford H. Smith.
 L. W. Severy, of New York City, for appel-
 lant. L. A. Wait, of Saratoga Springs, for re-
 spondent. No opinion. Order affirmed, with
 \$10 costs and disbursements. Order filed.

**H. BRIDGMAN SMITH CO., Respondent,
 v. MACE MFG. CO., Appellant.** (Supreme
 Court, Appellate Division, Second Department.
 February 27, 1914.) Action by the H. Bridg-
 man Smith Company against the Mace Manu-
 facturing Company. No opinion. Judgment
 and order of the County Court of Kings County
 affirmed, with costs.

HECHT v. WAHL. (Supreme Court, Appel-
 late Division, First Department. March 13

1914.) Action by Jonas Hecht against Ignatz Wahl. No opinion. Motion granted, unless appellant complies with terms stated in order. Order filed.

HEDGES, Respondent, v. PIONEER IRON WORKS, Appellant. (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Action by Dayton Hedges against the Pioneer Iron Works. No opinion. Orders affirmed, with \$10 costs and disbursements.

HEIFERMAN v. GREENHUT CLOAK CO. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Frank Heiferman against the Greenhut Cloak Company. No opinion. Application granted. Order signed. See, also, 83 Misc. Rep. 435, 145 N. Y. Supp. 142.

HEILBRUNN v. NORTH BRITISH & MERCANTILE INS. CO. OF LONDON & EDINBURGH. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Appeal from Appellate Term, First Department. Action by Simon Heilbrunn against the North British & Mercantile Insurance Company of London & Edinburgh. From a determination affirming an order of the City Court granting a motion for judgment, and dismissing the complaint for failure of plaintiff to reply to separate defense contained in the answer, plaintiff appeals. Determination affirmed, and appeal allowed to the Court of Appeals; the questions to be certified to be determined on settlement of order. Jacob R. Schiff, of New York City, for appellant. Leo Levy, of New York City, for respondent.

PER CURIAM. The determination appealed from is affirmed, with \$10 costs and disbursements, on the authority of Heilbrunn v. German Alliance Insurance Co., 150 App. Div. 670, 135 N. Y. Supp. 769. An appeal is allowed to the Court of Appeals; the questions to be certified to be determined on settlement of the order.

INGRAHAM, P. J., and McLAUGHLIN, J., dissent, on the dissenting opinion in Heilbrunn v. German Alliance Ins. Co., supra.

HERRMANN, Respondent, v. HERRMANN, Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Alicia Herrmann against Harry Herrmann.

PER CURIAM. Judgment affirmed. There is no exception in the case which presents a question for review in this court.

HIRSCH, Respondent, v. LICHTENSTEIN, Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Action by Charles S. Hirsch against Solomon K. Lichtenstein. A. S. Friend, of New York

City, for appellant. A. K. Stricker, of New York City, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed. See, also, 79 Misc. Rep. 31, 139 N. Y. Supp. 4.

McLAUGHLIN, J., dissents.

HOEFLE, Appellant, v. AMERICAN LAUNDRY MACHINERY MFG. CO., Respondent. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Emil Hoefle, as trustee, etc., against the American Laundry Machinery Manufacturing Company. No opinion. Order of the Special term of January 14, 1914, affirmed, with \$10 costs and disbursements. See, also, 146 N. Y. Supp. 621.

In re HOLLE et al. In re TAMMANY et al. (Supreme Court, Appellate Division, Third Department. March 13, 1914.) In the matter of the application of Charles J. Holle and others for judicial review of the primary election of the Democratic party in the Fifteenth ward of the city of Albany. In the matter of the application to punish John Tammany and others for an alleged contempt of court, arising in the above-entitled proceeding. No opinion. Motions granted. See, also, 160 App. Div. 369, 145 N. Y. Supp. 388.

HOPGOOD, Respondent, v. McCONNELL PRINTING CO., Appellant. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Thomas H. Hopgood against the McConnell Printing Company. C. J. Shearn, of New York City, for appellant. O. W. Ehrhorn, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

H. P. SICKLES CO., Respondent, v. R. T. FORD CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by the H. P. Sickles Company against the R. T. Ford Company. No opinion. Judgment affirmed, with costs.

HUGHES, Respondent, v. NEW YORK PUB. CO., Limited, Appellant. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by George Hughes against the New York Publishing Company, Limited. W. Huck, Jr., of New York City, for appellant. J. F. Brosnan, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

IENNA, Respondent, v. TOWBIN, Appellant. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Charles Ienna, an infant, etc., against Lewis Towbin. E. J. Redington, of New York City, for appellant. S. Wechsler, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

INNOVATION INGENUITIES, Inc., Appellant, v. NEW YORK TIMES CO., Respondent. (Supreme Court, Appellate Division, First Department, February 20, 1914.) Action by Innovation Ingenuities, Incorporated, against the New York Times Company. A. K. Stricker, of New York City, for appellant. No opinion. Judgment affirmed, with costs. Order filed. See, also, 158 App. Div. 929, 148 N. Y. Supp. 1123.

JACKSON et al., Respondents, v. NEW YORK CONTRACTING CO. et al., Appellants. (Supreme Court, Appellate Division, First Department, March 6, 1914.) Action by Samuel Jackson and others against the New York Contracting Company and others. J. A. Deering, of New York City, for appellants. I. Skutch, of New York City, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed.

JACOBS v. MONATON REALTY INVESTING CORPORATION. (Supreme Court, Appellate Division, First Department, February 13, 1914.) Action by Arthur E. Jacobs against the Monaton Realty Investing Corporation. No opinion. Motion granted; questions certified; order filed. See, also, 145 N. Y. Supp. 611.

JANISZEWSKI, Appellant, v. FITZPATRICK, Respondent. (Supreme Court, Appellate Division, Second Department, March 13, 1914.) Action by Felixa Janiszewski, as administratrix, etc., against William H. Fitzpatrick.

PER CURIAM. Order affirmed, with costs. See, also, 157 App. Div. 199, 141 N. Y. Supp. 340.

THOMAS, J., dissents.

JOHN L. SCHWARTZ BREWING CO., Respondent, v. MURPHY et al., Appellants. (Supreme Court, Appellate Division, Fourth Department, March 4, 1914.) Action by the John L. Schwartz Brewing Company against Edward J. Murphy and another. No opinion. Motion granted and appeal dismissed, with costs.

In re JOHNSON. (Supreme Court, Appellate Division, First Department, March 20, 1914.) Appeal from Surrogate's Court, New York County. Judicial settlement of the accounts of Le Roy W. Johnson, as administrator, etc. Appeal from a decree of the Surrogate's Court settling the account. Modified and affirmed. Hamilton R. Squier, of New York City, for appellant. Henry B. Johnson, of New York City, for respondent.

PER CURIAM. The decree appealed from should be modified, by reducing the allowance for counsel fee by the sum of \$200, and, as modified, affirmed, without costs to either party.

JOHNSON, Appellant, v. JOHNSON et al., Respondents. (Supreme Court, Appellate Division, Second Department, March 27, 1914.) Action by Charles F. Johnson against John A. Johnson and another. No opinion. Judgment affirmed, without costs.

JOHNSTON, Respondent, v. STRASSBURGER, Appellant. (Supreme Court, Appellate Division, First Department, March 18, 1914.) Action by Albert M. Johnston against Sarah Strassburger. L. M. Prince, of New York City, for appellant. H. Edwards, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

In re JONES (two cases). (Supreme Court, Appellate Division, First Department, February 27, 1914.) In the matter of Holmes Jones. No opinion. Motions denied. Settle order on notice. See, also, 159 App. Div. 782, 145 N. Y. Supp. 65.

JONES, Respondent, v. COMMERCIAL TRAVELERS' MUT. ACCIDENT ASS'N OF AMERICA, Appellant. (Supreme Court, Appellate Division, Fourth Department, March 4, 1914.) Action by Myrtle C. Jones, as executrix, etc., against the Commercial Travelers' Mutual Accident Association of America. No opinion. Judgment and order affirmed, with costs.

JONES, Respondent, v. WESTCHESTER ST. R. CO., Appellant. (Supreme Court, Appellate Division, Second Department, March 20, 1914.) Action by Samuel Jones against the Westchester Street Railroad Company.

PER CURIAM. Judgment and order of the County Court of Westchester County reversed, and new trial ordered, costs to abide the event, on the ground that the verdict is against the weight of the evidence.

RICH, J., votes to affirm.

JONES, Appellant, v. WOODIN et al., Respondents. (Supreme Court, Appellate Division, First Department, March 6, 1914.) Action by Frederick A. Jones against William H. Woodin and others. C. L. Craig, of New York City, for appellant. W. Rand, Jr., of New York City, for respondents. No opinion. Orders affirmed, with costs. Order filed. See, also, 150 App. Div. 900, 134 N. Y. Supp. 1136.

KAEHLBLE, Respondent, v. NEW YORK CENT. & H. R. CO., Appellant. (Supreme Court, Appellate Division, Second Department, March 18, 1914.) Action by Karl Kaelble against the New York Central & Hudson River Railroad Company. No opinion. Judgment and order reversed, and new trial granted, costs to abide the event, on the ground that the verdict was against the weight of evidence.

KANE, Appellant, v. KANE, Respondent. (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Action by Catharine A. Kane against Bernard F. Kane. No opinion. Order affirmed, with \$10 costs and disbursements.

KATZ v. KATZ. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Lizzie Katz against Louis Katz. No opinion. Motion denied, with \$10 costs. Order filed.

KAUFMAN, Appellant, v. HOPPER, Respondent. (Supreme Court, Appellate Division, Second Department. April 8, 1914.) Action by Lena Kaufman, as administratrix, etc., of Frederick Kaufman, deceased, against Abraham C. Hopper. No opinion. Judgment and order unanimously affirmed, with costs. See, also, 151 App. Div. 28, 135 N. Y. Supp. 363.

KAYSER, Appellant, v. MILLER, Respondent. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Bertha Kayser against Wm. H. Miller. J. Panken, of New York City, for appellant. F. H. Mills, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

KEEGAN, Appellant, v. MARCONI WIRELESS TELEGRAPH CO. et al., Respondents. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by William E. Keegan against the Marconi Wireless Telegraph Company and others. A. B. Hyman, of New York City, for appellant. P. S. Hill, of New York City, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

KEENAN, Appellant, v. JOLINE et al., Respondents. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Mary Keenan against Adrian H. Joline and another. G. W. Glaze, of New York City, for appellant. B. H. Ames, of New York City, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed.

KEVE v. COLUMBIA KID HAIR CURLERS CO. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Max Keve against the Columbia Kid Hair Curlers Company. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 145 N. Y. Supp. 1072, 1128.

KIMBARK, Respondent, v. NICHOLS, Appellant, et al. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Elmer M. Kimbark against James C. Nichols, impleaded. D. L. Fultz, of New York City, for appellant. E. L. Kalish, of New York

City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

KIMBARK v. WALDEMAR CO. et al. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Elmer M. Kimbark against the Waldemar Company and others. E. L. Kalish, of New York City, for appellant. F. P. Ufford, of New York City, for respondents. No opinion. Orders affirmed, with \$10 costs and disbursements. Orders filed. See, also, 145 N. Y. Supp. 1123; 146 N. Y. Supp. 1096.

KIMBARK v. WALDEMAR CO. et al. (two cases). (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Elmer M. Kimbark against the Waldemar Company and others. No opinion. Motions denied, with \$10 costs. Orders filed. See, also, 146 N. Y. Supp. 1096.

KLAR et al. v. SCHWARTZ. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Samuel Klar and another against Tobias Schwartz. No opinion. Motion denied, with \$10 costs. Settle order on notice.

KOPANCES, Appellant, v. OCEAN S. S. CO. OF SAVANNAH, Respondent. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Fedar Kopances against the Ocean Steamship Company of Savannah. No opinion. Order affirmed, with \$10 costs and disbursements, upon the ground that the court, pursuant to section 783 of the Code of Civil Procedure, authorized the first motion, which was in time, to be withdrawn, and the present motion to be made.

KURNICK, Respondent, v. GREENBAUM, Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Nathan Kurnick against Lena Greenbaum. No opinion. Motion to dismiss the appeal of Lena Greenbaum granted, with costs. See, also, 144 N. Y. Supp. 1124.

LAFAYE, Respondent, v. BARNARD et al., Appellants. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Delore Lafaye against Henry A. Barnard and another. No opinion. Judgment affirmed, with costs.

LAKE ERIE SEED CO., Appellant, v. NEW YORK, C. & ST. L. R. CO., Respondent. SAME v. WESTERN NEW YORK & P. R. CO. et al. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Actions by the Lake Erie Seed Company against the New York, Chicago & St. Louis Railroad Company and against the Western New York & Pennsylvania Railroad Company and another.

No opinion. Judgment in each case affirmed, with one bill of costs.

In re **LANCASHIRE WILCOX**, Appellant, v. **AMERICAN SURETY CO.**, Respondent. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) In the matter of Norman F. Lancashire, committee, etc. Action by Charles F. Wilcox, special guardian, against the American Surety Company.

PER CURIAM. Motion denied, on condition that the special guardian, appellant, place the case at the foot of the present calendar, and be ready for argument when reached; otherwise, motion granted. This court will not undertake to advise the special guardian as to the performance of his duties in matters of procedure. See, also, 144 N. Y. Supp. 1124.

LANG v. JUNG. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Fred Lang against Margaretha Jung and others. No opinion. Judgment and order affirmed, with costs. See, also, 158 App. Div. 905, 142 N. Y. Supp. 1127.

LANZ v. TOSSINY et al. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Mary E. Lanz against James P. Tossiny, individually and as executor, etc., and others. No opinion. Judgment affirmed by default, with costs.

LAUZON, Respondent, v. **NEW YORK, N. H. & H. R. CO.**, Appellant, et al. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Joseph A. Lauzon against the New York, New Haven & Hartford Railroad Company, and William W. Barrett, as president of the Adams Express Company, defendant. No opinion. Judgment and order reversed, and new trial granted, costs to abide the event, unless within 20 days plaintiff stipulate to reduce the recovery of damages to the sum of \$20,000, in which event the judgment, as modified, and the order, are unanimously affirmed, without costs.

LAWRENCE BROS., INC., Appellant, v. **CHIANGONE**, Respondent. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Lawrence Bros., Incorporated, against Rose Chiangone. No opinion. Order of the City Court of Yonkers affirmed, without costs. See, also, 159 App. Div. 919, 144 N. Y. Supp. 1125.

LEONORI, Respondent, v. **LEONORI**, Appellant. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Kathryn Leonori against Charles L. Leonori. A. L. Marilley, of New York City, for appellant. W. G. Philippeau, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

LERMAN, Respondent, v. **FISHKILL ELECTRIC RY. CO.**, Appellant. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Ida Lerman against the Fishkill Electric Railway Company. J. G. Meyer, of Matteawan, for appellant. P. Bernstein, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

LETSCHE, Respondent, v. **GUNTZER**, Appellant, et al. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Action by Annie Letsche against Anthony C. Gunzer, impleaded. L. E. Schlechter, of New York City, for appellant. F. R. Stoddard, Jr., of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

LEWIS, Respondent, v. **BROOKLYN HEIGHTS R. CO.**, Appellant, et al. (Supreme Court, Appellate Division, Second Department. February 27, 1914.) Action by Johanna B. Lewis, as administratrix, etc., of Eugene F. Lewis, deceased, against the Brooklyn Heights Railroad Company and another.

PER CURIAM. Judgment and order reversed, and new trial granted, costs to abide the event, upon the ground that the preponderance of evidence shows that the flat car was lighted, and that the relative positions of the cars was not such as made rule No. 41 applicable.

THOMAS and RICH, JJ., vote to affirm, upon the ground that rule No. 41 was applicable, and that violation of that rule was sufficient to justify the finding of negligence in the defendant.

LIEBERMAN, Respondent, v. **LIEBERMAN**, Appellant. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Appeal from Special Term, New York County. Action by Sara Lieberman against Joseph Monroe Lieberman. From an order denying a motion to amend the judgment of separation, so as to relieve defendant from certain payments of alimony, he appeals. Order reversed, and motion granted. See, also, 153 App. Div. 897, 138 N. Y. Supp. 1126. Henry A. Friedman, of New York City, for appellant.

PER CURIAM. The order, in so far as it is appealed from, is reversed, without costs, and the motion to amend the judgment granted, to the extent of reducing the alimony to \$10 a week from the date of the order appealed from.

LIEBLER et al., Respondents, v. **BOBBS MERRILL CO. et al.**, Appellants. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Theodore A. Liebler and another against the Bobbs Merrill Company and another. J. L. Lockwood, of New York City, for appellants. M. D. Josephson, of New York City, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

LIEBLER et al., Appellants, v. SHUBERT, Respondent. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Action by Theodore A. Liebler and others against Lee Shubert. D. Leventritt, of New York City, for appellants. E. E. McCall, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed. See, also, 153 App. Div. 893, 137 N. Y. Supp. 1127.

LITTLE, Appellant, v. MARTIN, Respondent. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Action by Joseph J. Little against Lucius T. Martin, as executor, etc. H. W. Bridges, of New York City, for appellant. R. Thorne, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

LOCKERT, Appellant, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Action by Christian Lockert, as administrator, etc., of Hans Edwin Lockert, deceased, against the New York Central & Hudson River Railroad Company. No opinion. Order setting aside verdict and granting a new trial unanimously affirmed, costs to abide the event.

LOCKWOOD, Respondent, v. GOLDENBERG, Appellant. (Supreme Court, Appellate Division, Third Department. March 13, 1914.) Action by Charles D. Lockwood against David C. Goldenberg. No opinion. Judgment and order unanimously affirmed, with costs.

LOCUST FARMS CO., Appellant, v. ST. JOHN, Respondent. (Supreme Court, Appellate Division, First Department. April 3, 1914.) Action by the Locust Farms Company against Mary E. St. John. A. Van Wyck, of New York City, for appellant. C. H. Briscoe, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

LORD & TAYLOR, Respondents, v. HATCH, Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Action by Lord & Taylor against Edward Hatch. G. Zabriskie, of New York City, for appellant. C. A. Jayne, of New York City, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 153 App. Div. 925, 143 N. Y. Supp. 1128.

LOTITO v. CONNECTICUT CAB CO. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Guiseppe Lotito against the Connecticut Cab Company. No opinion. Application denied, with \$10 costs. Order signed. Motion for stay denied, with \$10 costs. Order filed.

LUBINGER, Appellant, v. VOGEL et al., Respondents. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Philip Lubinger against Harry Vogel and others. D. L. Podell, of New York City, for appellant. L. Burgess, of New York City, for respondents. No opinion. Judgment affirmed, with costs. Order filed. See, also, 145 N. Y. Supp. 1131.

In re LUCIANO. (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Appeal from Westchester County Court. In the matter of the examination of Stefano Luciano, judgment debtor, in proceedings supplementary to execution. From an order of the County Court of Westchester County, Cornell Bros., judgment creditors, appeal. Reversed. Holmes Jones, of Tuckahoe, for appellants. Clark, Close & Davis, of White Plains, for respondent.

PER CURIAM. We are of opinion that the affidavit upon which the order in supplementary proceedings was based was sufficient. See *Jaques v. Willett* (City Ct.) 104 N. Y. Supp. 500, and *Sheri v. Kurzman*, 60 Misc. Rep. 332, 113 N. Y. Supp. 238. The order appealed from is reversed, with \$10 costs and disbursements, and the matter is remitted to the County Court of Westchester County for further proceeding.

LUDLAM v. BLOODGOOD et al. (Supreme Court, Appellate Division, Second Department. April 3, 1914.) Action by Mary Ludlam against Clara Bloodgood and others. No opinion. Interlocutory judgment affirmed, with costs.

LUDLAM v. LUDLAM et al. (Supreme Court, Appellate Division, Second Department. April 3, 1914.) Action by Mary Ludlam against Henry A. Ludlam and others. No opinion. Interlocutory judgment affirmed, with costs.

LYMAN, Respondent, v. DELAWARE & HUDSON CO., Appellant. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Margaret L. Lyman, as administratrix, etc., of Arden N. Lyman deceased, against the Delaware & Hudson Company. No opinion. Order affirmed, with costs.

LYNCH, Appellant, v. KRAJEWSKI-PESANT CO., Respondent. (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Action by Thomas Lynch against the Krajewski-Pesant Company. No opinion. Judgment unanimously affirmed, with costs.

McAVOY, Respondent, v. PRESS PUB. CO., Appellant. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Thomas F. McAvoy against the Press Publishing Company. C. B. Brophy, of New York City, for appellant. H. R. Limburg, of

New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

McCABE, Appellant, v. CARTER & WEEKS STEVEDORING CO., Respondent. (Supreme Court, Appellate Division, Second Department. March 8, 1914.) Action by Maria McCabe, as administratrix, etc., against the Carter & Weeks Stevedoring Company. No opinion. Motion granted, without costs. See, also, 144 N. Y. Supp. 247, 159 App. Div. 361.

McCABE, Appellant, v. MILLER, Superintendent of Buildings, Respondent. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Thos. J. McCabe against Rudolph P. Miller, as Superintendent of Buildings. W. Leslie, of New York City, for appellant. C. L. Barber, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

McCLAVE v. TEXAS CO. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by John McClave against the Texas Company. No opinion. Motion denied. Order filed. Memorandum per curiam. See, also, 145 N. Y. Supp. 737.

In re McDONALD. (Supreme Court, Appellate Division, First Department. February 13, 1914.) In the matter of Alexander McDonald, deceased. No opinion. Motion granted; questions certified; order filed. See, also, 145 N. Y. Supp. 267.

In re McNAMARA. (Supreme Court, Appellate Division, First Department. March 13, 1914.) In the matter of Andrew F. McNamara. No opinion. Referred to official referee. Settle order on notice.

McNULTY v. CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Patrick J. McNulty against the City of New York. No opinion. Motion to dismiss appeal granted, with \$10 costs. Order filed. See, also, 146 N. Y. Supp. 1099.

McNULTY v. CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Patrick J. McNulty against the City of New York. No opinion. Motion granted. Order filed. See, also, 146 N. Y. Supp. 1099.

MALIA v. KNAPP et al. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by William H. Malia against Lucion Knapp, impleaded. No opinion. Motion to dismiss appeal granted, with \$10 costs. Order filed.

MALLON, Respondent, v. LACKAWANNA STEEL CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Matilda C. Mallon, as administratrix, etc., against the Lackawanna Steel Company. No opinion. Judgment and order affirmed, with costs.

MANDERY, Appellant, v. MANDERY, Respondent. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Julia M. A. Mandery against Joseph J. Mandery. No opinion. Judgment affirmed, with costs.

In re MANHATTAN RY. CO. (Supreme Court, Appellate Division, First Department. February 13, 1914.) In the matter of the Manhattan Railway Company. No opinion. Motion granted. Settle order on notice. See, also, 145 N. Y. Supp. 1132; 146 N. Y. Supp. 1099.

In re MANHATTAN RY. CO. (Supreme Court, Appellate Division, First Department. February 27, 1914.) In the matter of the Manhattan Railway Company. No opinion. Report confirmed. Settle order on notice. See, also, 146 N. Y. Supp. 1099.

In re MANHATTAN RY. CO. In re NINTH AVE. ADDITIONAL TRACKS. (Supreme Court, Appellate Division, First Department. March 27, 1914.) In the matter of the Manhattan Railway Company. In the matter of the Ninth Avenue additional tracks. No opinion. Motion granted. Settle order on notice. See, also, 146 N. Y. Supp. 1099.

MARKLOWITCH, Respondent, v. GOOD-FRIEND, Appellant. (Supreme Court, Appellate Division, Second Department. April 3, 1914.) Action by Hyman Marklowitch against Braine Goodfriend. No opinion. Judgment and order unanimously affirmed, with costs.

MARKOWITZ, Respondent, v. RELIANCE TRADING CO., Appellant. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Nathan Markowitz against the Reliance Trading Company. R. W. MacKewan, of New York City, for appellant. G. Cohen, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

MARKS, Appellant, v. KELLOGG, Respondent. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Bertram L. Marks, as ancillary executor, etc., against L. Laffin Kellogg, as executor, etc. L. Lowenstein, of New York City, for appellant. W. K. Hartpence, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

In re **MARSHALL**. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) In the matter of the application of Charles A. Marshall for admission to the bar. No opinion. Application granted.

MARX, Respondent, v. **A. FELDMAN CONST. CO.**, Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Action by Max Marx against the A. Feldman Construction Company. J. Kochendorfer, of New York City, for appellant. N. W. Chandler, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

MARX & RAWOLLE, Appellants, v. **AMERICAN DRUGGISTS' SYNDICATE**, Respondent. (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Action by Marx & Rawolle against the American Druggists' Syndicate.

PER CURIAM. We are of opinion that plaintiff made out a prima facie case, which ought to have been submitted to the jury. The judgment is therefore reversed, and a new trial granted; costs to abide the event.

MASLANKA, Respondent, v. **AMERICAN MFG. CO.**, Appellant. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Leonora Maslanka, as administratrix, etc., against the American Manufacturing Company. No opinion. Motion denied, without prejudice to an application for reargument of the appeal. See, also, 144 N. Y. Supp. 1129; 146 N. Y. Supp. 1100.

MASLANKA, Respondent, v. **AMERICAN MFG. CO.**, Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Leonora Maslanka, as administratrix, etc., against the American Manufacturing Company. No opinion. Motion for reargument (of 144 N. Y. Supp. 1129) denied, without costs. See, also, 146 N. Y. Supp. 1100.

MASTER AMUSEMENT CO., Inc., Respondent, v. **MASTER MIND PRODUCTION CO., Inc.**, Appellant. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by the Master Amusement Company, Incorporated, against the Master Mind Production Company, Incorporated. H. J. Goldsmith, of New York City, for appellant. L. Laski, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

MATHESON v. MENTE et al. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Malcolm Ross Matheson, as substituted trustee of the estate of Richard J. Stainton, deceased, against Ottilie Mente and others. No opinion. Motion denied, on condition that plaintiff perfect his appeal, place the case on the April calendar, and

be ready for argument when reached; otherwise, motion granted, with \$10 costs.

MAUTSEWICH, Respondent, v. **UNITED STATES GYPSUM CO.**, Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Action by John Mautsewich against the United States Gypsum Company. E. C. Sherwood, of New York City, for appellant. M. T. Martin, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

CLARKE, J., dissents.

MAZZIOLA, Appellant, v. **EDWARDS** et al., Respondents. (Supreme Court, Appellate Division, First Department. Feb. 13, 1914.) Action by Louis Mazziola against one Edwards and others. M. Eisner, of New York City, for appellant. C. J. Nehrbas, of New York City, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

MENDOLA v. ILLINOIS SURETY CO. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Michele Mendola against the Illinois Surety Company. No opinion. Motion granted, unless appellant complies with terms stated in order. Order filed. See, also, 155 App. Div. 895, 141 N. Y. Supp. 1131.

MERCHANT, Respondent, v. **RYALL** et al. Appellants. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Metta F. Merchant, as administratrix, etc., against George M. Ryall and others. No opinion. Motion granted, to the extent only that the case be set down for argument at the April term. Respondent may have until March 25, 1914, to serve her brief, and the appellant Ryall may have 10 days thereafter to serve any reply brief, as he may be advised. See, also, 159 App. Div. 924, 144 N. Y. Supp. 1129.

MILERK, Appellant, v. **TARTAR CHEMICAL CO.**, Respondent. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Ignatz Milerk against the Tartar Chemical Company. No opinion. Order affirmed, costs to abide the event.

MILES, Respondent, v. **MILLER**, Appellant. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Oscar Miles against John D. Miller. No opinion. Judgment and order unanimously affirmed, with costs.

MIRAN, Respondent, v. **AMERICAN GAS MACH. CO.**, Appellant. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by John J. Miran against the American Gas Machine Company. No opinion. Judgment and order unanimously affirmed, with costs.

In re. **MOORE et al.** (Supreme Court, Appellate Division, Second Department. March 20, 1914.) In the matter of the application of David V. Moore and Michael F. Skane, electors and taxpayers of the town of Beekman, Dutchess county, N. Y., for resubmission etc., of local option questions under section 13 of the Liquor Tax Law (Consol. Laws, c. 34).

PER CURIAM. Order reversed, and resubmission ordered, with \$10 costs and disbursements, on the ground that the question of local option could not be legally submitted under the Liquor Tax Law, where the notice of a meeting for Tuesday was not published till the previous Saturday. The requirement of at least five days' prior publication is mandatory. Matter of Town of Livingston, 189 N. Y. 549, 82 N. E. 1133; 23 Cyc. 99. Although the conduct of the election is not complained of, and the ballots showed a general expression by the town electors, this failure in the length of time of publication made the vote cast wholly void, and requires a resubmission.

MORAN et al. v. SCHIFF et al. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Action by Anson B. Moran and others against Mortimer L. Schiff, impleaded. No opinion. Judgment and order affirmed, with costs, with leave to plaintiffs to amend on payment of costs. Order filed.

MORAN et al., Appellants, v. VREELAND et al., Respondents (five cases). (Supreme Court, Appellate Division, First Department. March 20, 1914.) Actions by Anson B. Moran and others against Herbert S. Vreeland and others. C. Mellen, of New York City, for appellants. J. L. Quackenbush, of New York City, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements, with leave to plaintiffs to amend on payment of costs. Orders filed. See, also, 81 Misc. Rep. 664, 143 N. Y. Supp. 522.

MOREY et al., Respondents, v. SCHUSTER et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Norris Morey and others against Casper Schuster and others. No opinion. Motion granted, amending order of reversal of December 23, 1913 (159 App. Div. 602, 145 N. Y. Supp. 258), so as to allow to appellants costs of the action accruing before notice of trial.

MOREY, Respondent, v. STEWART et al., Appellants. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Elwood P. Morey against Fannie E. Stewart, as executrix, and John C. Stewart, as executor, under the last will and testament of Samuel C. Stewart, deceased. No opinion. Judgment unanimously affirmed, with costs. See, also, 159 App. Div. 931, 144 N. Y. Supp. 1131.

MORRIS PARK ESTATES, Respondent, v. FABRICANT, Appellant (two cases). (Supreme

Court, Appellate Division, First Department. March 6, 1914.) Action by the Morris Park Estates against Fanny Fabricant. J. M. Roeder, of New York City, for appellant. R. McC. Marsh, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Orders filed.

MOWBRAY v. DE FOREST. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by William E. Mowbray against Harriet De Forest. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 145 N. Y. Supp. 1185.

MULDOON, Respondent, v. CARMANA REALTY CO., Appellant, et al. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Catherine E. Muldoon against the Carmana Realty Company, impleaded with others. J. E. Donnelly, of New York City, for appellant. No opinion. Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs. Order filed.

MUNNICH et al. v. JAFFE et al. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Charles L. Munnich and another against Max Jaffe and others.

PER CURIAM. Order reversed, and appellant Howard's motion granted, with \$10 costs and disbursements. After plaintiffs' attorneys on December 17th had written that they were willing to extend Howard's time to make a case to February 1st, their letter of December 29th, declining to give such extension, left Howard in a position where he could fairly ask such extension by order. Howard's default is opened, and his proposed case may be served within 20 days after entry of this order.

MURPHY v. MILLER et al. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Peter D. Murphy, as administrator, etc., of Robert G. Murphy, deceased, against Gertrude Miller and others. No opinion. Judgment affirmed, with costs. *Held* that, under all the circumstances of the case, the appellants, by reason of their laches, should not, in this action, be permitted to assert and maintain their claim to an interest in the premises in question.

MURPHY, Appellant, v. TEFFT-WELLER CO., Respondent. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Action by Thomas Murphy, as administrator, against the Tefft-Weller Company. W. E. Warland, of New York City, for appellant. E. P. Mowton, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

MURPHY v. WORTH et al. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) Action by Hugh C. Murphy

against Harry P. Worth, impleaded with Joseph F. O'Grady, Sheriff of Richmond County.

PER CURIAM. On this proceeding the Special Term should have determined the amount of the lien of the judgment creditor's attorney and have made an appropriate order accordingly. The sheriff had express notice of the claim of lien, and payments made to third parties in opposition to said claim of lien, and without notice to the lienor, were made at his own risk. The order is reversed, with \$10 costs and disbursements, and the matter is remitted to the Special Term, for determination as to the proper amount of the attorney's lien and its enforcement by appropriate order.

MURPHY, Appellant, v. YONKERS SAVINGS BANK et al., Respondents. (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Action by Denis J. Murphy, an infant, by Denis Murphy, guardian ad litem, against the Yonkers Savings Bank and Mary Higgins Duffy, as administratrix, etc.

PER CURIAM. Motion to dismiss appeal denied, upon condition that any amendments to the printed case proposed by the Savings Bank are within 10 days to be submitted to the trial justice for settlement, and then, when passed upon, and the case resettled, appellant within 10 days thereafter correct the appeal book, either by changing the matter that now stands in print, or by annexing additional pages, so as to conform to such resettlement, and shall then place the cause upon the May calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

NAPPA, Respondent, v. ERIE R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Frank Nappa against the Erie Railroad Company.

PER CURIAM. Judgment affirmed, with costs, upon the opinion of Kruse, J., on former appeal in same case, reported at 155 App. Div. 9, 139 N. Y. Supp. 547.

FOOTE, J., dissents.

NATIONAL FIREPROOFING CO., Appellant, v. TOWER BROS. STATIONERY CO. et al., Respondents. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by the National Fireproofing Company against the Tower Bros. Stationery Company and others. W. M. Geer, Jr., of New York City, for appellant. F. R. Kellogg, of New York City, for respondents. No opinion. Order reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs. Order filed.

NEWBURGH SAVINGS BANK v. JIMAL REALTY CO. et al. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by the Newburgh Savings Bank against the Jimal Realty Company, impleaded with others. No opinion. Motion to dismiss appeal granted, with \$10 costs. Order filed.

NEWCOMB v. LA ROE. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Warren P. Newcomb, as executor, etc., against Jeanne La Roe. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 146 N. Y. Supp. 133.

In re NEW COURT HOUSE SITE. (Supreme Court, Appellate Division, First Department. February 27, 1914.) In the matter of the New Court House Site. No opinion. Motion granted. Order filed.

NEWMAN v. J. J. MITCHELL CO. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Arthur L. Newman against the J. J. Mitchell Company. No opinion. Motion granted. Order filed. See, also, 158 App. Div. 917, 143 N. Y. Supp. 1132.

NEW YORK CATHOLIC PROTECTORY v. ROCKLAND COUNTY. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by the New York Catholic Protectors against Rockland County. No opinion. Motion granted; question certified; order filed. See, also, 159 App. Div. 455, 144 N. Y. Supp. 552.

NICHOLS, Respondent, v. NICHOLS, Appellant. (Appeal No. 1.) (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Action by Emily B. Nichols against Alexander A. Nichols.

PER CURIAM. As the plaintiff executed an agreement whereby she received the conveyance of the property in East Fifth street in full satisfaction of all claim for support, which agreement was not delivered to the defendant until after the termination of this action, the order should be modified, so far as it provides for the payment of \$75 monthly as in whole or in part an allowance to the plaintiff for her support, so that the decree shall provide that the said sum shall be paid for the support of the children alone, with leave, however, to the defendant, if he be so advised, to apply at Special Term for a reduction of said sum to such an amount as is proper for the support and maintenance of the children alone; and, as so modified, the order is affirmed, without costs. See, also, 146 N. Y. Supp. 1102.

NICHOLS, Respondent, v. NICHOLS, Appellant. (Appeal No. 2.) (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Action by Emily R. Nichols against Alexander A. Nichols.

PER CURIAM. Order reversed, without costs, on condition that within 20 days after entry of this order the defendant pay to plaintiff such sum as shall make the total payments \$75 a month for the support of plaintiff and the children from June 13, 1913, until November 28, 1913, with interest, and after the last-named date as shall make the total payment \$75 a month for the support of the children

alone, with interest, provided, however, that if said sum of \$75 a month be reduced by the special Term as from and after November 26, 1913, then the reduced amount shall be considered, instead of the \$75 a month, in determining the amount hereby required to be paid after the said November 26, 1913; otherwise, order affirmed, with \$10 costs and disbursements. See, also, 146 N. Y. Supp. 1102.

NICHOLSON, Respondent, v. TOWN OF STILLWATER, Appellant. (Supreme Court, Appellate Division, Third Department. March 1, 1914.) Action by Elizabeth M. Nicholson, administratrix, etc., of William S. Nicholson, deceased, against the Town of Stillwater.

PER CURIAM. Judgment and order reversed on law and facts, and new trial granted, with costs to appellant to abide event, unless the plaintiff stipulates to reduce the verdict to \$15,000, in which case judgment may be so modified, and, as so modified, judgment and order affirmed, without costs. The court finds that the damages to the plaintiff did not exceed the sum of \$15,000, and disapproves of the finding of act as to damages in excess thereof. See, also, 150 App. Div. 896, 184 N. Y. S. 1140; 108 N. Y. 203, 101 N. E. 858.

KELLOGG, J., votes for reversal absolutely.

NICKEL v. AYER. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Action by Margaretha Nickel, as administratrix against Frederick Ayer. L. F. Fish, of New York City, for plaintiff. B. L. Pettigrew, of New York City, for defendant. No opinion. Exceptions overruled, and judgment ordered for defendant, dismissing complaint, with costs. Settle order on notice. See, also, 141 App. Div. 932, 126 N. Y. Supp. 1140.

O'CONNOR v. WERNEKE. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Beatrice O'Connor against Anthony H. Werneke. No opinion. Motion granted, unless appellant complies with terms stated in order. Order filed. See, also, 145 N. Y. Supp. 1186; 146 N. Y. Supp. 1103.

O'CONNOR, Respondent, v. WERNEKE, Appellant, et al. (Supreme Court, Appellate Division, First Department. April 3, 1914.) Action by Beatrice O'Connor against Anthony H. Werneke, impleaded with others. W. G. Mulligan, of New York City, for appellant. E. L. Brisach, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed. See, also, 146 N. Y. Supp. 1103.

O'GRADY, Appellant, v. DOYLE, Respondent. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by James M. E. O'Grady against Michael Doyle. No opinion. Appeal dismissed, without costs, upon stipulation filed.

O'NEILL v. WALDO. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Felix O'Neill against Rhinelander Waldo. No opinion. Motion granted. Order filed. See, also, 145 N. Y. Supp. 1136.

OOTHOOT, Appellant, v. WARNER et al., Respondents. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Christiana Oothout against Mary Warner and others. W. W. Foster, of New York City, for appellant. E. J. Murphy, of New York City, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

In re OSHLAG. (Supreme Court, Appellate Division, First Department. March 20, 1914.) In the matter of Isidore Oshlag. No opinion. Referee's report approved, and proceeding dismissed. Settle order on notice. See, also, 157 App. Div. 912, 142 N. Y. Supp. 1133.

OVERROCHER, Respondent, v. BOSTON & M. R. R., Appellant. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Sarah Overrocher, as administratrix, etc., of Elsie Overrocher, deceased, against the Boston & Maine Railroad. No opinion. Judgment and order unanimously affirmed, with costs.

PALMER, Respondent, v. PALMER et al., Appellants. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Anna Amelia Palmer against William A. Palmer and another. No opinion. Judgment and order of the County Court of Westchester County affirmed, with costs.

PAOLUCCI, Appellant, v. RINEHART & DENNIS CO., Respondent. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Luigi Paolucci, as administrator, etc., of Virgilio Paolucci, deceased, against the Rinehart & Dennis Company. No opinion. Judgment and order unanimously affirmed by default, with costs. See, also, 145 N. Y. Supp. 1136.

PASSINO, Appellant, v. TAMER, Respondent. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Godfrey Passino against Michael Tamer. No opinion. Judgment affirmed, with costs.

PASUK v. AMERICAN MFG. CO. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Pawel Pasuk, an infant, by Pavel Dabydolski, his guardian ad litem, against the American Manufacturing Company. No opinion. Motion denied, without costs. See, also, 144 N. Y. Supp. 1134.

PATERNO, Respondent, v. PATERNO, Appellant. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Mildred Paterno against Francis S. Paterno. H. A. Bloomberg, of New York City, for appellant. M. Simmons, of New York City, for respondent.

PER CURIAM. Order affirmed, with \$10 costs and disbursements. Order filed.

SCOTT and DOWLING, JJ., dissent, and vote to reduce alimony to \$20 a week.

PAUL, Respondent, v. CLARK, Appellant. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Bernard Paul, an infant, by Joseph Paul, his guardian ad litem, against Walter L. Clark. No opinion. Motions denied, without costs. See, also, 145 N. Y. Supp. 985.

PAULIS, Respondent, v. CODINGTON CO., Appellant. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Annie Paulis against the Codington Company. A. G. McLaughlin, of New York City, for appellant. R. H. Ernest, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

PAWOLOWSKI v. CITY OF SCHENECTADY et al. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Dennis Pawolowski against the City of Schenectady and others.

PER CURIAM. Final order affirmed, with costs.

HOWARD, J., dissents.

PENDER, Appellant, v. CITY OF BINGHAMTON, Respondent. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Charles B. Pender against the City of Binghamton. No opinion. Motion denied. See, also, 145 N. Y. Supp. 1187.

PEOPLE, Respondent, v. BARTUGNO, Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Proceeding by the People of the State of New York against Ralph Bartugno. S. Wechsler, of New York City, for appellant. S. L. Richter, of New York City, for the People. No opinion. Judgment affirmed. Order filed.

PEOPLE, Respondent, v. BERLINER, Appellant. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Proceeding by the People of the State of New York against Hirsch Berliner. H. Greenberg, of New York City, for appellant. L. Fabricant, of New York City, for the People. No opinion. Judgment affirmed. Order filed.

PEOPLE, Respondent, v. BERTSCH, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Proceeding by the People of the State of New York against Philip Bertach. No opinion. Appeal dismissed, upon stipulation filed.

PEOPLE, Respondent, v. CHRISTMAN, Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Proceeding by the People of the State of New York against Charles Christman. No opinion. Motion to dismiss appeal denied. Motion for leave to argue upon the original record granted, upon condition that appellant place the case on the April calendar and be ready for argument when reached; otherwise, motion denied.

PEOPLE, Respondent, v. CINCOTTA, Appellant. (Supreme Court, Appellate Division, Second Department. April 3, 1914.) Proceeding by the People of the State of New York against Antonio Cincotta.

PER CURIAM. Judgment of conviction of the County Court of Kings County reversed, and new trial ordered, upon the ground that the evidence fails to establish the guilt of the defendant. See, also, 157 App. Div. 928, 142 N. Y. Supp. 1134.

BURR and RICH, JJ., dissent.

PEOPLE v. OLEARY. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Proceeding by the People of the State of New York against William Cleary. No opinion. Motion granted, and time extended to and including February 20, 1914. Order filed.

PEOPLE v. DE LUCCA. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Proceeding by the People of the State of New York against August De Luca. No opinion. Motion granted, on default.

PEOPLE, Respondent, v. EKEROLD, Appellant. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Proceeding by the People of the State of New York, on complaint of Carmine E. Pugliese, against Hagbard Ekerold. No opinion. Motion granted; question certified; order filed. See, also, 145 N. Y. Supp. 1137.

PEOPLE v. FARRELL. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Proceeding by the People of the State of New York against Thomas Farrell. No opinion. Motion granted, on default.

PEOPLE, Respondent, v. FRANZONE, Appellant. (Supreme Court, Appellate Division, Second Department. March 3, 1914.) Pro-

ceding by the People of the State of New York against John Franzone.

PER CURIAM. Judgment of conviction of the County Court of Kings County affirmed. JENKS, P. J., and STAPLETON, J., dissent.

PEOPLE, Respondent, v. GRUTZ, Appellant. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Proceeding by the People of the State of New York against George Grutz. R. H. Elder, of New York City, for appellant. R. S. Johnstone, of New York City, for the People. No opinion. Judgment affirmed. Order filed. See, also, 158 App. Div. 918, 143 N. Y. Supp. 1135.

PEOPLE v. HARRELL. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Proceeding by the People of the State of New York against Benjamin D. Harrell. No opinion. Time extended to March 6, 1914.

PEOPLE, Respondents, v. HENDERSON, Appellant. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Proceeding by the People of the State of New York against Charles Henderson. No opinion. Appeal dismissed, by default. See, also, 145 N. Y. Supp. 1137.

PEOPLE, Respondent, v. HOELDERLIN, Appellant. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) Proceeding by the People of the State of New York against William Hoelderlin.

PER CURIAM. Judgment of conviction of the Court of Special Sessions affirmed. When his defendant was held for trial, under a commitment, the essential question presented by his appeal was submitted for determination to the Special Term of this court. The opinion written by Mr. Justice Blackmar (People ex rel. Hoelderlin v. Kane, 79 Misc. Rep. 140, 39 N. Y. Supp. 350) exactly expresses our views of the validity of this statute.

PEOPLE v. HOGAN. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Proceeding by the People of the State of New York against John J. Hogan. No opinion. Motion granted, on default.

PEOPLE, Respondent, v. HOSMER, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Proceeding by the People of the State of New York against Lee Hosmer. No opinion. Appeal dismissed, upon stipulation filed.

PEOPLE, Respondent, v. LA PRAIRIE et al., Appellants. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Proceeding by the People of the State of New

York against Harry La Prairie and others. No opinion. Motion granted.

PEOPLE, Respondent, v. MANGHAVITA, Appellant. (Supreme Court, Appellate Division, Second Department. April 3, 1914.) Proceeding by the People of the State of New York against Giovanni Manghavit.

PER CURIAM. Judgment of conviction of the County Court of Kings County affirmed. See, also, 158 App. Div. 940, 143 N. Y. Supp. 1136.

STAPLETON, J., dissents.

PEOPLE, Respondent, v. MARCHIOLO, Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Proceeding by the People of the State of New York against John R. Marchiolo. C. F. Kinsley, of New York City, for appellant. R. S. Johnstone, of New York City, for the People. No opinion. Judgment affirmed. Order filed.

PEOPLE, Respondent, v. MARTIN, Appellant. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Proceeding by the People of the State of New York against Frieda Martin. C. H. McCarty, of New York City, for appellant. S. L. Richter, of New York City, for the People. No opinion. Judgment and order affirmed. Order filed.

PEOPLE, Respondent, v. MARTIN, Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Proceeding by the People of the State of New York against Fred W. Martin alias Frank Martin. C. G. F. Wahle, of New York City, for appellant. R. C. Taylor, of New York City, for the People. No opinion. Judgment affirmed. Order filed.

PEOPLE, Respondent, v. RICHARDSON, Appellant. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Proceeding by the People of the State of New York against Alfred Richardson. No opinion. Motion to dismiss appeal granted, upon the ground that the answering affidavits do not show any merits.

PEOPLE, Respondent, v. RIESENBERGER, Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Proceeding by the People of the State of New York against Emil Riesenberger. No opinion. Motion granted, on default.

PEOPLE, Respondent, v. ROBINSON, Appellant. (Supreme Court, Appellate Division, First Department. April 3, 1914.) Proceeding by the People of the State of New York against Thomas F. Robinson. R. H. Elder, of New York City, for appellant. R. C. Taylor, of New York City, for respondent. No opinion. Judgment affirmed. Order filed.

PEOPLE, Respondent, v. ROTHENBERG, Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Proceeding by the People of the State of New York against Bruno Rothenberg. C. L. Jordan, of New York City, for appellant. J. W. Osborne, of New York City, for the People. No opinion. Judgment and order affirmed. Order filed. See, also, 155 App. Div. 898, 140 N. Y. Supp. 1187.

PEOPLE v. SCHOLZ. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Proceeding by the People of the State of New York against Henry Scholz. No opinion. Motion granted, on default.

PEOPLE, Respondent, v. SIMMONS, Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Proceeding by the People of the State of New York against Joseph Simmons. A. Levy, of New York City, for appellant. G. Z. Medalie, of New York City, for the People. No opinion. Judgment and order affirmed. Order filed.

PEOPLE, Respondent, v. STERNBACH, Appellant. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Proceeding by the People of the State of New York against Isidor Sternbach. G. A. Rogers, of New York City, for appellant. G. Z. Medalie, of New York City, for the People. No opinion. Judgment affirmed. Order filed.

PEOPLE, Respondent, v. STRONG et al., Appellants. (Supreme Court, Appellate Division, Second Department. February 27, 1914.) Proceeding by the People of the State of New York against Nat. C. Strong and others. No opinion. Judgment of conviction of the Court of Special Sessions affirmed.

PEOPLE v. SWERSKY et al. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Proceeding by the People of the State of New York against Max Swersky and another. No opinion. Motion denied. Settle order on notice.

PEOPLE, Respondents, v. THOMPSON, Appellant. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Proceeding by the People of the State of New York against John Thompson.

PER CURIAM. Judgment of conviction of the County Court of Kings County reversed, and new trial ordered, because the court erred in admitting testimony as to subsequent offenses by the defendant upon the person of the female involved. People v. Robertson, 88 App. Div. 198, 84 N. Y. Supp. 401. See, also, 159 App. Div. 917, 144 N. Y. Supp. 1187; 146 N. Y. Supp. 1106.

THOMAS, J., dissents.

PEOPLE, Respondent, v. THOMPSON, Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Proceeding by the People of the State of New York against John Thompson. No opinion. Motion granted. See, also, 146 N. Y. Supp. 1108.

PEOPLE v. WEGMANN. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Proceeding by the People of the State of New York against Joseph Wegmann. No opinion. Motion granted, on default.

PEOPLE, Respondent, v. WILLINGER, Appellant. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Proceeding by the People of the State of New York against Morris Willinger. No opinion. In view of the exceptional circumstances of this case, the motion is granted; but we request that the transcript of the minutes furnished us be the first impression, if possible.

PEOPLE v. WILSON. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Proceeding by the People of the State of New York against John Wilson. No opinion. Motion granted, on default.

PEOPLE, Respondent, v. ZACCARIA, Appellant. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Proceeding by the People of the State of New York against Salvatore Zaccaria. J. Weber, of New York City, for appellant. R. S. Johnstone, of New York City, for the People. No opinion. Judgment affirmed. Order filed.

PEOPLE ex rel. ARDEN v. GALLAGHER et al. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Proceeding by the People of the State of New York on the relation of Juliette Arden, against Frank Gallagher and others. No opinion. Motion denied. Order filed. See, also, 144 N. Y. Supp. 900.

PEOPLE ex rel. CALKINS v. BOARD OF SUPRS OF ALBANY COUNTY et al. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Proceeding by the People of the State of New York, upon the relation of James S. Calkins, against the Board of Supervisors of the County of Albany, as the Board of Canvassers of the County of Albany, and another. No opinion. Motions in two cases granted, with \$10 costs in one case.

PEOPLE ex rel. CONEY ISLAND JOCKEY CLUB v. PURDY et al. (Supreme Court, Appellate Division, Second Department. February 27, 1914.) Proceeding by the People of the State of New York, on the relation of the Coney Island Jockey Club, against Lawson

Purdy and others, as Commissioners of Taxes and Assessments.

PER CURIAM. Order affirmed, with \$10 costs and disbursements. We think that the findings of the Special Term as to the excessiveness of the assessment were justified by the evidence, irrespective of the question of the amount of the assessments of previous years. See, also, 152 App. Div. 932, 137 N. Y. Supp. 136.

PEOPLE ex rel. ELLIS, Appellant, v. SMITH et al., Town Assessors, Respondents. Supreme Court, Appellate Division, Third Department. March 4, 1914.) Proceeding by the People of the State of New York, on the relation of Arnold H. Ellis, against E. Lyman Smith and others, Assessors of the Town of Villsboro, Essex County. No opinion. Final order and judgment unanimously affirmed, with costs.

PEOPLE ex rel. FLOOD, Appellant, v. ASSOCIATION OF MASTER PLUMBERS, Respondent. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Proceeding by the People of the State of New York, on the relation of Eugene Flood, against the Association of Master Plumbers. C. J. Farley, of New York City, for appellant. H. I. Tibbetts, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

PEOPLE ex rel. FOLEY v. WALDO, Police Com'r. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) Proceeding by the People of the State of New York, on the relation of James C. Foley, against Rhinelander Waldo, Police Commissioner of the City of New York. No opinion. Determination confirmed, with \$50 costs and disbursements, and writ quashed.

PEOPLE ex rel. GAINSFORTH, Appellant, v. BRANNAN et al., Respondents. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Proceeding by the People of the State of New York, on the relation of Sarah A. Gainsforth, against John W. Brannan and others. A. J. Talley, of New York City, for appellant. T. Farley, of New York City, for respondents. No opinion. Order affirmed, with costs. Order filed.

PEOPLE ex rel. JAY ST. RY. CO. v. McALL et al. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Proceeding by the People of the State of New York, on the relation of the Jay Street Railway Company against Edward B. McCall and others. W. N. Dykman, of Brooklyn, for relator. G. S. Coleman, of New York City for respondents. No opinion. Writ dismissed, and proceedings confirmed, with costs. Settle order a notice.

PEOPLE ex rel. KENEHAN v. HIGGINS. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Proceeding by the People of the State of New York, on the relation of Christopher Kenehan, against Thomas J. Higgins, as commissioner, etc. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 159 App. Div. 226, 144 N. Y. Supp. 157.

PEOPLE ex rel. KENERSON v. RUOFF, County Clerk. (Supreme Court, Appellate Division, Second Department. February 27, 1914.) Proceeding by the People of the State of New York, on the relation of William W. Kenerson, against Leonard Ruoff, Clerk of the County of Queens. No opinion. Order affirmed, with \$10 costs and disbursements.

PEOPLE ex rel. KNOENER v. JOHNSON. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Proceeding by the People of the State of New York, on the relation of George W. Knoener, against Joseph Johnson, as commissioner, etc. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 155 App. Div. 898, 140 N. Y. Supp. 1139.

PEOPLE ex rel. MASTERSON, Appellant, v. DEPARTMENT OF HEALTH OF CITY OF NEW YORK, Respondent. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Proceeding by the People of the State of New York, on the relation of Hugh W. Masterson, against the Department of Health of the City of New York. F. E. Klein, of New York City, for appellant. W. E. C. Mayer, of Brooklyn, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

PEOPLE ex rel. METROPOLITAN ST. R. CO. v. STATE BOARD OF TAX COM'RS. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Proceeding by the People of the State of New York, on the relation of the Metropolitan Street Railroad Company, against the State Board of Tax Commissioners. No opinion. Motion for resettlement granted. Settle orders on notice. Memorandum per curiam. See, also, 159 App. Div. 136, 144 N. Y. Supp. 74.

PEOPLE ex rel. MORRISSEY v. WALDO, Police Com'r. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Proceeding by the People of the State of New York, on the relation of John J. Morrissey, against Rhinelander Waldo, as Police Commissioner of the City of New York.

PER CURIAM. Determination annulled, on the ground that it is against the evidence, with \$50 costs and disbursements, and relator reinstated.

BURR and PUTNAM, JJ., dissent.

PEOPLE ex rel. OLIN et al. v. HENNESSY et al. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Proceeding by the People of the State of New York, on the relation of Stephen H. Olin and others, as executors, etc., against Joseph F. Hennessy and others. No opinion. Motion granted. Order filed. See, also, 154 App. Div. 109, 138 N. Y. Supp. 659; 159 App. Div. 814, 144 N. Y. Supp. 879.

PEOPLE ex rel. PEIXOTTO v. BOARD OF EDUCATION. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Proceeding by the People of the State of New York, on the relation of Bridget C. Peixotto, against the Board of Education. No opinion. Motion granted. Settle order on notice. See, also, 160 App. Div. 567, 145 N. Y. Supp. 853.

PEOPLE ex rel. PFEIFER v. WALDO, Police Com'r. (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Proceeding by the People of the State of New York, on the relation of Charles Pfeifer, against Rhinelander Waldo, as Police Commissioner of the City of New York. No opinion. Determination reversed, as against the evidence, and the penalty vacated, with \$50 costs and disbursements.

PEOPLE ex rel. REARDON v. WALDO, Police Com'r. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Proceeding by the People of the State of New York, on the relation of Michael F. Reardon, against Rhinelander Waldo, as Police Commissioner of the City of New York. No opinion. Determination confirmed, with \$50 costs and disbursements.

PEOPLE ex rel. ROACHE v. HANBURY. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) Proceeding by the People of the State of New York, on the relation of J. Benedict Roache, against Harry A. Hanbury. No opinion. Motions denied, upon condition that appellant perfect his appeal from the order adjudging him in contempt (145 N. Y. Supp. 483), place the case upon the April calendar, and be ready for argument when reached; otherwise, motions granted, with \$10 costs. See, also, 145 N. Y. Supp. 1126.

PEOPLE ex rel. STEWART, Appellant, v. CARLISLE, Com'r of Highways, Respondent. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Proceeding by the People of the State of New York, on the relation of Spencer J. Stewart, against John N. Carlisle, as Commissioner of Highways of the State of New York. No opinion. Order unanimously affirmed, with costs.

PEOPLE ex rel. SULZER v. SOHMER, State Comptroller. (Supreme Court, Appel-

late Division, Third Department. March 13, 1914.) Proceeding by the People of the State of New York, on the relation of William Sulzer, against William Sohmer, as Comptroller of the State of New York. No opinion. Order affirmed, without costs, as matter of law, and not in the exercise of discretion.

PEOPLE ex rel. TWILLMAN v. WALDO, Police Com'r. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Proceeding by the People of the State of New York, on the relation of Christian Twillman, against Rhinelander Waldo, as Police Commissioner of the City of New York. No opinion. Determination annulled, with \$50 costs and disbursements, upon the ground that the evidence fails to satisfactorily establish culpable neglect of duty, and relator reinstated.

PEOPLE ex rel. VON CLAUSEN v. HANLEY, Warden. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Proceeding by the People of the State of New York, on the relation of Ida Von Clausen, against John Hanley, Warden, etc. No opinion. Motion denied. Order filed. See, also, 145 N. Y. Supp. 1141; 146 N. Y. Supp. 1108.

PEOPLE ex rel. VON CLAUSEN v. HANLEY, Warden. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Proceeding by the People of the State of New York, on the relation of Ida Von Clausen, against John J. Hanley, Warden, etc. No opinion. Motion to dismiss appeal granted, unless appellant comply with terms stated in order. Order filed. See, also, 146 N. Y. Supp. 1108.

PEOPLE ex rel. WEAVER v. WALDO, Police Com'r. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Proceeding by the People of the State of New York, on the relation of Arthur H. Weaver, against Rhinelander Waldo, as Police Commissioner of the City of New York. No opinion. Determination confirmed, with \$50 costs and disbursements.

PEOPLE ex rel. ZIEGENHAIN, Respondent, v. ZIEGENHAIN, Appellant. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Proceeding by the People of the State of New York, on the relation of Elfreda Ziegenhain, against Herman Ziegenhain. A. P. Wagener, of New York City, for appellant. J. D. Carr, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

In re PERCIVAL'S ESTATE. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) In the matter of the estate of William G. Percival, deceased.

PER CURIAM. Decree of Surrogate's Court (79 Misc. Rep. 567, 141 N. Y. Supp. 180) mod-

ified, so as to disallow and reject the claim of Isaac D. West, as executor, etc., of Caroline S. Percival, which was allowed at \$961.39, and the findings contained in the finding of fact numbered II, to the effect that Caroline S. Percival paid for the land which was conveyed to her by the Van Dewalkers, and that after the sale of the land and the receipt of the purchase price by William G. Percival he never paid the same, nor any part thereof, to his wife, are disapproved, and, as so modified, the decree is affirmed, without costs of this appeal to any party.

PERRY v. HUDSON & M. R. CO. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Mary Perry against the Hudson & Manhattan Railroad Company. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 157 App. Div. 790, 142 N. Y. Supp. 768.

PIERCE, Respondent, v. ARNOT REALTY CORPORATION, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by William Pierce against the Arnot Realty Corporation. No opinion. Appeal dismissed, without costs, upon stipulation filed.

In re PIRSON. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) In the matter of the application of Philip Pirson for an order canceling liquor tax certificate No. 13,559, transferred to John Shuster. No opinion. Order affirmed, with costs.

PRITCHARD, Respondent, v. ELSNER, Appellant. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) Action by Frank Pritchard against Kurt L. Elsner. No opinion. Judgment and order unanimously affirmed, with costs.

In re PUBLIC SERVICE COMMISSION FOR FIRST DIST. (GRAVESEND AVE. ROUTE—ROUTE NO. 49). (Supreme Court, Appellate Division, Second Department. March 13, 1914.) In the matter of the application of the Public Service Commission for the First District for the appointment of three commissioners, etc. (Gravesend Avenue Route—Route No. 49.) No opinion. Motion granted. Hon. William Watson, Jos. H. Esquirol, Esq., and F. Wilder Bellamy, Esq., appointed commissioners. See, also, 145 N. Y. Supp. 1142.

PURCELL, Respondent, v. AMERICAN MFG. CO., Appellant. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) Action by Mary Purcell, an infant, by William J. Purcell, her guardian ad litem, against the American Manufacturing Company. No opinion. Judgment and order unanimously affirmed, with costs.

RAKAS, Respondent, v. PHILADELPHIA COAL & IRON CO., Appellant. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Enick Rakas, an infant, etc., against the Philadelphia Coal & Iron Company. P. M. Brown, of New York City, for appellant. J. C. Robinson, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

REDFIELD BROS., Inc., Respondent, v. FOLLETT, Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by the Redfield Bros., Incorporated, against Charles A. Follett. No opinion. Order reversed, with \$10 costs and disbursements, and motion to dismiss for lack of prosecution granted, with \$10 costs.

REES v. UNITED STATES OXYGEN CO. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by William A. Rees against the United States Oxygen Company. No opinion. Motion denied, with \$10 costs. Settle order on notice. See, also, 158 App. Div. 935, 143 N. Y. Supp. 1140; 146 N. Y. Supp. 1109.

REES et al. v. UNITED STATES OXYGEN CO. et al. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by William A. Rees and others against the United States Oxygen Company, impleaded with others. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 146 N. Y. Supp. 1109.

REID v. MEDICAL SOCIETY OF ONEIDA COUNTY (two cases). **STRANAHAN v. SAME. GROFF v. SAME.** (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Actions by William B. Reid, by George C. Reid, by J. Orley Stranahan, and by John E. Groff against the Medical Society of the County of Oneida. No opinions. Judgment in each case affirmed, with one bill of costs. Held, that the actions were prematurely brought.

REILLY v. STEINHART. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Hugh J. Reilly against Frank Steinhart. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 146 N. Y. Supp. 534.

REINLE v. FRITZ et al. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Philipp J. Reinle against Charles B. Fritz and others. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 145 N. Y. Supp. 1142.

REUSENS v. GIRARD et al. (Supreme Court, Appellate Division, First Department.

March 27, 1914.) Action by Guillaume Reusens against Julian M. Girard and others. No opinion. Motion granted; question to be certified on settlement of order. Settle order on notice. See, also, 160 App. Div. 625, 146 N. Y. Supp. 86.

RICHTER, Respondent, v. KRATENSTEIN, Appellant (two cases). (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Actions by Herman Richter against Lena Kratenstein. No opinion. Motions denied, with \$10 costs.

RING, Respondent, v. MAIN PAPER STOCK CO., Appellant. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by John Ring against the Main Paper Stock Company. C. S. Petrasch, of New York City, for appellant. A. Ruger, of Brooklyn, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

RITTS, Respondent, v. BUFFALO & W. ELECTRIC RY. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by John V. Ritts, against the Buffalo & Williamsville Electric Railway Company.

PER CURIAM. Judgment affirmed, with costs.

FOOTE, J., dissents, upon the ground that plaintiff does not own the fee of the land in the highway. The title of his grantor, Thayer, extended only to its north line.

ROBERT S. DENHAM CO., Respondent, v. SALT, Appellant. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Appeal from Special Term, New York County. Action by the Robert S. Denham Company against Edwin B. Salt. From an order denying a motion to open a default, and from an order denying a motion for reargument of such motion, defendant appeals. Reversed. See, also, 159 App. Div. 881, 143 N. Y. Supp. 892. George P. Breckenridge, of New York City, for appellant. Earl D. Deremer, of Brooklyn, for respondent.

PER CURIAM. The order denying the motion to open the default should be reversed, with \$10 costs and disbursements, and the motion to open the default and set aside the judgment granted, on payment of the costs as taxed. The order denying the motion for a reargument of the motion to open the default is affirmed, without costs to either party.

In re ROBERTS. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) In the matter of the application of John R. Roberts, a creditor, for an order directing the disposition of real property of Abby A. Parsons, deceased, to pay debts.

PER CURIAM. Decree of Surrogate's Court affirmed, with costs. Held that, assuming appellants to have an equitable right to require

the joint property of the makers of the claimant's note to be first applied toward the payment of the joint debt of the makers of the note before resort is had to the individual property of the joint makers, still such relief can only be had in a court having equitable jurisdiction. This the Surrogate did not have. Appellants' remedy, if any, is by an equitable action.

ROBSON, J., not sitting.

ROBERTS v. SCHANZ. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Martin Roberts against Joseph Schanz. No opinion. Application denied, with \$10 costs. Order signed. See, also, 88 Misc. Rep. 139, 144 N. Y. Supp. 824.

ROBERTSON, Respondent, v. ROBERTSON, Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Action by Lena B. Robertson against Arthur G. Robertson. A. A. Hovell, of Brooklyn, for appellant. P. B. Adams, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements, with leave to defendant to serve amended answer on payment of costs. Order filed.

ROCK v. ROCK. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by William T. Rock against Anna A. Rock. No opinion. Motion to dismiss appeal granted, unless appellant comply with terms stated in order. Order filed.

ROESLER, Respondent, v. DUNKIRK HOME TELEPHONE CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Eva Roesler, an infant, etc., against the Dunkirk Home Telephone Company.

PER CURIAM. Order denying motion for new trial upon ground of newly discovered evidence affirmed, with costs. Judgment and order denying motion for new trial upon the minutes of the court reversed, and new trial granted, with costs to appellant to abide event. Held, that the exception to the charge permitting the jury to award damages for permanent injuries and the refusal to charge specifically upon that subject as requested present error.

ROGERS, Appellant, v. BENSEN, Respondent. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by William T. Rogers against Albert V. Bensen. No opinion. Judgment and order unanimously affirmed, with costs.

ROSEMAN, Respondent, v. HENSLE CONST. CO., Appellant. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Action by Hyman Roseman against the Hensle Construction Company. C. Winter, of

New York City, for appellant. G. F. Hickey, of New York City, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

LAUGHLIN, J., dissents.

ROSENGART v. GUTKES. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Israel Rosengart against August H. Gutkes. No opinion. Motion granted, with \$10 costs. Order filed.

ROSENMAIER, Appellant, v. ARNOLD et al., Respondents. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Katherine C. Rosenmaier, by Raymond E. Aldrich, her guardian ad litem, against Charles W. H. Arnold and another, as executors, etc. No opinion. Order affirmed, with \$10 costs and disbursements.

ROSE THEATRE CO., Respondent, v. CORN, Appellant. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by the Rose Theatre Company against Roselle Corn. O. J. Heermance, of New York City, for appellant. H. M. Flateau, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

ROWE, Appellant, v. COLEMAN, Respondent. (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Action by Perry B. Rowe against Clyde J. Coleman. No opinion. Orders modified, so as to provide that plaintiff shall have the right of cross-examination under the open commissions, without any condition as to paying the expenses occasioned by such cross-examination, and, as so modified, the orders are affirmed, without costs to either party.

RUEFNER v. ELLISON. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Paul Ruefner against Walter B. Ellison. With this case have been consolidated in this court cases bearing titles as follows: Lena Meyerhoff v. Nathan Taubenfeld; John McCullough v. City of New York; Harry B. Snyder v. Metropolitan Life Ins. Co.; Louis Mayer v. Benjamin Schwinger; Henry J. Gilbert v. Max Hart; John Corcoran v. Thomas Miller; Sethlow Realty Co. v. David Meyer; Equitable Trust Co. v. John F. King; John M. Gardner v. Phillip Lesser; Simon Schwartz v. August Kuhn; Jennie Manheimer v. Independent Order Abawas Israel. No opinions. Applications for leave to appeal from Appellate Term denied, with \$10 costs in each case. Orders signed.

ST. CLAIR v. HOWE. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Action by Fay St. Clair against

Sam Howe. No opinion. Application denied, with \$10 costs. Order signed.

SALOMON v. SALOMON. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Amelia Salomon against Joseph Salomon. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 153 App. Div. 901, 138 N. Y. Supp. 1140.

SAMMIS, Respondent, v. BROWN, Appellant, et al. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Action by John S. Sammis against Leon P. Brown, individually, etc., impleaded. M. Cohen, of New York City, for appellant. T. F. Kane, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

SANDERSE v. YORKSHIRE REALTY & CONSTRUCTION CO. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Cornelius Sanderse against the Yorkshire Realty & Construction Company. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 145 N. Y. Supp. 1144.

SANITARY CARPET CLEANER, Respondent, v. REED MFG. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by the Sanitary Carpet Cleaner against the Reed Manufacturing Company. No opinion. Motion granted, amending order of reversal of December 23, 1913 (159 App. Div. 587, 145 N. Y. Supp. 218), so as to direct final judgment in favor of defendant, instead of granting a new trial.

SCANLON, Respondent, v. NEW YORK TELEPHONE CO., Appellant. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) Action by Annie Scanlon against the New York Telephone Company.

PER CURIAM. Judgment and order of the City Court of Yonkers reversed, and new trial ordered, costs to abide the event, unless within ten days after entry of the order herein plaintiff stipulates to reduce the recovery of damages to the sum of \$200, in which event the judgment, as so modified, and the order, are unanimously affirmed, without costs.

In re SCHIMOCK. (Supreme Court, Appellate Division, First Department. March 27, 1914.) In the matter of Henryette Schimock, deceased. No opinion. Decree affirmed, with costs. Order filed.

SCHUTZINGER v. A. D. GRANGER CO. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Edwin N. Schutzinger against the A. D. Granger Company. No opinion. Motion to dismiss appeal granted, with \$10 costs, unless appellant

comply with terms stated in order. Order filed. See, also, 146 N. Y. Supp. 1112.

SCHUTZINGER, Respondent, v. A. D. GRANGER CO., Appellant. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Action by Edwin M. Schutzinger against the A. D. Granger Company. W. J. Martin, of New York City, for appellant. R. B. Honeyman, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 146 N. Y. Supp. 1111.

SCHWABE et al. v. HERTZOG. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Alfred J. Schwabe and others against Aladar W. Hertzog. No opinion. Motions denied, with \$10 costs. Orders filed. See, also, 146 N. Y. Supp. 644.

SCHWARTZ, Appellant, v. WILLIAMS et al., Respondents. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Michel I. Schwartz against Herbert E. Williams and others. No opinion. Judgments affirmed, with costs. See, also, 158 App. Div. 947, 148 N. Y. Supp. 1143.

SCHWARTZMAN, Appellant, v. JETTER et al., Respondents. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Samuel Schwartzman against J. Edward Jetter and others. H. Nathan, of New York City, for appellant. J. T. Mahoney, of New York City, for respondents. No opinion. Order reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs. Order filed.

SCHWER et al. v. COHN et al. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Michael Schwer and others against William L. Cohn and others. No opinion. Application granted. Order signed.

SEAMAN, Respondent, v. SMITH et al., Appellants. (Supreme Court, Appellate Division, Second Department. March 13, 1914.) Action by Richard F. B. Seaman against Fitzhugh Smith and others. No opinion. Judgment affirmed, with costs. See, also, 154 App. Div. 948, 139 N. Y. Supp. 1144.

SEAQUIST, Respondent, v. SEAQUIST, Appellant. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) Action by Augusta Seaquist against Nels A. Seaquist. No opinion. Order affirmed, with \$10 costs and disbursements.

SEARS, Respondent, v. KELLEY, Appellant. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Lena M. Sears against Elmer W. Kelley.

No opinion. Judgment modified, by deducting from the damages \$88, the value of the boxes, and, as so modified, unanimously affirmed, without costs.

SECURITY BANK OF NEW YORK v. FINKELSTEIN. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by the Security Bank of New York against Herman Finkelstein. No opinion. Motion granted. Order filed. See, also, 145 N. Y. Supp. 5.

SELWYN & CO. v. SHUBERT et al. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Selwyn & Co. against Lee Shubert, impleaded. No opinion. Motion granted; questions certified; order filed.

SHANNON, Respondent, v. VAN LIEW, Appellant. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Mary Shannon against De Forest Van Liew. **PER CURIAM.** Judgment affirmed, with costs.

HOWARD, J., dissents.

SHAWMUT TIRE CO. OF NEW YORK, Inc., Respondent, v. LATHAN-PHELPS CO., Inc., et al., Appellants. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Action by the Shawmut Tire Company of New York, Incorporated, against the Lathan-PHELPS Company, Incorporated, and others. M. Rubinger, of New York City, for appellants. A. Stickney, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements, with leave to defendants to withdraw demurrer and to answer, on payment of costs in this court and in the court below. Order filed.

SHERIDAN et al. v. SHERIDAN et al. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Bernard Sheridan and another against Patrick F. Sheridan and others, impleaded with Margaret A. Brown. No opinion. Order affirmed, with \$10 costs and disbursements.

SHIEBLER, Respondent, v. SUFFOLK GAS & ELECTRIC LIGHT CO., Appellant. (Supreme Court, Appellate Division, Second Department. April 3, 1914.) Action by Marvin Shiebler against the Suffolk Gas & Electric Light Company. No opinion. Judgment and order unanimously affirmed with costs.

SHIFFNER, Appellant, v. BECK, Respondent. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Clara Shiffner against George H. Beck. No opinion. Order affirmed on reargument, without costs, and defendant permitted to plead over

within five days after service upon him of a copy of the order herein, if he has not already so pleaded over. For former opinion, see 159 App. Div. 821, 145 N. Y. Supp. 27. See, also, 145 N. Y. Supp. 1145.

SHUMAN v. SHUMAN. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Lillian B. Shuman against George H. Shuman. No opinion. Motion to dismiss appeal denied. Order filed.

SIMEK v. BELLE ISLE. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Marek Simek, as administrator, against Joseph F. Belle Isle. No opinion. Order denied, with \$10 costs. Order filed. See, also, 144 N. Y. Supp. 1145.

SINAI v. KARP et al. (two cases). (Supreme Court, Appellate Division, First Department. February 20, 1914.) Actions by Ray Sinai and by Mollie Sinai against Joseph Karp, impleaded with Simon S. Rosenstamm. J. J. Mahoney, of New York City, for appellant. F. Herwig, of New York City, for respondent. No opinions. Judgments and orders appealed from affirmed, with costs. Orders filed.

SISSELMAN, Appellant, v. SUTHERLAND, Respondent. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Sam Sisselman against Elmer Sutherland. J. T. Booth, of New York City, for appellant. H. W. Smith, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

SIXTY WALL STREET v. CLEVINGER. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Sixty Wall Street against Joseph R. Clevenger. No opinion. Application granted. Order signed.

SKRABAL, Appellant, v. TAUS, Respondent, et al. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Action by Mary Skrabal, as executrix, against Joseph Taus, impleaded. H. B. Lewis, of New York City, for appellant. J. F. Tausch, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs. Order filed.

CLARKE and HOTCHKISS, JJ., dissent.

SMITH v. CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Charles W. Smith against the City of New York. No opinion. Application denied, with \$10 costs. Order signed. See, also, 83 Misc. Rep. 98, 144 N. Y. Supp. 676.

SNYDER, Respondent, v. HYGIEA REFRIGERATING CO., Appellant. (Supreme

Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Jacob H. Snyder against the Hygeia Refrigerating Company. No opinion. Judgment and order affirmed, with costs.

SNYDER v. PRUDENTIAL INS. CO. OF AMERICA. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Harry B. Snyder against the Prudential Insurance Company of America. No opinion. Application denied, with \$10 costs. Order signed.

SOLOVIE et al., Respondents, v. WHELAN, Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Jacob Solovie and another against Jane Whelan. No opinion. Order of the County Court of Kings County affirmed, with \$10 costs and disbursements, without, however, passing on the applicable rule of damages.

SOUTHERN DUTCHESS GAS & ELECTRIC CO., Respondent, v. MURPHEY et al., Appellants. (Appeal No. 2.) (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by the Southern Dutchess Gas & Electric Company against Harry E. Murphey and others.

PER CURIAM. Order affirmed, with \$10 costs and disbursements. We think the powers conferred on electric light companies by Transportation Corporation Law (Consol. Laws, c. 63) § 61, subd. 2, also under the franchise to use the streets of Fishkill, did not take from plaintiff the power also to condemn an easement over the property of defendants, such as it sought to do in these proceedings.

SPINA v. CITY OF NEW YORK. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Antonio Spina, as administrator, etc., against the City of New York. No opinion. Motions denied, without costs. See, also, 145 N. Y. Supp. 1146.

STEINERT v. VAN AKEN et al. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Henry N. Steinert, as receiver, against Charles H. Van Aken and others. No opinion. Motion denied, with costs. Order filed. See, also, 145 N. Y. Supp. 760.

STERN et al., Respondents, v. HERZMAN-SKY, Appellant. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Appeal from Special Term, New York County. Action by Joseph W. Stern and others against Bernard Herzmansky. From an order denying a motion to vacate the attachment, defendant appeals. Modified and affirmed. Nathan Burkan, of New York City, for appellant.

Theodore B. Richter, of New York City, for respondents.

PER CURIAM. The order appealed from should be modified, by reducing the amount stated in the warrant of attachment to \$1,500, and, as so modified, affirmed, without costs.

McLAUGHLIN and **SCOTT, JJ.**, dissent, and vote to reverse the order appealed from, and to vacate the attachment, on the ground that it does not appear from the papers that the plaintiffs have a cause of action against the defendant.

STERN v. HERMANSKY. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Joseph W. Stern against Bernard Hermansky. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 146 N. Y. Supp. 1113.

STOLLWERCK BROS., Inc., Appellant, v. CUPPY, Respondent. (Supreme Court, Appellate Division, First Department. April 3, 1914.) Action by Stollwerck Bros., Incorporated, against Haslitt A. Cuppy. E. H. Wilson, of New York City, for appellant. F. M. Thompson, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

In re **STUART.** (Supreme Court, Appellate Division, Second Department. March 20, 1914.) In the matter of the application of John Stuart to compel Louis Mathot, an attorney and counselor at law, to pay over certain moneys. No opinion. Order affirmed, with \$10 costs and disbursements.

SWITKES, Respondent, v. THEODOR SAUER CO., Appellant. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Joseph Switkes against the Theodor Sauer Company. E. P. Mowton, of New York City, for appellant. C. Steckler, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

TASSINI v. VIANE. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by August Tassini, an infant, etc., against Paul Viane. No opinion. Motion to dismiss appeal granted, with \$10 costs, unless appellant comply with terms stated in order. Order filed. See, also, 146 N. Y. Supp. 1114.

TASSINI, Respondent, v. VIANE, Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Action by August Tassini against Paul Viane. J. I. Cuff, of New York City, for appellant. G. F. Hickey, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 146 N. Y. Supp. 1114.

TERPEZONE CO., Respondent, v. KNOX TERPEZONE CO. OF AMERICA et al., Appellants. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Action by the Terpezone Company against the Knox Terpezone Company of America and others. L. H. Rogers, of New York City, for appellants. R. S. Fletcher, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements, with leave to defendants to withdraw demurrer and to answer, on payment of costs in this court and in the court below. Order filed. See, also, 146 N. Y. Supp. 1114.

TERPEZONE CO. v. KNOX TERPEZONE CO. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by the Terpezone Company against the Knox Terpezone Company. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 146 N. Y. Supp. 1114.

TERRENCE, Respondent, v. AUTENRIETH, Appellant. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) Action by Mary Terrence against Jacob Autenrieth, Jr. No opinion. Judgment and order unanimously affirmed, with costs. See, also, 156 App. Div. 914, 915, 141 N. Y. Supp. 1148.

THOMPSON et al. v. ATKINSON. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Morris S. Thompson and another against Elizabeth Atkinson. No opinion. Motion granted, unless appellant complies with terms stated in order. Order filed.

In re **THORN.** (Supreme Court, Appellate Division, First Department. March 13, 1914.) In the matter of Frank Thorn. No opinion. Proceeding opened, so as to refer to the official referee the additional charges specified in the supplemental petition. Settle order on notice. See, also, 158 App. Div. 927, 143 N. Y. Supp. 1146.

THOS. J. BUCKLEY ENGINEERING CO., Appellant, v. McCALL et al., Respondents. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by the Thos. J. Buckley Engineering Company against Edward E. McCall and others. W. B. Ellison, of New York City, for appellant. L. T. Harkness, of New York City, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 83 Misc. Rep. 603, 145 N. Y. Supp. 525.

TIGER, Respondent, v. DE LAVAL SEPARATOR CO., Appellant. (Supreme Court, Appellate Division, Second Department. April 3, 1914.) Action by Cornelius B. Tiger against the De Laval Separator Company. No opinion. Judgment and order unanimously affirmed, with costs.

In re TILDEN et al. (Supreme Court, Appellate Division, First Department. March 13, 1914.) In the matter of the petition of George H. Tilden and others. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

TITLE GUARANTY & SURETY CO. v. McNALLY et al. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by the Title Guaranty & Surety Company against Thomas McNally and others. No opinion. Motion granted, with \$10 costs. Order filed.

TOWNSEND, Respondent, v. T. A. GILLESPIE CO., Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Charles Townsend against T. A. Gillespie Company. No opinion. Judgment and order unanimously affirmed, with costs.

TREEGER, Respondent, v. MASON-SEAMAN TRANSP. CO., Appellant. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Appeal from Trial Term, New York County. Action by Samuel Treeger against the Mason-Seaman Transportation Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed, and new trial ordered. William H. Corbitt, of New York City, for appellant. J. Nathan Holfat, of New York City, for respondent.

PER CURIAM. The judgment and order appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide the event, upon the ground that the verdict was contrary to the weight of the evidence as to the negligence of the defendant and the absence of contributory negligence on the part of the plaintiff.

TRIFANT v. WILLIAMS. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Ruth L. Trifant against Henry G. Williams. No opinion. Motion granted, with \$10 costs. Order filed.

TRIMBLE, Respondent, v. MACKENZIE, Appellant. (Supreme Court, Appellate Division, First Department. April 3, 1914.) Action by Mary Trimble against Mary H. MacKenzie. T. F. Kuper, of New York City, for appellant. H. W. Smith, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

TRIPLER, Respondent, v. FAIRCHILD, Appellant. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Lorenzo E. Tripler against Harry P. Fairchild. W. E. Van Steenberg, of New York City, for appellant. D. Whitford, of New York City, for respondent. No opinion. Order af-

firmed, with \$10 costs and disbursements. Order filed.

TROIANO et al. v. EGAN et al. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Andrew Troiano and others against Charles E. Egan and others. No opinion. Motion to dismiss appeal granted, with \$10 costs. Order filed. See, also, 154 App. Div. 940, 189 N. Y. Supp. 1148.

TUBBS et al., Appellants, v. HULSE et al., Respondents. (Supreme Court, Appellate Division, First Department. April 3, 1914.) Action by George W. Tubbs and others against Frederick Hulse and others, as trustees, etc., J. A. Gray, of New York City, for appellants. D. Cady Herrick, of Albany, for respondents. No opinion. Judgment affirmed, with costs. Order filed. See, also, 159 App. Div. 905, 144 N. Y. Supp. 1148.

TULL, Respondent, v. BARRETT, Appellant. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Action by Edward E. Tull against Marion A. Barrett. R. P. Buell, of New York City, for appellant. C. O. Maas, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed. See, also, 154 App. Div. 938, 139 N. Y. Supp. 1148.

TUTHILL v. FORBES. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Frank E. Tuthill against Margaret E. Forbes. No opinion. Application granted. Order filed. See, also, 145 N. Y. Supp. 660.

TYNDALL, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Mary A. Tyndall, as administratrix, etc., of James J. Tyndall, deceased, against the New York Central & Hudson River Railroad Company. No opinion. Judgment and order unanimously affirmed, with costs. See, also, 157 App. Div. 186, 141 N. Y. Supp. 879; 146 N. Y. Supp. 1115.

TYNDALL, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Third Department. March 13, 1914.) Action by Mary A. Tyndall, as administratrix, etc., of James J. Tyndall, deceased, against the New York Central & Hudson River Railroad Company. No opinion. Motion granted. See, also, 146 N. Y. Supp. 1115.

UNIACK, Respondent, v. MERCHANTS' UNION ICE CO., Appellant. (Supreme Court, Appellate Division, First Department. March 20, 1914.) Appeal from Trial Term, New York County. Action by Cornelius Uniack against the Merchants' Union Ice Company. From a judgment for plaintiff, defendant appeals. Re-

versed and remanded. See, also, 157 App. Div. 910, 142 N. Y. Supp. 1148. Frederick M. Thompson, of New York City, for appellant. L. F. Fish, of New York City, for respondent.

PER CURIAM. There was no evidence to support the finding that the plaintiff was free from contributory negligence, and the motion to dismiss the complaint, made on the trial, should have been granted. The judgment is therefore reversed, and a new trial ordered, with costs to the appellant to abide the event.

INGRAHAM, P. J., and LAUGHLIN, J., dissent, and vote for affirmance.

UNION BANK OF BROOKLYN v. SCHNEIDER et al. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) Action by the Union Bank of Brooklyn against David Schneider and others. Rosie Felner and others, appellants. No opinion. Judgment of the County Court of Kings County affirmed, with costs. See, also, 149 App. Div. 928, 133 N. Y. Supp. 1148.

UNION TRUST CO. OF NEW JERSEY, Respondent, v. WILLIAM R. JENKINS CO., Appellant. (Supreme Court, Appellate Division, First Department. February 20, 1914.) Action by the Union Trust Company of New Jersey against the William R. Jenkins Company. M. Kirtland, of New York City, for appellant. W. M. K. Olcott, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

UNITED PRODUCE CO., Respondent, v. PADDLEFORD, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by the United Produce Company against Jesse F. Paddleford. No opinion. Order affirmed, with \$10 costs and disbursements.

UNITED STATES TITLE GUARANTY CO., Respondent, v. LE CORN BLDG. CO., Appellant. (Supreme Court, Appellate Division, Second Department. February 27, 1914.) Action by the United States Title Guaranty Company against the Le Corn Building Company. No opinion. Judgment and order of the County Court of Kings County affirmed, with costs.

VAN CLEFT, Appellant, v. WILLIAMS et al., Respondents. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Joseph Van Cleft against Ella D. Williams and another, as trustees, etc. No opinion. Judgment affirmed, with costs.

VAN TASSEL et al., Appellants, v. BROWN et al., Respondents. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) Action by Ambrose Van Tassel and another against Alonzo Brown and others.

PER CURIAM. Upon filing proof by service of the affidavit and notice of motion upon the attorney for plaintiffs, the motion will be granted,

and the order heretofore made (145 N. Y. Supp. 1148) resettled, so as to permit defendant to interpose an answer upon the terms previously stated, setting up any equitable claim, if any, that he might have for improvements made upon the property by him, or by reason of any taxes paid by him upon said property.

VARNUM, Respondent, v. BARRETT, Appellant. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Robert T. Varnum, as executor, against William M. Barrett, as president, etc. E. G. Benedict, of New York City, for appellant. E. F. Lindsay, of New York City, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

McLAUGHLIN and SCOTT, JJ., dissent, on Canfield v. New York Trans. Co., 128 App. Div. 450, 112 N. Y. Supp. 854.

VENTIMIGLIA v. EICHNER et al. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Maria J. Ventimiglia against Minna Eichner, as administratrix, and the City of New York. C. A. Peters, of New York City, for appellant. G. A. Moses, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 140 N. Y. Supp. 395; 155 App. Div. 236, 146 N. Y. Supp. 1116.

VENTIMIGLIA v. EICHNER. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Maria J. Ventimiglia against Minna Eichner. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 146 N. Y. Supp. 1116.

VILLAGE OF FREDONIA, Appellant, v. FREDONIA NATURAL GAS LIGHT CO. et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by the Village of Fredonia against the Fredonia Natural Gas Light Company and others.

PER CURIAM. Order (145 N. Y. Supp. 820) reversed, with \$10 costs and disbursements, and motion to vacate the injunction denied, with \$10 costs, with leave to renew at Special Term the motion to vacate the injunction, in case plaintiff neglects to proceed with due diligence to the trial of the action. Held, that there is sufficient doubt as to the law and facts involved, respecting the right of the defendant to lay its pipes as proposed, to require the reinstatement of the preliminary injunction until the hearing and determination of the action. See, also, 145 N. Y. Supp. 1149.

ROBSON, J., dissents, and votes for affirmance. **LAMBERT, J.,** not sitting.

VIRGINIA STATE INS. CO., Respondent, v. AMERICAN FIDELITY CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by the

Virginia State Insurance Company against the American Fidelity Company. No opinion. Judgment affirmed, with costs.

VULCAN DETINNING CO., Respondent, v. SEWARD et al., Appellants (two cases). (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by the Vulcan Detinning Company against George O. Seward and another. C. Seasongood, of New York City, for appellants. E. S. Seidman, of New York City, for respondent. No opinion. Orders affirmed, with \$10 costs and disbursements. Order filed.

WAGOR et al., Respondents, v. ERIE R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. March 4, 1914.) Action by Walter M. Wagon and others against the Erie Railroad Company. No opinion. Appeal dismissed, without costs, upon stipulation filed.

WALTER et al., Appellants, v. WALTER, Respondent. (3 cases). (Supreme Court, Appellate Division, First Department. March 6, 1914.) Action by Moritz Walter and others against Anna K. Walter. D. Leventritt, of New York City, for appellants. G. R. Bristol, of New York City, for respondent. No opinion. Orders affirmed, with \$10 costs and disbursements. Orders filed.

WASHBURN v. RAINIER et al. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Appeal from Special Term, Nassau County. Action by Henry J. Washburn against John T. Rainier and others. From a Special Term order as resettled, denying the motion of defendants John T. Rainier and Paul N. Lineberger for a readjustment of costs, they appeal. Reversed, appeal from taxation of costs sustained, and motion to strike out the costs as taxed, except those in Court of Appeals before argument, and disbursements for printing the case in the Court of Appeals and printing the points, granted. See, also, 144 N. Y. Supp. 1149. T. G. Durkan, of New York City, for appellants. Jesse Fuller, Jr., of Brooklyn, for respondent.

PER CURIAM. When the provision of the original order of this court of March 15, 1912, to the effect that the judgment appealed from be reversed, "with costs of the action to abide the event," is read in connection with the order of this court of December 12, 1913, resettling the same, it seems to us perfectly clear that upon such resettlement it was the purpose of this court to permit plaintiff, if he desired, to retrace the steps which he had taken upon the strength of the form of the order as originally entered, and to compensate him for any expense that he had incurred by reason thereof. Bearing this in mind, it is equally clear that the only costs and disbursements that were to be paid were those which had accrued in the interval between the date of the original order of reversal and the resettlement thereof. These were taxable costs in the Court of Ap-

peals before argument, and such disbursements in connection with such appeal as would be properly taxable, and which had been made up to that time. The order appealed from should be reversed, with \$10 costs and disbursements, the appeal from the taxation of costs sustained, and the motion granted to strike out all of the costs as taxed, except costs in the Court of Appeals before argument, and disbursements for printing the case in the Court of Appeals and printing the points.

WASSERMAN v. BRONX HOME NEWS PUB. CO. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Joseph A. Wasserman against the Bronx Home News Publishing Company. No opinion. Order modified, by requiring the bill of particulars to be served 20 days after the completion of the examination of the plaintiff before trial, and, as so modified, affirmed, without costs. Settle order on notice. See, also, 146 N. Y. Supp. 1117.

WASSERMAN, Respondent, v. BRONX HOME NEWS PUB. CO. et al., Appellants. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Joseph A. Wasserman against the Bronx Home News Publishing Company and others. E. P. Seelman, of New York City, for appellants. M. L. Heidenheimer, of New York City, for respondent. No opinion. Order reversed, with \$10 costs and disbursements, and motion to vacate order for examination of plaintiff before trial denied. Time for examination to be fixed on settlement of order. Settle order on notice. See, also, 146 N. Y. Supp. 1117.

WELLS, Appellant, v. WELLS, Respondent. (Supreme Court, Appellate Division, Third Department. March 13, 1914.) Action by Samuel Wells against Aaron Wells. No opinion. Appeal dismissed, without costs.

WELLS, Respondent, v. WELLS, Appellant. (Supreme Court, Appellate Division, Third Department. March 13, 1914.) Action by Samuel Wells against Aaron Wells. No opinion. Judgment and order unanimously affirmed, with costs.

WERNER, Respondent, v. LIPSIIUS et al., Appellants. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) Action by Charles Werner against Louis Lipsius and another, copartners, etc. No opinion. Judgment and order unanimously affirmed, with costs.

WESSEL, Respondent, v. SCHWARZLER, Appellant. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Action by Mary Wessel against Albert J. Schwarzler. M. D. Steuer, of New York City, for appellant. J. H. Cohen, of New York City, for respondent. No opinion. Judgment and order

affirmed, with costs. Order filed. See, also, 144 App. Div. 587, 129 N. Y. Supp. 521.

WESSEL, Respondent, v. SCHWARZLER, Appellant. (Supreme Court, Appellate Division, First Department. March 6, 1914.) Action by May Wessel against Albert J. Schwarzler. M. D. Steuer, of New York City, for appellant. J. H. Cohen, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 144 App. Div. 589, 129 N. Y. Supp. 522.

WEST v. JARMULOWSKY. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Florence A. West against Harry Jarmulowsky. No opinion. Application denied, with \$10 costs. Order signed. See, also, 144 N. Y. Supp. 755.

In re WEST 231st. STREET. (Supreme Court, Appellate Division, First Department. March 27, 1914.) In the matter of West 231st Street. No opinion. Motion granted; question certified; order filed.

WHISLER et al., Respondents, v. COLE, Appellant. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Benjamin A. Whisler and another against Henry G. Cole. No opinion. Judgment unanimously affirmed, with costs, on opinion of Van Kirk, J., 81 Misc. Rep. 519, 143 N. Y. Supp. 478, at Special Term.

WHITCOMB, Appellant, v. HILL, Respondent, et al. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by James A. Whitcomb against Walker Hill and R. Russell Brant. No opinion. Order affirmed, with \$10 costs and disbursements. See, also, 146 N. Y. Supp. 1118.

WHITCOMB, Appellant, v. HILL, Respondent, et al. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by James A. Whitcomb against Walker Hill and R. Russell Brant. No opinion. Motion denied, without costs. See, also, 146 N. Y. Supp. 1118.

WHITE v. JACOBS. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Katie White against Alexander Jacobs. No opinion. Motion granted, with \$10 costs. Order filed.

WHITE STUDIO v. DREYFOOS. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by the White Studio against Alexander W. Dreyfoos. No opinion. Motion granted. Order filed. See, also, 144 N. Y. Supp. 1150.

WHITING, Respondent, v. WHITING, Appellant. (Supreme Court, Appellate Division, Third Department. March 4, 1914.) Action by Fanny L. Whiting against Gordon Whiting. No opinion. Interlocutory judgment unanimously affirmed, with costs.

WIESNEWSKY, Respondent, v. E. E. SMITH CONTRACTING CO., Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Joseph Wiesnewsky against the E. E. Smith Contracting Company. No opinion. Order reversed, and new trial granted, costs to abide the event, because of the error in the refusal of the learned trial court to charge as requested at folios 883 and 884.

In re WILLETT. (Supreme Court, Appellate Division, Second Department. March 6, 1914.) In the matter of William Willett, an attorney. No opinion. Motion granted.

WILLIAMS v. CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. March 13, 1914.) Action by Charles Williams against the City of New York. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 145 N. Y. Supp. 1150.

WILLIAMSON, Respondent, v. JEROME et al., Appellants. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by William A. Williamson against Thomas J. Jerome and others. J. C. Coleman, of New York City, for appellants. C. L. Craig, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

WILLIAMSON, Appellant, v. WACHOVIA BANK & TRUST CO., Respondent. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by William A. Williamson against the Wachovia Bank & Trust Company. C. L. Craig, of New York City, for appellant. J. C. Coleman, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

In re WILSON. (Supreme Court, Appellate Division, Second Department. April 8, 1914.) In the matter of Robert H. Wilson, an attorney.

PER CURIAM. Ordered that the charges annexed to the moving papers be filed, and that a copy thereof be personally delivered to said Robert H. Wilson, as provided by Judiciary Law (Consol. Laws, c. 30) § 476, and that he have 20 days thereafter in which to file his answers to the same, or otherwise to present his defense thereto. The further disposition of the motion is reserved until after the filing of such answers or defense. The counsel heretofore designated to present charges, to wit, William N. Dykman, Esq., and Stephen C. Baldwin, Esq., are now severally discharged and relieved from

further duties in the matter. See, also, 160 App. Div. 521, 145 N. Y. Supp. 557.

WISNIEWSKY, Respondent, v. SMITH, Appellant. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Mary Wisniewsky, as administratrix, etc., of John Wisniewsky, deceased, against Edward C. Smith. No opinion. Order affirmed, without costs.

WITTGREN, Appellant, v. WELLS BROS. CO. OF NEW YORK, Respondent. (Supreme Court, Appellate Division, Second Department. February 27, 1914.) Action by Elsa Wittgren, as administratrix, etc., of Nies Bernhard Wittgren, deceased, against the Wells Bros. Company of New York. No opinion. Judgment and order unanimously affirmed on reargument, with costs, on the authority of *Wittgren v. Wells Bros. Co.*, 141 App. Div. 693, 128 N. Y. Supp. 896; 149 App. Div. 961, 134 N. Y. Supp. 1150. See, also, 144 N. Y. Supp. 1150, 1151; 146 N. Y. Supp. 1119.

WITTGREN, Appellant, v. WELLS BROS. CO. OF NEW YORK, Respondent. (Supreme Court, Appellate Division, Second Department. March 20, 1914.) Action by Elsa Wittgren, as administratrix, etc., of Nies Bernhard Wittgren, deceased, against the Wells Bros. Company of New York. No opinion. Motion denied, without costs. See, also, 146 N. Y. Supp. 1119.

WOLFE v. MACK. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Moses Wolfe against James F. Mack. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 145 N. Y. Supp. 1150.

WOODCOCK, Respondent, v. TAYLOR, Appellant, et al. (Supreme Court, Appellate Division, First Department. February 27, 1914.) Action by Daniel Woodcock against Arthur J. Taylor, impleaded. J. V. Judge, of New York

City, for appellant. M. M. Menken, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 145 N. Y. Supp. 1150.

WULFF, Respondent, v. ROSEVILLE TRUST CO., Appellant. (Supreme Court, Appellate Division, First Department. March 27, 1914.) Action by Richard J. Wulff against the Roseville Trust Company. R. C. Durland, of New York City, for appellant. G. W. Study, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

ZIGLER, Respondent, v. HOLBROOK, CABOT & ROLLINS CORPORATION, Appellant. (Supreme Court, Appellate Division, First Department. February 13, 1914.) Action by Major Zigler against the Holbrook, Cabot & Rollins Corporation. B. Patterson, of New York City, for appellant. H. Gottlieb, of New York City, for respondent. No opinion. Order modified, by reducing the condition upon which the defendant was permitted to amend the answer to the payment of \$10 motion costs, and, as so modified, affirmed, without costs. Settle order on notice.

In re ZIRINSKY. (Supreme Court, Appellate Division, Second Department. March 27, 1914.) In the matter of David Zirinsky, an attorney.

PER CURIAM. The malpractice in swearing to, and submitting for taxation, a false and excessive bill of costs, and verifying the same by the affidavit of the attorney, is a serious offense. Matter of Mashbir, 44 App. Div. 632, 60 N. Y. Supp. 451. In order that the actual disbursements incurred may be properly shown by vouchers and other proofs, and the matter be duly subjected to investigation, it is ordered that the charges herein be referred to Hon. Josiah T. Marean, official referee, to take proof as to the proceedings in the action of Lipsitz v. Beere, and to report, with his opinion thereon, to this court.

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(F) Discretion of Lower Court.

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§ 1052 (N.Y.Sup.) Defendant cannot complain that the court improperly allowed a witness to testify as to his use of the notes made by the original surveyor of the land in dispute, where on cross-examination the notes were offered in evidence by defendant.—*Wightman v. Campbell*, 146 N. Y. S. 666.

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§ 1177 (N.Y.Sup.) Under Const. art. 6, § 2, and Code Civ. Proc. § 1317, as amended by Laws 1912, c. 380, where, in an action for injuries, plaintiff's own case showed that she was negligent as a matter of law, and the court should have sustained a motion to dismiss, the Appellate Division had jurisdiction on reversal to dismiss the complaint without directing a new trial.—*Peterson v. Ocean Electric Ry. Co.*, 146 N. Y. S. 604, 611.

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§ 1177 (N.Y.Sup.) Where the record contains no comprehensible calculation from which the exact error in the amount of the judgment can be computed, a new trial will be granted.—*Kuhmarker Mfg. Co. v. Hills*, 146 N. Y. S. 1013.

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§ 42 (N.Y.Sup.) An attorney presenting affidavits of his client in an alimony proceeding, falsely stating that she had no funds to pay him, when he knew she had a savings bank account deposit of \$2,400, and either she or some one for her had paid counsel \$300, the attorney was guilty of misconduct warranting suspension for three months.—In re Wagener, 146 N. Y. S. 589.

§ 44 (N.Y.Sup.) Where an attorney, engaged to collect part of the proceeds of an estate belonging to nonresident infants, misappropriated the funds and tried to conceal his misappropriation by false testimony, he should be disbarred.—In re Feinblatt, 146 N. Y. S. 804.

§ 44 (N.Y.Sup.) Where an attorney in a criminal case was paid money to use for defendant, and without authority used it to suppress testimony in violation of Pen. Law, §§ 379, 570, and in gambling and appropriated it to his own use, and thereafter presented a false claim for expenditures never made, he is guilty of conduct calling for disbarment.—In re Hartridge, 146 N. Y. S. 421.

§ 44 (N.Y.Sup.) Where an attorney obtained money from his client to loan on real estate security so as to pay her \$150 a month, but appropriated it to his own use and lost it, he was guilty of professional misconduct, justifying disbarment, though he repaid some of the money.—In re Avrutis, 146 N. Y. S. 741.

§ 44 (N.Y.Sup.) An attorney who, after agreeing to accept as his fee 30 per cent. of the judgment and all costs, tendered to his client an amount less than one-half the judgment as full satisfaction, and falsely testified to an interview with the client authorizing the retention of certain sums by him, held guilty of professional misconduct.—In re Smith, 146 N. Y. S. 906.

An attorney, guilty of professional misconduct in withholding from a judgment more than the amount to which he was entitled by contract and falsely testifying to authority for the retention of part of such amount, will be suspended for two years with leave to apply for reinstatement at the end of that term on conditions.—Id.

§ 44 (N.Y.Sup.) Junior partners of a firm of attorneys, who received moneys drawn from the personal account of the senior partner, into which were put the firm fees, and out of which were paid the firm expenses, are not guilty of misconduct, under Judiciary Law, § 88, because they did not ascertain that taking money from

that account would deprive a client of the senior partner of money which he had deposited therein.—In re Clarke, 146 N. Y. S. 1030.

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§ 53 (N.Y.Sup.) Evidence held to show that respondent committed perjury in verifying an answer in a suit against him for an admitted debt, and also in testifying before the referee on the hearing of charges based thereon.—In re Greenbaum, 146 N. Y. S. 969.

§ 54 (N.Y.Sup.) Disbarment by the Appellate Division, under Judiciary Law, § 88, subd. 2, as amended by Laws 1913, c. 720, of an attorney guilty of crime, is not dependent on his conviction, as it is under subdivision 3; so that, the bar association having preferred a charge against an attorney not indicted, the referee should take and report all the testimony for both sides.—In re Stanton, 146 N. Y. S. 890.

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§ 76 (N.Y.Sup.) The relation of attorney and client may be dissolved by either party for cause, and the client may dissolve it without cause.—Martin v. Camp, 146 N. Y. S. 1041.

§ 77 (N.Y.Sup.) Counsel in charge of a proceeding in an action has authority of the attorney appearing for the same party to make any stipulation or do any other act in relation to the procedure which, in his judgment, would benefit the cause of his client.—Montrose v. Baggott, 146 N. Y. S. 649.

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

§ 106 (N.Y.Sup.) Where attorneys are sued for negligence in that they permitted sureties on an appeal bond to become discharged by failure to justify, after taking exceptions to them, their liability is to be determined by the settled law at the time of the acts which are asserted to be negligent.—Montrose v. Baggott, 146 N. Y. S. 649.

§ 112 (N.Y.Sup.) Since a stipulation by counsel for a defendant to withdraw exceptions to sureties on an appeal bond is sufficient to hold the sureties though the sureties do not justify, attorneys for plaintiff are not liable for negligence for the reason that, in an action on the bonds, the court held the sureties discharged because of their failure to justify.—Montrose v. Baggott, 146 N. Y. S. 649.

Attorneys for plaintiff are not liable to him because in an action on an appeal bond the court incorrectly determined that the sureties were discharged by a stipulation between the parties.—Id.

§ 129 (N.Y.Sup.) In an action against attorneys for negligence in permitting sureties on appeal bonds to be discharged by failure to justify, evidence held sufficient to take to the jury the question of the making of an oral stipulation between the parties to the suit withdrawing the exceptions to the sureties.—*Montrose v. Baggett*, 146 N. Y. S. 649.

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§ 130 (N.Y.Sup.) An attorney cannot recover compensation for services rendered a member of a firm which was in financial difficulties, where he not only represented the firm, but creditors of the firm.—*Eisemann v. Hazard*, 146 N. Y. S. 685.

That an attorney, who represented a member of a bankrupt firm, disclosed to the committee of creditors of which he was a member owing to his representation of firm creditors that he was the attorney for the firm, will not entitle him to compensation.—*Id.*

§ 134 (N.Y.Sup.) Where an attorney, having contracted to render services for contingent fee, was displaced after a portion of the service had been rendered, his cause of action was on the contract and not on a quantum meruit.—*Martin v. Camp*, 146 N. Y. S. 1041.

Where an attorney was employed to obtain certain awards and reduced assessments for a percentage of the award and a portion of the reduction of assessments, and before his work was completed he was displaced by his client, he was entitled to wait until the awards were made and the assessments reduced by his successor and then recover contract compensation.—*Id.*

§ 165 (N.Y.Sup.) It is unnecessary for one sued for an attorney's fee to set up the illegality of the attorney's action in representing conflicting interests, where the facts appear from the testimony given in support of the attorney's case.—*Eisemann v. Hazard*, 146 N. Y. S. 685.

ATTORNEY GENERAL

See Railroads, § 79.

AUTHORITY.

See Attorney and Client, §§ 63-77.

AUTOMOBILES.

See Highways, § 184; Railroads, § 350.

BAILMENT.

See Carriers, § 181½; Depositaries; Pledges.

§ 14 (N.Y.Sup.) Where empty carboys, to contain acid sold, were delivered to defendant under the agreement that those not returned should be paid for at a fixed price, defendant was only a bailee of the carboys, and not liable for their loss owing to an act of God.—*Niagara Alkali Co. v. Champion Coated Paper Co.*, 146 N. Y. S. 284.

BANKRUPTCY.

See Assignments for Benefit of Creditors; Insolvency; Set-Off and Counterclaim, § 31.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 192 (N.Y.Sup.) Bankr. Law, § 47a, as amended in 1910, would not render ineffectual a materialman's lien on money due on a contract for a street improvement because the contractor was adjudicated a bankrupt before the filing of the lien.—*Hildreth Granite Co. v. City of Watervliet*, 146 N. Y. S. 449.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 424 (N.Y.Sup.) An intentional sale by a brokerage firm of stock held by it upon an account and depositing the proceeds in bank in the firm name held to create a liability for willful and malicious "injury to the property of another," with Bankruptcy Act, § 17, as amended by Act Feb. 5, 1903, § 17, exempting such debts from discharge.—*Kavanaugh v. McIntyre*, 104 N. E. 135, 210 N. Y. 175.

§ 429 (N.Y.) If some of the members of a bankrupt firm wrongfully converted corporate stock so as to create a liability for "willful and malicious injury to the property of another" within Bankruptcy Act, § 17, as amended by Act Feb. 5, 1903, exempting such debts from discharge, the members of the bankrupt firm who did not participate in such wrongful acts are not released from liability for such debts by the discharge in bankruptcy.—*Kavanaugh v. McIntyre*, 104 N. E. 135, 210 N. Y. 175.

BANKS AND BANKING.

See Assignments, § 49; Bills and Notes, § 840.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(E) Insolvency and Dissolution.

§ 80 (N.Y.Sup.) An allegation of a claim against an insolvent bank that the claimant has by virtue of a demand become entitled to all the "right, title and interest" of the people of the state to the money deposited therein, representing the canal funds of the state, indicated that it stood in the shoes of the state.—*United States Fidelity & Guaranty Co. v. Borough Bank of Brooklyn*, 146 N. Y. S. 870.

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

§ 119 (N.Y.Sup.) The relation between a depositor and a bank is that of debtor and creditor.—*North British & Mercantile Ins. Co. v. Merchants' Nat. Bank*, 146 N. Y. S. 720.

§ 145 (N.Y.Sup.) Where a check was obtained from the drawer by certain conspirators, who had no authority to receive it for the payee, and, after the conspirators had procured its

certification, they also procured a forged indorsement of the name of the payee and obtained payment from defendant, the check was never lawfully delivered, and plaintiff, notwithstanding the certification, was entitled to recover the amount from the drawee bank.—*Anglo-South American Bank v. National City Bank of New York*, 146 N. Y. S. 457.

§ 148 (N.Y.Sup.) A bank must know the signatures of its depositors and is primarily liable if it pays out money on forged checks, unless the depositor's negligence contributed to the payment without any negligence upon the part of the bank.—*North British & Mercantile Ins. Co. v. Merchants' Nat. Bank*, 146 N. Y. S. 720.

A bank depositor *held* not entitled to complain that its cashier did not have authority to sign an instrument by which the bank was authorized to deliver to the person named the depositor's passbook and take his receipt in printed form on the reverse side.—*Id.*

The fact that a bank which paid checks fraudulently drawn on a depositor's account by the depositor's employes received the checks for payment from other solvent banks, so that if required to again pay their amount to the depositor it could seek reimbursement from the other banks, would not be ground for requiring it to again pay checks.—*Id.*

§ 154 (N.Y.Sup.) In an action by a bank depositor to recover the proceeds of checks fraudulently drawn by plaintiff's employes against plaintiff's account, evidence *held* to make it a jury question whether plaintiff by reason of its negligence in not examining its books should recover.—*North British & Mercantile Ins. Co. v. Merchants' Nat. Bank*, 146 N. Y. S. 720.

(D) Collections.

§ 174 (N.Y.Sup.) Under Negotiable Instruments Law, § 42, bank which collected checks upon which payee's indorsement was forged *held* liable to make good the amount it had received.—*Standard Steam Specialty Co. v. Corn Exchange Bank*, 146 N. Y. S. 181.

Where an employe of a corporation, authorized only to indorse checks to the order of the bank in which they were customarily deposited, indorsed them in blank, *held*, that the indorsement was a forgery, and the bank which collected them for transferees was liable for the amount collected.—*Id.*

(F) Exchange, Money, Securities, and Investments.

§ 190 (N.Y.Sup.) Where bankers issued traveler's checks, payable through correspondents on the holder's countersignature, the bankers, having paid lost or stolen checks on a countersignature that was forged, were liable to the owner, and were entitled to recover reimbursement against their immediate indorser, each indorser being entitled to recover against his prior indorser in turn.—*Sullivan v. Knauth*, 146 N. Y. S. 583.

Traveler's checks, lost or stolen and paid by the drawee under a forged countersignature of the owner, *held* not lost within a provision of the agreement that the bankers would refund the amount of lost checks on a suitable bond of indemnity.—*Id.*

VI. LOAN, TRUST, AND INVESTMENT COMPANIES.

§ 317 (N.Y.Sup.) The State Superintendent of Banks taking possession of the assets and property of a trust company pursuant to Banking Law, § 19, for purposes of liquidation, may sue and be sued in effect as a receiver.—*In re Carnegie Trust Co.*, 146 N. Y. S. 809.

Under Code Civ. Proc. § 3246, allowing recovery of costs against a person sued as trustee or under authority of statute, *held*, that a claimant against a trust company in liquidation by the State Superintendent of Banks was entitled to interest on costs from the date when the court directed the payment of a dividend on his judgments.—*Id.*

A creditor of a trust company in liquidation whose dividend was deferred by reason of an unsuccessful contest of his claim *held* entitled to interest on the dividend founded upon his judgments notwithstanding he had been allowed interest in the computation of the amount of such judgments.—*Id.*

BENEFICIAL ASSOCIATIONS.

See Associations; Insurance, §§ 694–825; Judgment, § 585; Mandamus, § 160.

§ 12 (N.Y.Sup.) A by-law giving a member of a benefit society the right to appeal to a meeting thereof from any decision of the society does not apply to an expulsion for nonpayment of dues, and the pursuit of such remedy is not a condition precedent to mandamus to review the expulsion.—*People ex rel. Weiss v. Philip Bernstein Sick & Benefit Society*, 146 N. Y. S. 886.

BEQUESTS.

See Wills.

BETTING.

See Gaming.

BIDS.

See Taxation, § 685.

BILL OF EXCHANGE.

See Bills and Notes.

BILL OF PARTICULARS.

See Pleading, §§ 818, 823.

BILLS AND NOTES.

See Accord and Satisfaction, §§ 9, 11; Assignments, § 49; Banks and Banking, §§ 145, 190; Contracts, § 159; Contribution, §§ 4, 9; Corporations, § 425; Principal and Agent, § 136; Principal and Surety, § 112.

I. REQUISITES AND VALIDITY.

(B) Form and Contents of Promissory Notes and Duebills.

§ 46 (N.Y.Sup.) That a writing, promising to pay a certain sum on a certain date with interest, also contained a receipt for the money loaned did not affect its legal character as a note.—*Scantlebury v. Tallcott*, 146 N. Y. S. 184.

(D) Acceptance.

§ 74 (N.Y.Sup.) Under the express provisions of Negotiable Instruments Law, § 112, the acceptor of a bill engages that he will pay it according to the tenor of his acceptance.—*Anglo-South American Bank v. National City Bank of New York*, 146 N. Y. S. 457.

(E) Consideration.

§ 92 (N.Y.Sup.) The advance by the payee of a note to the party signing it of the amount thereof, for the benefit of a company of which the party signing was treasurer, was a sufficient consideration to support the obligation of such party, whether he retained the money personally or delivered it to the company.—*Scantlebury v. Tallcott*, 146 N. Y. S. 184.

§ 98 (N.Y.Sup.) A recital, in a nonnegotiable note, "value received" is an admission that the instrument was issued for a sufficient consideration, binding, as such, upon each of the makers; the promise being joint and several.—*Owens v. Blackburn*, 146 N. Y. S. 966, 969.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.**(D) Bona Fide Purchasers.**

§ 335 (N.Y.Sup.) The holder of a note, who accepted it with knowledge that if defendant should be indebted to the payee in a less amount than that named in the note, he was to be liable only for the reduced amount, could recover only the actual debt.—*Sellitto v. Lamberti Const. Co.*, 146 N. Y. S. 178.

§ 340 (N.Y.Sup.) The bank receiving a check of a corporation indorsed by an officer or agent thereof in blank or to his own order is thereby put upon inquiry.—*Standard Steam Specialty Co. v. Corn Exchange Bank*, 146 N. Y. S. 181.

§ 362 (N.Y.Sup.) A bona fide purchaser of an accommodation note can, even after maturity, transfer good title to another person, though the assignee has notice of defenses.—*Cleary v. Dykeman*, 146 N. Y. S. 611.

VII. PAYMENT AND DISCHARGE.

§ 430 (N.Y.Sup.) The substitution of a note signed by a third person in place of a prior note constitutes a payment of the prior note, if that was the intention of the parties.—*Orth v. Anderson*, 146 N. Y. S. 689.

VIII. ACTIONS.

§ 493 (N.Y.Sup.) Under Negotiable Instruments Law, § 20, a note not payable to bearer or order is not presumed to be supported by a consideration.—*Owens v. Blackburn*, 146 N. Y. S. 966, 969.

§ 496 (N.Y.Sup.) In an action on a note, where defendant claimed that plaintiff was not the real party in interest, but was acting for the accommodation payee, he has the burden of establishing that fact.—*Cleary v. Dykeman*, 146 N. Y. S. 611.

§ 523 (N.Y.Sup.) Proof that a party furnished the money for the purchase of a note prima facie

shows him to be the real owner.—*Cleary v. Dykeman*, 146 N. Y. S. 611.

Where defendant claimed that plaintiff was not entitled to recover as he was acting for the accommodation payee, evidence held insufficient to establish that fact.—*Id.*

BONA FIDE PURCHASERS.

See Bills and Notes, §§ 335-362; Eminent Domain, § 153; Vendor and Purchaser, § 228.

BONDS.

See Appeal, § 1227; Attorney and Client, §§ 106-129; Executors and Administrators, § 318; Insurance, § 508½; Master and Servant, §§ 30, 40; Principal and Surety.

BOUNDARIES.

See Fences; Trial, § 105.

I. DESCRIPTION.

§ 14 (N.Y.Sup.) Where a division line was described as beginning at a corner on the west side of a millpond and thence up the said pond 43¼ degrees east, etc., which line ran along the westerly bank of the pond, sometimes 30 feet from the water and sometimes nearer, plaintiff's record title did not extend to the thread of the pond.—*Sherman v. Brown*, 146 N. Y. S. 867.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 36 (N.Y.Sup.) In a suit involving a disputed boundary, notes of a survey of the land made when it was owned by the parties' common grantor held inadmissible, where it did not appear under what circumstances the survey was made and defendant's deed in no way referred to it.—*Wightman v. Campbell*, 146 N. Y. S. 666.

§ 48 (N.Y.Sup.) Where a portion of plaintiff's east line ran along the bank of the upper portion of a pond some distance from the water, the extension of the south line fence by defendant's grantors to and into the water held not a recognition of plaintiff's ownership of the bank and shores of the pond opposite his land.—*Sherman v. Brown*, 146 N. Y. S. 867.

§ 49 (N.Y.Sup.) Practical location of a boundary line with a continued and undisturbed occupation thereto by the grantee for more than 20 years held conclusive on the parties and their successors in title, even though the boundary line so located was erroneous.—*Myer v. Idlewood Ass'n*, 146 N. Y. S. 469.

BOXING.

See Theaters and Shows, § 1.

BREACH OF MARRIAGE PROMISE.

See Execution, § 443.

BRIDGES.

See Contracts, §§ 54, 187, 330.

BROKERS.

See Bankruptcy, § 424; Frauds, Statute of, § 45; Insurance, § 84; Trial, § 260; Usury, §§ 28, 119.

II. EMPLOYMENT AND AUTHORITY.

§ 9 (N.Y.Sup.) An agreement by the president of a corporation with a real estate broker that so long as he remained president it would not purchase certain tracts of land through any one but the broker is not binding upon the company after the resignation of the president, although he remained a director and one of the committee in charge of the purchase of that property.—*Foss v. New York Cent. & H. R. R. Co.*, 146 N. Y. S. 980.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

§ 24 (N.Y.Sup.) Statement of a customer to brokers carrying stocks for him on margin, that he was going away, and did not want to lose any more than they had to his credit, amounts to an order to sell, so that they, not selling till the loss exceeded his margin with them, cannot recover of him the difference.—*Hirsch v. Jacoby*, 146 N. Y. S. 179.

IV. COMPENSATION AND LIEN.

§ 41 (N.Y.Sup.) Where the president of a company had agreed with a broker that while he was president it would not purchase certain land through any one else, the purchase of one tract through the broker after the resignation of the president and negotiations through him for the purchase of other tracts was not a ratification by the company of the agreement of the former president or an implied agreement to purchase only through the broker.—*Foss v. New York Cent. & H. R. R. Co.*, 146 N. Y. S. 930.

§ 49 (N.Y.Sup.) A broker employed to procure an acceptance of an assignment of a mortgage, who secured an acceptance "subject to the requirements and regulations" of the accepting company, could not recover commissions, where the deal fell through because an estoppel certificate against another mortgage could not be furnished.—*Sugarman v. Kearns*, 146 N. Y. S. 192.

§ 52 (N.Y.Sup.) Under a contract which provided for payment of a special commission "if a sale is made," a broker was entitled to a commission if a sale was actually made after he brought the parties together.—*Youngman v. North Electric Co.*, 146 N. Y. S. 69.

§ 57 (N.Y.Sup.) Where plaintiff was entitled to a commission under a contract with defendant, "if a sale was made" of patent rights after plaintiff had brought defendant and another together for negotiations, the fact that the sale made was in the form of a license, which was practically a sale, would not prevent plaintiff from recovering commissions.—*Youngman v. North Electric Co.*, 146 N. Y. S. 69.

§ 60 (N.Y.Sup.) A contract to pay a broker commissions upon the rent under the renewal of a lease, if the tenant exercised his option to renew, does not entitle the broker to commission where tenant failed to exercise his option within the time required, but later took a new lease

with different provisions.—*Allwin Realty Co. v. Barth*, 146 N. Y. S. 980.

§ 64 (N.Y.Sup.) Purchase of land, being incomplete because the purchaser's assignee of his contract was unwilling and unable to complete it, the broker, whose contract with the seller made closing a condition precedent to right to a commission, unless the seller defaulted, cannot recover a commission.—*A. H. Ivins Co. v. Martin Holding Co.*, 146 N. Y. S. 128.

§ 65 (N.Y.Sup.) A contract whereby a broker for a purchaser was to secure his commission from the vendors is not contrary to public policy, if the vendors understood that the broker was representing the purchaser.—*Foss v. New York Cent. & H. R. R. Co.*, 146 N. Y. S. 930.

§ 69 (N.Y.Sup.) A broker who secures a tenant for a term with an option to renew at the end of the term is entitled to a commission only on the rents for the original term.—*Allwin Realty Co. v. Barth*, 146 N. Y. S. 980.

V. ACTIONS FOR COMPENSATION.

§ 88 (N.Y.Sup.) In an action by a broker, who was to receive his commission from the vendors, against the purchaser for breach of its agreement not to purchase through another, evidence *held* not to show as a matter of law that the broker did not exercise good faith toward the purchaser.—*Foss v. New York Cent. & H. R. R. Co.*, 146 N. Y. S. 930.

BY-LAWS.

See Beneficial Associations, § 12.

CANCELLATION OF INSTRUMENTS.

See Certiorari, § 24; Corporations, § 30; Intoxicating Liquors, §§ 108, 108; Taxation, § 770½; Wills, § 307.

CARRIERS.

See Contracts, § 186; Indemnity, § 13.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

§ 20 (N.Y.Sup.) Under Public Service Commissions Law, § 49, subd. 7, and Railroad Law, § 78, where street railroad companies agreed to honor each other's transfers, refusal to do so *held* not to subject the company to the penalty imposed by section 49; such agreement not being such a contract as is provided for in section 78.—*Schenk v. International Ry. Co.*, 146 N. Y. S. 365.

Under Public Service Commissions Law, § 49, subd. 7, and Railroad Law, § 78, under agreement by defendant to permit B. company to use its street car tracks for a few blocks, refusal to honor B. company's transfers over another part of its line *held* not to subject defendant to the statutory penalty.—*Id.*

(B) Interstate and International Transportation.

§ 30 (N.Y.Sup.) Under Act to Regulate Commerce, § 6, providing that terminal charges shall be stated in the published schedules, a shipper's charge against a carrier for "spotting"

cars on the shipper's tracks in its own yards could not be collected as a terminal charge, where it had never been published as such.—New York Cent. & H. R. R. Co. v. General Electric Co., 146 N. Y. S. 322.

As used in the Act to Regulate Commerce, § 6, providing that the published schedules shall state separately all "terminal charges," the words quoted mean a separate rate for a service at a terminal, not always rendered in transportation from place to place, for a privilege or facility not furnished to all shippers.—Id.

§ 32 (N.Y.Sup.) As used in the Act to Regulate Commerce, § 15, providing that a shipper rendering service "connected with" the transportation may be paid therefor by the carrier, the phrase quoted is a synonym of "a part of it"; it does not mean something in addition to transportation that touches or is attached to transportation.—New York Cent. & H. R. R. Co. v. General Electric Co., 146 N. Y. S. 322.

§ 35 (N.Y.Sup.) A carrier's contract to pay a shipper 20 cents per ton for "spotting cars" on the shipper's private side track in its own yards held a contract to pay an unlawful rebate, and hence invalid under the act to regulate commerce.—New York Cent. & H. R. R. Co. v. General Electric Co., 146 N. Y. S. 322.

II. CARRIAGE OF GOODS.

(I) Connecting Carriers.

§ 181½ (N.Y.Sup.) The fact that the shipper, upon learning that the goods had not been delivered long after they were shipped, after directing the initial carrier, to have them returned at once, took the matter up with the delivering carrier on the suggestion of the initial carrier, would not relieve the initial carrier from liability for non-delivery.—Wien v. New York Cent. & H. R. R. Co., 146 N. Y. S. 1010.

Even if the shipper should have accepted the consignee's offer to take the goods at two-thirds of their value, where they had not been delivered after long delay, instead of having them returned to the shipper when they were sold for one-half their value, failure to do so would not warrant dismissal of the complaint in an action against the initial carrier for damages for nondelivery; only going to reduce the amount of recovery.—Id.

IV. CARRIAGE OF PASSENGERS.

(D) Personal Injuries.

§ 314 (N.Y.Sup.) Complaint, in action for injuries to passenger on a street car, alleging that plaintiff signaled to alight, and that the car stopped at a point where repairs were being made in the street, and plaintiff stepped into a hole in the street, and was injured, due to defendant's negligence, plaintiff exercising due care, held to state a cause of action.—Page v. United Traction Co., 146 N. Y. S. 530.

CARRYING WEAPONS.

See Weapons.

CARS.

See Replevin, §§ 8, 25.

CERTIFICATE.

See Criminal Law, § 1073; Taxation, § 770½.

CERTIORARI.

See Contempt, § 67; Execution, § 418; Intoxicating Liquors, § 76; Taxation, § 496.

I. NATURE AND GROUNDS.

§ 24 (N.Y.Sup.) A contractor engaged to do state paving, whose contract has been canceled by the Highway Commissioner as not for the best interest of the state, cannot review the cancellation of the contract by certiorari.—Standard Bitulithic Co. v. Carlisle, 146 N. Y. S. 386.

II. PROCEEDINGS AND DETERMINATION.

§ 40 (N.Y.Sup.) The four months within which a writ of certiorari may be applied for under Code Civ. Proc. § 2125, begins to run, where the object of the writ is to review proceedings closing town highways, from the time the filing and recording of all papers in the highway proceedings is completed pursuant to Highway Law, § 191.—People ex rel. Simons v. Dowling, 146 N. Y. S. 919.

§ 41 (N.Y.Sup.) A mere delay of 11 months in applying for a writ of certiorari to review proceedings closing a town highway will not require denial of the writ on the ground of laches.—People ex rel. Simons v. Dowling, 146 N. Y. S. 919.

CHAMPERTY AND MAINTENANCE.

§ 5 (N.Y.Sup.) It is not a defense to an action on a judgment that the action is prosecuted under a champertous agreement between plaintiffs and their attorneys.—Schwabe v. Herzog, 146 N. Y. S. 644.

CHANCERY.

See Equity.

CHARGE.

See Wills, §§ 821, 822.

To jury, see Criminal Law, §§ 786-834; Trial, §§ 234-260.

CHARITIES.

See Taxation, § 242.

I. CREATION, EXISTENCE, AND VALIDITY.

§ 2 (N.Y.Sur.) The validity of bequests to foreign voluntary associations for public or charitable uses depends upon the law of the domicile of the legatee, and not the law of the domicile of the testator.—In re Weekes, 146 N. Y. S. 1006.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

§ 50 (N.Y.Sur.) In a proceeding involving the validity of a bequest, evidence held to show the

capacity of a foreign unincorporated association to take a bequest for a public or charitable use.—*In re Weekes*, 146 N. Y. S. 1006.

CHEAT.

See Fraud.

CHECKS.

See Bills and Notes.

CHILDREN.

See Adoption; Negligence, §§ 122, 136.

CHOSE IN ACTION.

See Assignments.

CITIZENS.

See Aliens.

CLAIMS.

See Executors and Administrators, §§ 221-263; Insolvency, § 118.

CLUBS.

See Associations.

COLLATERAL ATTACK.

See Judgment, §§ 506, 517.

COLLATERAL UNDERTAKINGS.

See Guaranty.

COLLECTION.

See Banks and Banking, § 174.

COLLEGES AND UNIVERSITIES.

See Taxation, § 80.

COLOR OF TITLE.

See Adverse Possession.

COMMERCE.

See Carriers; Judgment, § 641.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION AND COMMISSIONERS.

See Eminent Domain, § 237.
Mandamus, § 73; Municipal Corporations, §§ 185, 603, 630, 974.

COMMISSIONS.

See Brokers, §§ 49-88; Insurance, § 84.

COMMON LAW.

See Criminal Law, § 59; Jury, § 12; Tender.

§ 3 (N.Y.Sup.) There is no common law of the United States in the sense of a national customary law, distinct from the English common law as adopted by the several states each for itself, applied as its local law.—*United States Fidelity & Guaranty Co. v. Borough Bank of Brooklyn*, 146 N. Y. S. 870.

COMPENSATION.

See Attorney and Client, §§ 130-165; Brokers, §§ 41-88; Corporations, § 308; Eminent Domain, §§ 131-153, 205; Master and Servant, § 80; Municipal Corporations, § 220; Principal and Agent, § 81.

COMPENSATORY DAMAGES.

See Damages, §§ 40, 62.

COMPETENCY.

See Evidence, § 151; Witnesses, §§ 143-202.

COMPLAINT.

See Indictment and Information.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Constitutional Law, § 276.

§ 2 (N.Y.Sup.) Judiciary Law, § 480, added by Laws 1913, c. 603, as to settlements of actions for personal injuries, *held* not to apply, where it did not appear that the attorney had or claimed any lien, that defendant had notice of any such claim, or that plaintiff was not willing and able to satisfy his attorney's claim.—*Sweeney v. Nassau Electric R. Co.*, 146 N. Y. S. 1054.

§ 5 (N.Y.Sup.) Where, a dispute having arisen, defendant prepared a statement of his account, and forwarded it with his check, stated to be in settlement, to plaintiff, the conversion into cash of the check after defendant again, on plaintiff demanding more, stated it was sent in full settlement, was an accord and satisfaction.—*Read Printing Co. v. J. J. Little & Ives Co.*, 146 N. Y. S. 194.

CONCEALED WEAPONS.

See Weapons.

CONCEALMENT.

See Principal and Surety, § 42.

CONCLUSION.

See Pleading, § 8.

CONDEMNATION.

See Eminent Domain.

CONFIDENTIAL RELATIONS.

See Witnesses, § 202.

CONFLICT OF LAWS.

See Charities, § 2; Marriage, § 8; Replevin, § 25.

CONSIDERATION.

See Bills and Notes, §§ 92, 98, 493; Contracts, § 54; Sales, § 21; Subscriptions, § 5.

CONSPIRACY.

See Criminal Law, §§ 422, 427, 507.

II. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

§ 47 (N.Y.Sup.) Evidence in a prosecution for conspiring to obstruct justice *held* to sustain a conviction against two of the defendants.—*People v. Sweeney*, 146 N. Y. S. 637.

CONSTITUTIONAL LAW.

See Appeal, § 1177; Army and Navy, § 50; Associations, § 2; Carriers, § 35; Intoxicating Liquors, § 19; Jury, § 12; Woods and Forests, § 8.

IV. POLICE POWER IN GENERAL.

§ 81 (N.Y.Sup.) Where a business is lawful and open to all and beyond the prohibitive power of the Legislature, the right of governmental control must be confined to such reasonable regulation as is designed to conserve the public health, safety, morals, peace, and order.—*People ex rel. Niger v. Van Dell*, 146 N. Y. S. 992.

VII. OBLIGATION OF CONTRACTS.

(B) Contracts of States and Municipalities.

§ 120 (N.Y.Sup.) If an order of the State Athletic Commission, prohibiting a prize fighter from taking part in a boxing contest under the auspices of an athletic club, is a lawful exercise of the Commissioner's discretion, it cannot be claimed that the order is not valid on the ground that it impairs a contract by the pugilist with the athletic club for holding the contest.—*Fitzsimmons v. New York State Athletic Commission*, 146 N. Y. S. 117.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

§ 202 (N.Y.) Code Cr. Proc. § 221b, added by Laws 1912, c. 390, providing that stenographic minutes of depositions, etc., on preliminary examination, when certified by the official stenographer and magistrate, shall comply with the requirements of the chapter as to the taking and subscribing of depositions, etc., *held* applicable to depositions taken on preliminary examination, and certified to by the official stenographer, and read in evidence at trial, pursuant to Code Cr. Proc. § 8, though section 221b did not become effective until after the offense was committed.—*People v. Qualey*, 104 N. E. 138, 210 N. Y. 202.

X. EQUAL PROTECTION OF LAWS.

§ 239 (N.Y.Sup.) Penal Law, § 936a, punishing any person who, acting as an officer of any secret fraternal order maintaining lodges, solicits or initiates persons to membership in a lodge on condition of payment of dues, assessments, etc., to any grand officer unless "elected by or from delegates chosen by members of the local lodges," is invalid as discriminatory under the fourteenth amendment to the federal Constitution.—*People ex rel. Niger v. Van Dell*, 146 N. Y. S. 992.

§ 246 (N.Y.Sup.) Measure of damages adopted against a railroad for burning trees on portions of forest preserves *held* not to deny equal protection of the laws.—*People v. New York Cent. & H. R. R. Co.*, 146 N. Y. S. 490.

§ 250 (N.Y.Sup.) A liquor dealer in Greater New York is not unlawfully discriminated against because his license may be forfeited after a conviction upon which sentence is suspended, under Liquor Tax Law, § 2, from which conviction he has no right of appeal, although a liquor dealer outside of Greater New York has a right of appeal by Code Cr. Proc. § 750, as amended by Laws 1907, c. 685, under similar circumstances.—*Dornhoefer v. Farley*, 146 N. Y. S. 891.

XI. DUE PROCESS OF LAW.

§ 255 (N.Y.Sup.) The word "liberty" as used in the state and federal Constitutions means, in a negative sense, freedom from restraint, but in a positive sense, it involves the idea of freedom secured by the imposition of restraint, and it is in this sense that the state under its police power promotes the freedom of all by the imposition upon particular persons of restraints which are deemed necessary for the general welfare.—*Fitzsimmons v. New York State Athletic Commission*, 146 N. Y. S. 117.

§ 271 (N.Y.Sup.) A liquor dealer in Greater New York is not deprived of his property without due process of law, because his license may be forfeited after a conviction, upon which sentence is suspended, under Liquor Tax Law, § 2, from which conviction he has no right of appeal, although a liquor dealer outside of Greater New York has a right of appeal by Code Cr. Proc. § 750, as amended by Laws 1907, c. 685, under similar circumstances.—*Dornhoefer v. Farley*, 146 N. Y. S. 891.

§ 274 (N.Y.Sup.) Laws 1911, c. 779, creating the State Athletic Commission, and authorizing it to regulate boxing contests, is within the police power, so that a pugilist prohibited by the Commission from taking part in a boxing contest cannot claim that he was thereby deprived of his "liberty" without due process of law, if the Commission did not abuse its discretion.—*Fitzsimmons v. New York State Athletic Commission*, 146 N. Y. S. 117.

§ 276 (N.Y.Sup.) Right of plaintiff to settle an action *held* a property right of which the Legislature cannot deprive him, though it may limit his power to settle for the protection of his attorney's claim for services.—*Sweeney v. Nassau Electric R. Co.*, 146 N. Y. S. 1054.

§ 302 (N.Y.Sup.) Measure of damages adopted against a railroad for burning trees on portions of forest preserve *held* not to deny due process of law.—*People v. New York Cent. & H. R. R. Co.*, 146 N. Y. S. 490.

CONSTRUCTION.

See Contracts, §§ 159-218; Covenants, §§ 51-84; Landlord and Tenant, §§ 37-49; Sales, §§ 87, 88; Statutes, §§ 183-217; Wills, §§ 448-708.

CONTEMPT.

See Criminal Law, § 168; Execution, §§ 418, 419; Executors and Administrators, § 241; Witnesses, § 21.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§ 2 (N.Y.Sup.) As used in the statute, "criminal contempt" has to do with vindicating the dignity of the court, while "civil contempt" has to do in part with recompensing the person injured by the conduct complained of.—*Hanbury v. Benedict*, 146 N. Y. S. 44.

§ 3 (N.Y.Sup.) Criminal contempts may occur in either criminal actions or civil actions and special proceedings.—*Hanbury v. Benedict*, 146 N. Y. S. 44.

§ 20 (N.Y.Sup.) Before one can be punished for contempt in not complying with a direction of the court, the precise thing to be done by the party proceeded against must be definitely stated.—*Coffin v. Coffin*, 146 N. Y. S. 565.

An order for a judgment *held* not a specific judgment which could be made the basis of contempt proceedings for failure to comply therewith.—*Id.*

Failure of a guardian to comply with a judgment directing her to pay a sum of money to the ward *held* not to be made the basis of contempt proceedings under Judiciary Law, § 753, subd. 1.—*Id.*

In view of Code Civ. Proc. § 1240, a guardian, failing to obey an order directing him to pay over money to his ward, *held* not to be punished for contempt under Judiciary Act, § 753, subd. 3, or under Code Civ. Proc. § 1241, subd. 1.—*Id.*

A guardian, failing to obey a judgment directing her to pay over money to the ward, cannot be punished for contempt under Code Civ. Proc. § 1241, subd. 4.—*Id.*

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

§ 40 (N.Y.Sup.) The proceeding to determine whether a person has been guilty of a criminal contempt in connection with a civil action or special proceeding, and which is instituted by a warrant of attachment or an order to show cause, is a civil or special proceeding and not a criminal one.—*Hanbury v. Benedict*, 146 N. Y. S. 44.

§ 67 (N.Y.Sup.) Under Code Civ. Proc. § 2121, and section 2148, which is a part of the same article providing that such article shall not apply to determinations in criminal matters, except criminal contempts, even if a criminal contempt committed in a civil action is a "criminal matter" within the statute, the arti-

cle applies and prevents the issuance of a writ of certiorari.—*Hanbury v. Benedict*, 146 N. Y. S. 44.

III. PUNISHMENT.

§ 82 (N.Y.Sup.) An executor imprisoned for contempt for disobeying an order to pay to himself as trustee a certain sum, who has been declared bankrupt and is suffering from diseases which will probably be fatal shortly if his confinement is continued, *held* entitled to be discharged from imprisonment as unable to endure the same, under Judiciary Law, § 775.—*In re Scheuer*, 146 N. Y. S. 706.

CONTINGENT FEES.

See Attorney and Client, §§ 63, 134.

CONTINUANCE.

See Wills, § 307.

CONTRACTS.

See Accord and Satisfaction; Account Stated; Assignments; Attorney and Client, §§ 63, 134; Bailment; Bills and Notes; Brokers; Carriers, § 35; Certiorari, § 24; Compromise and Settlement; Constitutional Law, § 120; Covenants; Damages, § 81; Deeds; Depositaries; Dower, § 38; Election of Remedies, § 7; Frauds, Statute of; Gaming, § 17; Guaranty; Highways, § 113; Husband and Wife, §§ 278, 279; Indemnity; Injunction, §§ 58-62; Insurance; Joint Adventures; Landlord and Tenant; Mechanics' Liens, §§ 73, 75; Mortgages; Pleading, §§ 8, 358; Principal and Agent, § 146; Railroads, § 216; Reformation of Instruments; Sales; Specific Performance; Stipulations; Subrogation; Subscriptions; Trial, § 165; Usury; Vendor and Purchaser; Waters and Water Courses, § 183½; Wills, § 708; Work and Labor.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

§ 9 (N.Y.Sup.) An agreement to give a "proper and sufficient mortgage" on land to secure a person for advances made by her for taxes, water charges, etc., was too indefinite to be enforced.—*Meixel v. Meixel*, 146 N. Y. S. 587.

§ 10 (N.Y.Sup.) A written agreement by which defendant "agrees to hire the employé, beginning November 26, 1912, from month to month at the monthly wage of \$60," and which provides that the employé may terminate it by giving certain notice, and is signed by defendant and the employé, was not lacking in mutuality.—*Bozzone v. Stafford*, 146 N. Y. S. 1076.

(B) Parties, Proposals, and Acceptance.

§ 15 (N.Y.Sup.) A written statement that the signer of a paper intended to pay a certain sum out of the proceeds of certain land was not a binding contract, as it was not assented to by the payee named therein.—*In re Narganes*, 146 N. Y. S. 922.

(C) Formal Requisites.

§ 42 (N.Y.Sup.) A written statement that the signer of a paper intended to pay a certain sum out of the proceeds of certain land was not

a binding contract, as it was not delivered to the payee named therein.—*In re Narganes*, 146 N. Y. S. 922.

§ 45 (N.Y.Sup.) The possession by an executor of an instrument two years after he became executor, signed by testator and acknowledging an indebtedness to the executor in a certain sum, was not evidence that testator had ever delivered the instrument to the executor, and hence it could not be made the basis of a contract between testator and the executor which would support a claim against the estate.—*In re Narganes*, 146 N. Y. S. 922.

(D) Consideration.

§ 54 (N.Y.Sup.) That a municipality allowed a railroad company, which was bound to maintain a bridge over its tracks, to elevate the new bridge and increase its length, was sufficient consideration to support an agreement on the part of the railroad company to pay all damages accruing by reason of the reconstruction.—*Rigney v. New York Cent. & H. R. R. Co.*, 146 N. Y. S. 396.

(E) Validity of Assent.

§ 94 (N.Y.Sup.) If a contract by defendants to pay plaintiff a royalty on a play produced by defendants, if plaintiff would not sue defendants for infringing plaintiff's rights in certain other plays, was valid when made, the fact that plaintiff afterwards made a statement to defendants calculated to convey the false impression that he had a copyright on the plays in which he was interested would not affect the validity of the contract.—*Hart v. Walsh*, 146 N. Y. S. 235.

§ 95 (N.Y.Sup.) If plaintiff, believing that certain plays were being infringed by defendants, threatened to restrain defendants' production of their play unless they paid him a royalty, defendants' contract to pay plaintiff a royalty if he did not sue them was not invalid for duress.—*Hart v. Walsh*, 146 N. Y. S. 235.

§ 99 (N.Y.Sup.) Evidence held not to show that defendants were induced to make a contract by plaintiff's fraudulent claim that he owned the copyright to certain plays.—*Hart v. Walsh*, 146 N. Y. S. 235.

(F) Legality of Object and of Consideration.

§ 108 (N.Y.Sup.) The "public policy" of the state is to be ascertained from the established law as found in the Constitution, statutes, or judicial records, being the principle of law that no one can lawfully do that which tends to injure the public or to be against the public good.—*Cahill v. Gilman*, 146 N. Y. S. 224.

If an act contracted for is in violation of public policy, the contract is unenforceable whether the act be criminal or not.—*Id.*

§ 131 (N.Y.Sup.) Where plaintiff, a director of an insurance company, loaned certain securities to the president, on his stating that it was to deceive the insurance commissioner, while in fact it was to cover the president's defalcation, the contract was illegal.—*Logan v. Fidelity-Phoenix Fire Ins. Co. of New York*, 146 N. Y. S. 678.

§ 137 (N.Y.Sup.) If a contract, which contains an element which is legal and one which is against public policy, is entire, the legal consideration cannot be separated from that which is illegal so as to make the legal part enforceable, irrespective of the equities between the parties to the contract.—*Cahill v. Gilman*, 146 N. Y. S. 224.

§ 138 (N.Y.Sup.) If the contract at the basis of plaintiff's cause of action is illegal, he cannot recover, though he declared upon a contract which was colorably lawful.—*Cahill v. Gilman*, 146 N. Y. S. 224.

§ 138 (N.Y.Sup.) Where plaintiff, a director of an insurance company, loaned certain securities to the president, on his stating that it was to deceive the insurance commissioner, while in fact it was to cover the president's defalcation, the contract being illegal, plaintiff could not recover for the conversion of the securities by the refusal of the insurance company to return the same.—*Logan v. Fidelity-Phoenix Fire Ins. Co. of New York*, 146 N. Y. S. 678.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 159 (N.Y.Sur.) Under a contract whereby a partner withdrew from a firm upon payment of a certain price, with option to apply thereon, at the "face or par value," a mortgage note bearing interest, and another note not purporting interest on its face, held that the term "face or par value" included the amount due on the mortgage note at the time of election, but that no interest could be computed on the other note.—*In re Stoneman*, 146 N. Y. S. 172.

(B) Parties.

§ 186 (N.Y.) Where a switching contract was intended for the benefit of the operator of certain blast furnaces on land adjoining the right of way, it was enforceable by an assignee of the landowner operating one of the furnaces as a contract made for the benefit of another.—*Baird v. Erie R. Co.*, 104 N. E. 614, 210 N. Y. 225.

§ 187 (N.Y.Sup.) A contract whereby a railroad company was allowed, in reconstructing a bridge carrying a street over its tracks, to increase the length of the bridge and elevate it, in consideration of its agreeing to pay all damages arising out of the work, held not only for the benefit of the municipality in which the bridge was located, but for property owners whose land was injured by the reconstruction.—*Rigney v. New York Cent. & H. R. R. Co.*, 146 N. Y. S. 396.

(D) Place and Time.

§ 213 (N.Y.Sup.) Where when a contract was made for constructing an addition to a mill, it was understood that the wheel pit was to be lowered below the depth specified in the contract, the time it would take competent engineers, with knowledge of the actual physical conditions and adequate equipment, to do such additional work should be added to the contract time for completing the work.—*New York State*

Nat. Bank of Albany v. Whitehall Water Power Co., 146 N. Y. S. 769.

Where the parties to a construction contract contemplated that the time required for the deepening of the wheel pit should be added to the time provided for completing the contract, the time required for deepening the wheel pit must be determined in view of the physical conditions of the ground as they actually were, and not as they were believed to be.—Id.

V. PERFORMANCE OR BREACH.

§ 285 (N.Y.Sup.) Where a construction contract provided that, should there appear any discrepancy between the specifications and plans, the architect's explanation thereof should bind the contractor, a decision of the architect that certain work was not extra work, but was required by the contract under the plans and specifications, was binding.—New York State Nat. Bank of Albany v. Whitehall Water Power Co., 146 N. Y. S. 769.

§ 300 (N.Y.Sup.) Where a supplemental construction contract provides for the doing of additional work which lies at the foundation of the work originally contracted for, the law implies that the time provided in the original contract for completing the work is thereby extended by the time necessary for doing the extra work.—New York State Nat. Bank of Albany v. Whitehall Water Power Co., 146 N. Y. S. 769.

§ 310 (N.Y.Sup.) A surety company, which insured the risks of an insolvent surety company, which had executed an indemnity contract guaranteeing defendant's performance of a city construction contract, held entitled to sue for a premium due under defendant's original contract with the insolvent company to pay an annual premium, as against an objection that the insolvency of the original surety company necessarily terminated the indemnity contract.—National Surety Co. v. Winston, 146 N. Y. S. 825.

§ 316 (N.Y.Sup.) In an action for damages for breach of a contract which, however, had been continued in force and effect by the parties and acted upon by them during its term, the plaintiff could not claim that defendant could not recover for breaches on his part.—Poppenberg v. R. M. Owen & Co., 146 N. Y. S. 478.

§ 318 (N.Y.Sup.) Where one party to a contract defaulted in fulfilling the terms of its agreement, the other party could terminate the contract and refuse further performance on his part.—Poppenberg v. R. M. Owen & Co., 146 N. Y. S. 478.

§ 322 (N.Y.Sup.) In an action involving liquidated damages for failure to construct an addition to a mill within the time contracted for, evidence held not to show that the first cofferdam was constructed upon the theory that the wheel pit was not to be changed, but to show that the wheel was to be at a greater depth.—New York State Nat. Bank of Albany v. Whitehall Water Power Co., 146 N. Y. S. 769.

VI. ACTIONS FOR BREACH.

§ 326 (N.Y.Sup.) Where a contract was continued in force and acted upon by the parties

during its term, plaintiff suing for damages after breach by defendant could recover only for defendant's breach.—Poppenberg v. R. M. Owen & Co., 146 N. Y. S. 478.

§ 330 (N.Y.Sup.) An action upon a contract under seal can be maintained only in the right of those who are by its express terms parties thereto.—Weber v. Columbia Amusement Co., 146 N. Y. S. 53.

§ 330 (N.Y.Sup.) Where a railroad company, in consideration of the municipality allowing it to elevate a bridge over their tracks upon reconstruction, agreed to pay all damages which might accrue by reason of the elevation, property owners injured have sufficient interest to maintain an action upon the contract.—Rigney v. New York Cent. & H. R. R. Co., 146 N. Y. S. 395.

CONTRADICTION.

See Witnesses, §§ 388-400.

CONTRIBUTION.

§ 4 (N.Y.Sup.) Though a note was joint and several as to the makers, their liability as between themselves was presumably joint, so that those who paid no part of the note will be required to contribute proportionally to one who paid the note.—Owens v. Blackburn, 146 N. Y. S. 966, 969.

§ 9 (N.Y.Sup.) In an action by one of the makers of a nonnegotiable note against the other makers for contribution, an allegation that plaintiff was compelled to pay the note sufficiently alleged that neither of the defendants paid it.—Owens v. Blackburn, 146 N. Y. S. 966, 969.

Since the law implies an agreement by the other signers of a joint and several note to equally contribute in case one of the signers is required to pay it, the one paying and suing for contribution need not allege an agreement to contribute by the other signers.—Id.

CONTRIBUTORY NEGLIGENCE.

See Negligence, § 68.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Assignments; Assignments for Benefit of Creditors; Deeds; Easements, §§ 23, 30; Fraudulent Conveyances; Religious Societies, § 26; Vendor and Purchaser.

COPYRIGHTS.

See Contracts, §§ 94, 95, 99.

CORPORATIONS.

See Abatement and Revival, § 59; Accord and Satisfaction, §§ 2, 3, 20; Banks and Banking; Carriers; Injunction, § 12; Insurance; Limitation of Actions, §§ 55, 100; Municipal Corporations; Perpetuities, § 7; Pledges, § 33; Railroads; Street Railroads; Taxation, §§ 115, 123, 171½, 376, 496, 876, 879, 893, 895;

Waters and Water Courses, §§ 183½, 203; Wills, § 684.

I. INCORPORATION AND ORGANIZATION.

§ 30 (N.Y.Sup.) Corporate owner of land, conveyed to it subject to a mortgage representing a secret profit of the promoters, *held* entitled, in a suit to cancel the mortgage, to recover the damages to the defrauded stockholders, to be held in trust for and paid to them.—Hyde Park Terrace Co. v. Jackson Bros. Realty Co., 146 N. Y. S. 1037.

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS, AND RECORDS.

§ 56 (N.Y.Sup.) A resolution increasing the number of directors does not become operative until the certificate showing the increase is filed in the office of the Secretary of State and the county clerk, as required by Stock Corporation Law, § 26.—Lewis v. Matthews, 146 N. Y. S. 424.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(A) Nature and Amount of Capital and Shares.

§ 67 (N.Y.Sup.) Where a domestic corporation operated a co-operative association to supply its members with supplies at cost, an agreement that, in consideration of their contributing \$25, they might withdraw at any time and receive back the amount in cash or trade *held* in violation of Stock Corporation Law, § 28.—G. H. McGill Co. v. Underwood, 146 N. Y. S. 362.

VI. OFFICERS AND AGENTS.

(A) Election or Appointment, Qualification, and Tenure.

§ 283 (N.Y.Sup.) An election of directors held before a resolution increasing their number has become operative by filing the certificate as required by statute is not void, and the title to office cannot be raised collaterally.—Lewis v. Matthews, 146 N. Y. S. 424.

§ 289 (N.Y.Sup.) An election of directors held before a resolution increasing their number has become operative by filing the certificate as required by statute is not void, and, where it is recognized as valid and they assume to act without objection from any one, they become de facto directors.—Lewis v. Matthews, 146 N. Y. S. 424.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

§ 308 (N.Y.Sup.) A vote by the directors to pay the officers for past services performed without agreement as to salary is without authority.—Lewis v. Matthews, 146 N. Y. S. 424.

The fixing of future salaries of the officers of a corporation is a matter of administration within the power of the directors, and, when their action is ratified by a majority of the stockholders, it cannot be disturbed at the instance of the dissenting stockholder in the absence of fraud.—Id.

A want of power in a de facto board of direc-

tors to pass a resolution fixing the salaries of officers is an irregularity that can be ratified by the stockholders.—Id.

§ 312 (N.Y.Sup.) An unauthorized vote by the directors to pay the officers for past services performed without agreement as to salary cannot be ratified by a mere majority of the stockholders.—Lewis v. Matthews, 146 N. Y. S. 424.

§ 320 (N.Y.Sup.) Complaint and reply in a stockholder's action to compel the return of a certain sum to a corporation by directors, who had wrongfully procured and retained such sum, considered with the answer, and *held* that defendant's motion for judgment on the pleadings should be denied.—Theobald v. United States Rubber Co., 146 N. Y. S. 597.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

§ 376 (N.Y.Sup.) A domestic corporation may not purchase its own stock except out of surplus earnings.—G. H. McGill Co. v. Underwood, 146 N. Y. S. 362.

(B) Representation of Corporation by Officers and Agents.

§ 413 (N.Y.Sup.) A by-law of a company giving its president special supervision and care over its property and concerns did not authorize him to borrow money or securities on the company's credit to cover his own defalcations.—Logan v. Fidelity-Phenix Fire Ins. Co. of New York, 146 N. Y. S. 678.

§ 425 (N.Y.Sup.) Within Negotiable Instruments Law, § 42, a corporation which authorized an employé to indorse checks for deposit *held* not estopped to deny her authority to indorse them in blank as against bank who collected them for her transferees.—Standard Steam Specialty Co. v. Corn Exchange Bank, 146 N. Y. S. 181.

§ 425 (N.Y.Sup.) The president of an insurance company had no implied authority to borrow securities from a director, ostensibly to retire certain reinsurance risks, but in fact to cover his own defalcations, and, having done so, the corporation was not estopped to deny the existence of any such authority.—Logan v. Fidelity-Phenix Fire Ins. Co. of New York, 146 N. Y. S. 678.

§ 432 (N.Y.Sup.) Receipt by the president of defendant for certain corporate stock borrowed from plaintiff *held* not conclusive of the question whether it was borrowed for the account of the insurance company or for the individual benefit of the president.—Logan v. Fidelity-Phenix Fire Ins. Co. of New York, 146 N. Y. S. 678.

§ 432 (N.Y.Sup.) In an action against a corporation for breach of a contract of employment entered into between plaintiff and defendant's treasurer, evidence that defendant accepted and paid for plaintiff's services for one week is sufficient prima facie evidence of the treasurer's authority.—Latiner v. Wonderland Amusement Co., 146 N. Y. S. 779.

(D) Contracts and Indebtedness.

§ 448 (N.Y.Sup.) Admissions of corporate liability, made prior to the completion of the incorporation, are not binding on the company.—*Nahoum v. N. E. Marcoglou & Co.*, 146 N. Y. S. 1063.

VIII. INSOLVENCY AND RECEIVERS.

§ 568 (N.Y.Sup.) Creditors of an insolvent corporation as between themselves held only entitled to interest upon their claims to the date when the receiver took possession of the assets.—*In re Carnegie Trust Co.*, 146 N. Y. S. 809.

XII. FOREIGN CORPORATIONS.

§ 640 (N.Y.Sup.) Since, under the General Corporation Law of New Jersey, § 30, as amended by Act March 28, 1904 (P. L. p. 275), an action could not be maintained in New Jersey against directors for a judgment in the name of the corporation, for dividends unlawfully declared, such an action cannot be maintained in New York against the directors of a New Jersey corporation, though New York Stock Corporation Law, § 28, makes directors liable "to such corporation," and section 70 makes directors of a foreign corporation liable in the same manner as the directors of a domestic corporation.—*De Raismes v. United States Lithograph Co.*, 146 N. Y. S. 813.

The internal management of a foreign corporation should be left entirely to the state of its origin.—*Id.*

CORROBORATION.

See Criminal Law, §§ 507, 510, 511.

COSTS.

See Banks and Banking, § 317; Executors and Administrators, § 263; Insurance, § 513; Intoxicating Liquors, § 254.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 3 (N.Y.Sup.) Costs can only be taxed when awarded in pursuance of some statute, and there is no flexibility in the rule relating to costs in law actions, for nothing is left to the court's discretion.—*Moore v. Vulcanite Portland Cement Co.*, 146 N. Y. S. 94.

§ 3 (N.Y.Sup.) While statutory costs are a matter of right, authority for a claimed item of costs must be found in the statute.—*Friedman v. Borchardt*, 146 N. Y. S. 896.

§ 9 (N.Y.Sup.) Where a referee, under a reference of all the issues, filed a report without awarding costs, an interlocutory judgment thereon terminated his power to grant discretionary costs under Code Civ. Proc. §§ 1018, 1022, and his subsequent appointment as referee to ascertain damages only did not empower him to award such costs, but his authority as to costs was limited to costs arising in the ascertainment of the damages.—*Barnes v. Midland R. Terminal Co.*, 146 N. Y. S. 1033.

§ 13 (N.Y.Sup.) The action being in equity, neither party is entitled to costs as matter of right.—*Blydenburgh v. Ely*, 146 N. Y. S. 259.

§ 57 (N.Y.Sup.) The court, in confirming the report of a referee, appointed after interlocutory judgment to ascertain damages only, may, in confirming his report on damages, review his recommendation as to costs incurred in ascertaining the damages, and only the court which imposes costs on the losing party may grant an extra allowance under Code Civ. Proc. §§ 8252, 8253.—*Barnes v. Midland R. Terminal Co.*, 146 N. Y. S. 1033.

III. PERSONS, PROPERTY, AND FUNDS LIABLE.

§ 97 (N.Y.Sup.) Persons having an interest in the action, who refused to join as plaintiffs and being made defendants, merely asked for their share of any recovery, could not be held liable for costs under Code Civ. Proc. § 3247.—*Moore v. Vulcanite Portland Cement Co.*, 146 N. Y. S. 94.

§ 99 (N.Y.Sup.) Under Code Civ. Proc. § 3247, providing that when the cause of action becomes the property of a person not a party to the action, such person shall be liable for the costs, persons made defendants, for whose benefit a portion of the judgment against the other defendant was assigned in trust to be paid when collected, could not be held liable upon reversal.—*Moore v. Vulcanite Portland Cement Co.*, 146 N. Y. S. 94.

COUNTERFEITING.

See Set-Off and Counterclaim.

COURTS.

See Appeal; Appearance; Attorney and Client, § 46; Contempt; Eminent Domain, §§ 66, 237; Executors and Administrators, § 17; Intoxicating Liquors, § 76; Judges.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 14 (N.Y.Sup.) Under Code Civ. Proc. § 1780, a nonresident administrator could not maintain an action against a foreign corporation for wrongful death occurring in another state.—*English v. New York, N. H. & H. R. Co.*, 146 N. Y. S. 963.

The courts of New York, though having jurisdiction, should not entertain jurisdiction of an action for wrongful death against a foreign corporation brought by a nonresident administratrix for a wrongful death occurring in another state.—*Id.*

§ 37 (N.Y.Sup.) An objection to the jurisdiction may be taken at any time.—*People ex rel. Cecere v. Slocum*, 146 N. Y. S. 556.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§ 87 (N.Y.Sur.) An affirmance of a judgment by the Court of Appeals without an opinion is not necessarily an approval of the opinion of the court below.—*In re Bassett's Will*, 146 N. Y. S. 842.

§ 89 (N.Y.Sup.) The rule of stare decisis held controlling only as to decisions in harmony with established law.—*Montrose v. Baggott*, 146 N. Y. S. 649.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 189 (N.Y.Sup.) A default in the Municipal Court will not be opened where the only excuse was that defendant's attorney handed plaintiff an affidavit that he was going to appear in the City Magistrate's Court, which plaintiff presented with a statement of the circumstances.—*Miller v. Samson*, 146 N. Y. S. 182.

§ 189 (N.Y.Sup.) Where defendant in Municipal Court, after two defaults had been opened, again defaulted, and no reason for his failure to appear was shown, court held to have properly refused to open the default.—*Bodow v. Levin*, 146 N. Y. S. 144.

§ 189 (N.Y.Sup.) Under Municipal Court Act, § 145, there being a verified complaint in an action for more than \$50, a written answer or demurrer is necessary to raise an issue, so that there being such complaint and no answer or demurrer, plaintiff making a prima facie case, there can be no judgment on the merits for defendant.—*Funk & Wagnalls Co. v. Miller*, 146 N. Y. S. 187.

§ 189 (N.Y.Co.Ct.) While the judgment of a City Court must under Code Civ. Proc. § 3017, be deemed a judgment of the County Court after being docketed therein, the latter court cannot set it aside.—In re *Korpolinski*, 146 N. Y. S. 559.

Under Code Civ. Proc. § 721, providing that judgments of courts of record are not to be impaired by a mistake in the name of a party, a judgment granted in a City Court and docketed in the County Court could not be impaired on account of a mistake in the name of the defendant.—Id.

§ 190 (N.Y.Sup.) Sureties on bond on appeal from the Municipal Court held to be discharged if exceptions are taken and the sureties do not satisfy but are bound if no exceptions are taken, or if taken the sureties justify.—*Montrose v. Baggott*, 146 N. Y. S. 649.

If, on appeal from a Municipal Court, exceptions to sureties on the appeal bond are withdrawn by written or oral stipulation before the time for justification fixed either by original notice or by stipulation for adjournment thereof expires, the undertaking stands as though no exception to the sureties had been taken.—Id.

§ 190 (N.Y.Sup.) Judgment on the pleadings should be rendered for defendant in an action against a surety on an undertaking on appeal from the Municipal Court, where the complaint does not allege compliance with Code Civ. Proc. 1309, prohibiting such an action until 10 days after service upon appellant's attorney and the surety of a notice of entry of judgment affirming the judgment appealed from or dismissing the appeal, etc.—*Monarch Mining Co. v. Laughlin*, 146 N. Y. S. 1063.

V. COURTS OF PROBATE JURISDICTION.

§ 200¼ (N.Y.Sup.) The Surrogate's Court is one of strictly limited statutory jurisdiction and has no general equity powers.—In re *Ziegler*, 146 N. Y. S. 881.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

§ 489 (N.Y.Sup.) Act Cong. March 3, 1881, § 10, and Act Cong. Feb. 20, 1905, § 23, relating to trade-marks and jurisdiction of suits thereon, held not to impair the jurisdiction of state courts over suits for the protection of trade-marks, whether registered or not.—*Julius Kayser & Co. v. Italian Silk Underwear Co.*, 146 N. Y. S. 22.

COVENANTS.

See Injunction, §§ 62, 113, 126.

II. CONSTRUCTION AND OPERATION.

(C) Covenants as to Use of Real Property.

§ 51 (N.Y.Sup.) A restrictive covenant in a deed that the "north wall of said dwelling shall stand five feet from the north line of plot" construed as fixing the exact position of the north wall, and not that the wall could be built no closer to the north line.—*Thompson v. Diller*, 146 N. Y. S. 438.

Where an original owner of a tract of land platted it and made all deeds to lots therein subject to restrictive building and beauty covenants, and the subsequent lot owners executed the covenants in accordance with the common plan, such covenants are to be enforced in the very words used if free from ambiguity.—Id.

Covenants in a deed held not to restrict entrance to a dwelling house at the side.—Id.

(D) Covenants Running with the Land.

§ 79 (N.Y.Sup.) If it appears that building restrictions in a deed were entered into for the common advantage of all the lot owners in a common tract, the right of enforcement passes to successive lot owners.—*Thompson v. Diller*, 146 N. Y. S. 438.

A purchaser under a deed containing restrictive building covenants held bound by a covenant in a deed to his grantor, though it differed from the covenant in his deed.—Id.

§ 84 (N.Y.Sup.) Restrictive building covenants in deeds are valid and will be enforced in equity against subsequent purchasers who buy with notice.—*Thompson v. Diller*, 146 N. Y. S. 438.

IV. ACTIONS FOR BREACH.

§ 108 (N.Y.Sup.) The fact that a lot owner might build his house across the whole width of his lot and destroy the building scheme contained in covenants in his deed held no defense to the enforcement of such covenants.—*Thompson v. Diller*, 146 N. Y. S. 438.

The enforcement of a restrictive building covenant in a deed held not defeated by the fact that in some instances different covenants were

made as to some of the lots in the common tracts.—Id.

The fact that restrictive covenants in a deed were to cease at a stated time *held* no defense to the enforcement of such covenants 11 years before the termination of the period.—Id.

§ 121 (N.Y.Sup.) A judgment of foreclosure, to which defendant was not a party, *held* not available to show breach of defendant's covenant that the property was free from all incumbrances, in the absence of evidence that she had notice of the action and an opportunity to defend.—*Fernbach v. Stein*, 146 N. Y. S. 1078.

Where defendant was not a party to a suit to foreclose a mortgage on property which she sold to plaintiff with a covenant against incumbrances, evidence that her brother was a witness in such action was insufficient to show that she had notice and an opportunity to defend.—Id.

CREDIBILITY.

See Witnesses, §§ 330-400.

CREDITORS.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances; Insolvency; States, § 110.

CRIMINAL LAW.

See Conspiracy; Contempt, §§ 2, 3, 40, 67; Gaming, § 68; Homicide; Indictment and Information; Intoxicating Liquors, § 242; Libel and Slander, § 147; Prize Fighting; Threats; Weapons.

III. PARTIES TO OFFENSES.

§ 59 (N.Y.Sup.) To be an "accomplice" one must be so connected with the crime that at common law he could himself be convicted as a principal or accessory before the fact.—*People v. Sweeney*, 146 N. Y. S. 637.

To make one a principal or accessory before the fact, so that he can be an accomplice, he must have had an intention that his act should aid in the commission of the crime.—Id.

VI. LIMITATION OF PROSECUTIONS.

§ 147 (N.Y.Sup.) In view of Code Cr. Proc. § 4, requiring a crime to be prosecuted by indictment, one cannot under Pen. Code, § 610, be convicted of an attempt to commit the crime charged in the indictment, where the indictment was found after an indictment for the attempt was barred by limitations.—*People v. Di Pasquale*, 146 N. Y. S. 523.

VII. FORMER JEOPARDY.

§ 168 (N.Y.Sup.) While contempt of court is in the nature of a crime, the procedure resulting in a criminal contempt is not a criminal prosecution which will prevent subsequent criminal prosecution, notwithstanding Const. art. 1, § 6, prohibiting double jeopardy for the same offense.—*Hanbury v. Benedict*, 146 N. Y. S. 44.

§ 173 (N.Y.Co.Ct.) That defendant has pleaded not guilty to an indictment is not cause for dismissal under Const. art. 1, § 6, relative to former jeopardy, of a second indictment found against him for the same offense.—*People v. Stanton*, 146 N. Y. S. 862.

X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

§ 325 (N.Y.Sur.) Where there are conflicting presumptions, one of which will impute a felony, and the other a crime of lesser degree, the presumption for the lesser offense will be followed.—*In re Eichler*, 146 N. Y. S. 846.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 339 (N.Y.) On a trial for homicide, evidence *held* to show that defendants used or were called by the various aliases and nicknames mentioned in the indictment and used by the court and district attorney in referring to defendants.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

(C) Other Offenses, and Character of Accused.

§ 378 (N.Y.) That defendant, in a prosecution for larceny, had been questioned on direct examination as to the prosperity and business ability of some members of his family did not authorize the district attorney to show that he was related to another person accused of murder.—*People v. Pindar*, 104 N. E. 133, 210 N. Y. 191.

(D) Materiality and Competency in General.

§ 390 (N.Y.) In a prosecution for larceny in obtaining money by a fraudulent check, the defense being innocent intent, defendant was entitled to show any restitution actually made, but he could not show that he contemplated making restitution.—*People v. Pindar*, 104 N. E. 133, 210 N. Y. 191.

(G) Acts and Declarations of Conspirators and Codefendants.

§ 422 (N.Y.) Where there was some testimony that a police lieutenant conspired with defendants and others to kill deceased, conversations between him and any of the conspirators *held* admissible.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

Admission of conversations between defendants' co-conspirators and a third person *held* not error in any event, where they were repeated to defendants, who acted thereon assuming that they were truthfully reported.—Id.

§ 427 (N.Y.) On a trial for homicide, evidence as to a conspiracy between the four defendants and three witnesses for the state *held* sufficient to justify testimony as to conversations between two or more of such witnesses in the absence of defendants.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

(J) Testimony of Accomplices and Codefendants.

§ 507 (N.Y.Sup.) A mere messenger of conspirators to prevent F. from testifying to certain matters *held* not an accomplice, requiring corroboration of his testimony.—*People v. Sweeney*, 146 N. Y. S. 637.

§ 510 (N.Y.Sup.) The evidence of accomplices alone is sufficient to establish that a crime has

been committed.—*People v. Sweeney*, 146 N. Y. 1, 637.

The rule as to the corroboration of an accomplice's evidence does not apply to every part of his evidence.—*Id.*

§ 511 (N.Y.) Where accused's connection with crime is established entirely by the testimony of confessed accomplices, evidence that accused had a motive to commit the crime will not of itself supply necessary corroboration.—*People v. Becker*, 104 N. E. 396, 210 N. Y. 274.

§ 511 (N.Y.Sup.) The evidence corroborating an accomplice's testimony need not, of itself, prove defendants' participation in the crime, nor need it be inconsistent with their innocence, if it tends to connect them with the crime without the aid of the accomplice's testimony.—*People v. Sweeney*, 146 N. Y. S. 637.

(M) Weight and Sufficiency.

§ 566 (N.Y.Sup.) The probative force of a witness' identification of accused must be determined by the witness' reliability based on his familiarity with the person in controversy and his freedom from prejudice.—*People v. Cassidy*, 146 N. Y. S. 15.

In a prosecution for robbery in the first degree and grand larceny in the second degree, evidence held insufficient to identify accused as the person who committed the offense.—*Id.*

XII. TRIAL.

(A) Preliminary Proceedings.

§ 627½ (N.Y.Sup.) A motion for leave to inspect the minutes of the grand jury is addressed to the sound discretion of the court.—*People v. Sweeney*, 146 N. Y. S. 637.

B) Course and Conduct of Trial in General.

§ 649 (N.Y.) Refusal of the trial judge to grant an adjournment during the cross-examination of a witness, after accused's counsel, who had been in court with long sessions for a week, had been constantly engaged for a period of ten hours and a half with but slight intermission, held an abuse of discretion.—*People v. Becker*, 104 N. E. 396, 210 N. Y. 274.

§ 655 (N.Y.) Accused is not only entitled to have questions of law decided properly, but to have questions of discretion reasonably disposed of, and that the court, however unintentionally, shall not discriminate against him and in favor of the people.—*People v. Becker*, 104 N. E. 396, 210 N. Y. 274.

Conduct of the court at the beginning of a trial for murder in refusing to hear accused's counsel on a motion for postponement and threatening to have him removed out of court, all in the presence of the panel from which the jury was subsequently selected, held improper.—*Id.*

The rule that inadvertent slips of counsel will be excused on appeal does not apply to the presiding judge, whose failure or refusal to correct and check important and repeated errors of the district attorney in his opening statement will not be excused.—*Id.*

In a prosecution for a capital crime, the

court, in criticising accused's counsel, denying every application made by him for an adjournment, and ruling against him on matters connected with the conduct of the trial, held guilty of prejudicial misconduct which deprived accused of a fair trial.—*Id.*

§ 655 (N.Y.) Use of aliases and nicknames by the court in referring to defendants, where not excessive, held not error.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

§ 656 (N.Y.) It was error for the court of its own motion to criticise accused's counsel for peculiarities in the form of his questions which were innocuous, to intervene to protect the people's witnesses on cross-examination, to exclude questions, and to refuse to permit the district attorney to concede a fact about which there was apparently no dispute.—*People v. Becker*, 104 N. E. 396, 210 N. Y. 274.

Discrimination by the trial judge in his treatment of witnesses, showing prejudice in favor of the people, held to constitute prejudicial misconduct on his part.—*Id.*

(C) Reception of Evidence.

§ 662 (N.Y.) Code Cr. Proc. § 8, permitting the reading of a deposition of a decedent whose testimony has been taken in the presence of accused on preliminary examination with opportunity for cross-examination, is constitutional.—*People v. Qualey*, 104 N. E. 138, 210 N. Y. 202.

(E) Arguments and Conduct of Counsel.

§ 707 (N.Y.) It is not contumacious conduct for accused's counsel, after having been erroneously refused permission to ask questions of a witness, to refuse to put them long after the witness had been dismissed, on this being tendered for that purpose.—*People v. Becker*, 104 N. E. 396, 210 N. Y. 274.

§ 713 (N.Y.) Use of aliases and nicknames by district attorney in referring to defendants, where not excessive or in bad faith, held not prejudicial error.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

§ 720 (N.Y.) On a trial for homicide, it was the duty of counsel for the prosecution as well as for the defendants to discuss the evidence from their respective standpoints.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

§ 722½ (N.Y.) In a prosecution of a police lieutenant for procuring the killing of a gambler, statements of the district attorney in opening the case with reference to accused's general corrupt conduct as a grafting police officer, having no relation to the crime in question, held improper.—*People v. Becker*, 104 N. E. 396, 210 N. Y. 274.

§ 728 (N.Y.) Where, after objection, counsel for prosecution refrained from any prejudicial use of the term "gunmen" in referring to defendants, and no ruling or instruction was requested, held, that no error appeared.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

§ 730 (N.Y.) References of the district attorney in opening a murder case to the conduct of accused, as a grafting lieutenant of police, held

not cured by the court's rulings on the objection.—*People v. Becker*, 104 N. E. 393, 210 N. Y. 274.

(F) Province of Court and Jury in General.

§ 742 (N.Y.) Credibility of witnesses, though of the criminal and depraved class, and weight to be given their testimony, *held* for the jury.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

(G) Necessity, Requisites, and Sufficiency of Instructions.

§ 786 (N.Y.) It is improper to charge that accused, being an interested witness, is not entitled to as much credence as an uninterested witness.—*People v. Gerdvane*, 104 N. E. 129, 210 N. Y. 184.

§ 811 (N.Y.) A charge, in a prosecution for homicide, outlining in detail the claims of the prosecution and the evidence and arguing in favor of the credibility of the people's witnesses, but containing no statement of the arguments or evidence of accused to rebut the same, was erroneous.—*People v. Becker*, 104 N. E. 396, 210 N. Y. 274.

(H) Requests for Instructions.

§ 834 (N.Y.) On a trial for homicide, the modification by the court of a requested instruction as to considering the result of the separate trial of one jointly indicted with defendants *held* not error.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

Addition to instruction as to determining homicide case on the evidence and not on the addresses of counsel, that the argument of counsel based on evidence should receive attention, *held* not error.—*Id.*

On a trial for homicide, the modification of an instruction as to disregarding references in the evidence to the character or fate of a friend of the defendants *held* not error.—*Id.*

(L) Waiver and Correction of Irregularities and Errors.

§ 900 (N.Y.) Improper statements made by the district attorney in his opening statement, charging accused with general corrupt conduct and grafting as a police officer, *held* not cured by the subsequent admission of a statement by one of the conspirators to the district attorney, including accusations of extended corrupt conduct by accused in making collections from disorderly persons for protection from prosecution.—*People v. Becker*, 104 N. E. 396, 210 N. Y. 274.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1037 (N.Y.) Where no statements were made by the counsel for the prosecution in discussing the evidence that could not have been corrected if attention had been called thereto on the submission of the case to the jury, any alleged misunderstanding arising from any such statement did not require a reversal.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

§ 1048 (N.Y.) Except where the sentence is of death, the jurisdiction of the Appellate Court is confined to the consideration of errors pointed out by proper exceptions on the record.—*People v. Pindar*, 104 N. E. 133, 210 N. Y. 191.

§ 1056 (N.Y.) Where persons convicted of murder in the first degree were defended by able and experienced counsel, the failure of their counsel to except to the charge deprived the claim of error in the charge of much of its force.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

§ 1060 (N.Y.) In a prosecution for larceny, an exception at the conclusion of the district attorney's argument, without asking for a ruling thereon, *held* insufficient to raise any question in the Appellate Court.—*People v. Pindar*, 104 N. E. 133, 210 N. Y. 191.

(C) Proceedings for Transfer of Cause, and Effect Thereof.

§ 1073 (N.Y.Sup.) Upon conviction of carrying a concealed weapon, *held*, that accused was entitled to a certificate of reasonable doubt.—*People v. Vogorito*, 146 N. Y. S. 255.

§ 1073 (N.Y.Sup.) Admission of evidence that defendant presented proofs of claim *held* to entitle him to a certificate of reasonable doubt, where the indictment charged merely the presentation of a false claim for insurance, in violation of Penal Law, § 1202, and it affirmatively appeared from the record, and was conceded by the trial justice, that a valid claim arose at the time of the fire.—*People v. Markheim*, 146 N. Y. S. 628.

In a prosecution for the presentation of a false claim for insurance money, in violation of Penal Law, § 1202, the action of the court in withdrawing from the jury and deciding for himself two essential elements of the crime as charged, the existence of the claim and the presentation thereof, entitled defendant to a certificate of reasonable doubt.—*Id.*

(D) Record and Proceedings Not in Record.

§ 1088 (N.Y.) On appeal in a homicide case, *held*, that testimony of witnesses on separate trial of one jointly indicted with defendants could not be read into the record, though the record of the other trial was on file in the Court of Appeals.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

(G) Review.

§ 1134 (N.Y.) The rule that record evidence not in the return may sometimes be read by the court on review only applies in support of the decision below and never to secure a reversal.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

§ 1159 (N.Y.) While, on appeal from a conviction of a capital crime, the court must determine whether the verdict is supported by the weight of the evidence, it is not required to determine the credibility of witnesses, but only to decide whether, considering the infirmities of the people's case, there is still a preponderating weight of evidence showing accused's guilt beyond a reasonable doubt.—*People v. Becker*, 104 N. E. 396, 210 N. Y. 274.

§ 1159 (N.Y.) The verdict of the jury on conflicting evidence should be sustained, though involving consideration of testimony of criminal and depraved class.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

§ 1170½ (N.Y.) Error in limiting defendant's cross-examination of a witness for the state was cured, where the witness was recalled by defendant and gave testimony favorable to defendant.—*People v. Pindar*, 104 N. E. 133, 210 N. Y. 191.

Error in refusing to permit defendant to ask a witness for the prosecution if he had ever gone under the name of Foster was cured, where the witness in subsequent testimony admitted that he did.—Id.

§ 1170½ (N.Y.) Error in refusing to require the district attorney to produce an agreement granting an accomplice immunity in consideration of his testimony, that it might be used in his cross-examination, held not corrected by the subsequent production of the agreement after the witness had left the stand.—*People v. Becker*, 104 N. E. 396, 210 N. Y. 274.

Where accused had taken the depositions of witnesses in another state to which an accomplice had fled, which showed statements and admissions seriously impeaching the accomplice's testimony given for the people, error in refusing to open the commissions that they might be used in cross-examination of the accomplice was not cured by the subsequent reversal of the ruling.—Id.

Where the court had refused to permit accused's counsel to use a published copy of a statement made by an accomplice to the district attorney for cross-examination of the accomplice, error in refusing to require the district attorney to produce the original was not cured by its subsequent production on condition that accused would put it in evidence.—Id.

Where the court erroneously excluded questions asked of certain witnesses or terminated the examination, the error was not cured by subsequently recalling the witnesses and permitting the questions to be asked, and, on accused's counsel declining to do so, directing the district attorney to put the questions.—Id.

Where the cross-examination of the main witness for the people was improperly and unduly restricted, the error was not cured by subsequent tender of the witness to accused for further and complete cross-examination after other witnesses had testified.—Id.

§ 1170½ (N.Y.) On trial for homicide, where defendants contended that they were prejudiced by question asked expert as to length of time since revolver was fired without foundation being laid, held, that they could not have been prejudiced by the cross-examination of defendant respecting the matter or the examination of the expert.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

Exclusion of question asked witness in homicide case for the purpose of impeaching another witness held not reversible error; the same question not having been asked the other witness, and it not being clear that a sufficient foundation was laid.—Id.

(H) Determination and Disposition of Cause.

§ 1186 (N.Y.) Notwithstanding Code Cr. Proc. § 542, the Court of Appeals will not disregard instructions which improperly withdrew from the jury the question of the effect of accused's intoxication, and were erroneous as to his credibility as a witness.—*People v. Gerdvne*, 104 N. E. 129, 210 N. Y. 184.

CROSS-EXAMINATION.

See Witnesses, § 269.

CUSTOMS AND USAGES.

See Common Law, § 8.

DAMAGES.

See Constitutional Law, §§ 246, 302; Contracts, §§ 322, 326; Corporations, § 30; Costs, §§ 9, 57; Eminent Domain, §§ 131-153; Fraud, § 59; Landlord and Tenant, § 48; Malicious Prosecution, §§ 66-69; Nuisance, § 50; Sales, §§ 371, 384, 418; Woods and Forests, § 8.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

§ 40 (N.Y.Sup.) Where a business is wrongfully interrupted and a loss is sustained, evidence of the falling off in business, with loss of income, shows the injury to the usable value of the property damaged, and is proper in estimating the damages recoverable.—*Barnes v. Midland R. Terminal Co.*, 146 N. Y. S. 1033.

(B) Aggravation, Mitigation, and Reduction of Loss.

§ 62 (N.Y.Sup.) The shipper was not bound to accept the consignee's offer to take the goods at two-thirds of their value, when they had not been delivered after long delay, instead of having them returned to the shipper, though they were sold on return for only one-half of their value.—*Wien v. New York Cent. & H. R. R. Co.*, 146 N. Y. S. 1010.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 76 (N.Y.Sup.) Courts do not favor agreements by which the damages of the parties are fixed regardless of the actual losses sustained, and while such agreements under certain circumstances are binding, the courts incline to treat them rather as a provision for penalty than for liquidated damages.—*Poppenberg v. R. M. Owen & Co.*, 146 N. Y. S. 478.

§ 81 (N.Y.Sup.) Contract, giving the purchaser of a certain number of motor cars an exclusive agency therefor, construed, and held that the distributor's recovery on its counterclaim was not limited to the \$987 remaining in its hands as the balance of the agent's deposit.—*Poppenberg v. R. M. Owen & Co.*, 146 N. Y. S. 478.

§ 81 (N.Y.Sup.) Where lessees of a tenement house deposited \$2,000 as security for the per-

formance of their covenants, one of which was the payment of the rent reserved of \$1,200 per year, and afterwards defaulted in the payment of \$325 rent, the \$2,000 deposit held a penalty and not liquidated damages, and hence the landlord could only recover actual damages.—*Feinsot v. Burstein*, 146 N. Y. S. 939.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(B) Evidence.

§ 166 (N.Y.Sup.) Evidence of a conjectural and purely speculative character as to the possible future results of plaintiff's injuries may not be admitted, and the issue of his permanent injury thereon submitted.—*Hess v. Methodist Book Concern*, 146 N. Y. S. 143.

(C) Proceedings for Assessment.

§ 206 (N.Y.Sup.) The statute authorizing a physical examination of an injured party before trial does not authorize the taking of photographs or an X-ray picture of any portion of the party's anatomy, especially where she has submitted to a physical examination for defendant's benefit.—*Lasher v. S. Bolton's Sons*, 146 N. Y. S. 321.

§ 206 (N.Y.Sup.) Where plaintiff, upon defendant's refusal to submit to an examination, moved to strike out the answer, and defendant offered to submit if a proper bill of particulars was filed, the motion will, on the filing of a proper bill, be denied, with leave to renew if defendant then refuses to submit to an examination.—*Neuburger v. Gowan*, 146 N. Y. S. 526.

DEATH.

See Courts, § 14; Discovery, § 89; Landlord and Tenant, § 165.

II. ACTIONS FOR CAUSING DEATH.

(D) Pleading and Evidence.

§ 48 (N.Y.Sup.) In an action in New York by a mother, as foreign administratrix, for the wrongful death of her son occurring in Connecticut, the complaint was fatally defective for not pleading a statute of Connecticut conferring such right of action upon plaintiff.—*English v. New York, N. H. & H. R. Co.*, 146 N. Y. S. 963.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances; Insolvency.

DECEDENTS.

See Descent and Distribution; Executors and Administrators; Witnesses, §§ 143, 181.

DECEIT.

See Fraud.

DEDICATION.

I. NATURE AND REQUISITES.

§ 32 (N.Y.Sup.) A formal acceptance of a dedication is not required, even if the statute pro-

vides therefor, unless it declares such form of acceptance exclusive.—*White v. Moore*, 146 N. Y. S. 593.

§ 33 (N.Y.Sup.) An offer of dedication may be accepted by a municipality created after the offer was made.—*White v. Moore*, 146 N. Y. S. 593.

§ 38 (N.Y.Sup.) Grantees in deeds implying a covenant of easement in land dedicated to public use by platting a map and sales under it have such an interest in the land that the dedication cannot be revoked without their consent.—*White v. Moore*, 146 N. Y. S. 593.

§ 44 (N.Y.) Evidence, held not sufficient to show that the locus in quo had become a public street by irrevocable dedication and acceptance.—*Stillman v. City of Olean*, 104 N. E. 129, 210 N. Y. 168.

DEEDS.

See Covenants; Dedication, § 38; Mortgages; Navigable Waters, § 37; Reformation of Instruments, § 13; Taxation, §§ 745, 770-2; Trusts, § 61.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

§ 8 (N.Y.Sup.) A conveyance by a stranger to the title, who did not even have possession, passes nothing.—*Weeks v. Dominy*, 146 N. Y. S. 624.

DEFAULT.

See Judgment, §§ 126, 153.

DELIVERY.

See Contracts, § 42; Frauds, Statute of, § 90.

DENTISTS.

See Libel and Slander, § 12.

DEPOSITARIES.

See Subrogation.

§ 13 (N.Y.Sup.) Under Code Civ. Proc. §§ 1969, 1974, relating to actions for public funds illegally converted, etc., and the disposition of proceeds of actions by the state, held, that on liquidation of a designated depositary of court funds the State Comptroller was entitled to demand and receive the amount of the deposit from the surety, and to assign over the state's rights therein.—*United States Fidelity & Guaranty Co. v. Carnegie Trust Co.*, 146 N. Y. S. 301.

DEPOSITIONS.

See Constitutional Law, § 202; Criminal Law, §§ 662, 1170½; Witnesses, § 390.

DEPOSITS.

See Banks and Banking, §§ 119-154.

DEPOSITS IN COURT.

See Tender, § 26.

DESCENT AND DISTRIBUTION.

See Dower; Executors and Administrators; Wills.

I. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.**(A) Heirs and Next of Kin.**

§ 34 (N.Y.Sup.) Consol. Laws, c. 13, § 98, conforms distribution of personalty to the descent of realty, and cousins are not entitled as next of kin as against nephews and nieces and heir descendants.—In re Butterfield's Will, 146 N. Y. S. 671.

§ 34 (N.Y.Sur.) Under Decedent Estate Law, § 98, subd. 12, providing that no representation shall be admitted among collaterals after brothers' and sisters' descendants, the descendants do not include children of deceased first cousins, as the brothers and sisters referred to are those of the intestate.—In re Oatley's Estate, 146 N. Y. S. 796.

§ 40 (N.Y.Sur.) Under Decedent Estate Law, § 98, subd. 5, providing that if there be no widow and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin in equal degree to the deceased, and subdivision 10, providing that, where the descendants or next of kin of the deceased entitled to share in his estate are all in equal degree to the deceased, their share shall be equal where the next of kin of a decedent were first cousins and second cousins, the first cousins were entitled to equal amounts to the exclusion of the second cousins.—In re Oatley's Estate, 146 N. Y. S. 796.

DESCRIPTION.

See Boundaries, § 14; Taxation, § 421.

DEVISES.

See Wills.

DISBARMENT.

See Attorney and Client, §§ 38-54.

DISCHARGE.

See Accord and Satisfaction; Appeal, § 1227; Master and Servant, §§ 30, 40; Principal and Surety, §§ 104, 112.

DISCOVERY.**II. UNDER STATUTORY PROVISIONS.****A) Interrogatories and Examination of Parties and of Other Persons.**

§ 38 (N.Y.Sup.) An order for examination before trial is for the eliciting of testimony, and is not authorized for the purpose of finding out the name of a third person who will be a witness.—Elson v. Ungerer, 146 N. Y. S. 533.

§ 40 (N.Y.Sup.) Extent of examination before trial determined.—Stem v. Warren, 146 N. Y. S. 591.

(B) Production and Inspection of Writings and of Other Matters.

§ 89 (N.Y.Sup.) Code Civ. Proc. §§ 803-809, and General Rules of Practice, 14-16, do not authorize an administratrix, suing for the negligent death of a railroad employé, to compel an inspection of reports of the employés of the company as to the accident.—Falco v. New York, N. H. & H. R. Co., 146 N. Y. S. 1024.

DISCRETION OF COURT.

See Appeal, §§ 959, 977; Costs, § 3; Criminal Law, §§ 627½, 649, 655; Easements, § 58; Executors and Administrators, § 17.

DISMISSAL AND NONSUIT.

See Appeal, §§ 1008, 1177; Carriers, § 181½; Criminal Law, § 173; Indictment and Information, § 144; Trial, § 165.

DISQUALIFICATION.

See Judges, §§ 45, 47.

DISSOLUTION.

See Partnership, §§ 310, 327.

DISTRIBUTION.

See Descent and Distribution; Executors and Administrators, § 318; Insolvency, § 118.

DISTRICT AND PROSECUTING ATTORNEYS.

See Criminal Law, §§ 722½, 730, 900, 1037, 1060, 1170½.

DIVORCE.

See Husband and Wife, §§ 278-289.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**(B) Parties, Process, and Incidental Proceedings.**

§ 83 (N.Y.Sup.) Code Civ. Proc. § 757, providing that when a sole party dies and the action survives, the court must allow or compel the action to be continued by or against his representatives, has no application to an action for divorce.—Faversham v. Faversham, 146 N. Y. S. 569.

(D) Evidence.

§ 129 (N.Y.Sup.) Evidence that defendant in divorce had procured a railroad ticket for a woman not his wife and caused her to be transported to another state, with intent to cohabit with her, was not sufficient corroboration of defendant's confession of the charge of living in adultery, made in the complaint, so as to authorize a divorce on that ground.—Stetson v. Stetson, 146 N. Y. S. 245.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 209 (N.Y.Sup.) In a wife's suit for legal separation, an allowance of alimony was unauthorized.—*Randolph v. Field*, 146 N. Y. S. 247.

§ 231 (N.Y.Sup.) The right to alimony is merely a personal right arising out of the domestic relations, and is not a property right.—*Faversham v. Faversham*, 146 N. Y. S. 569.

§ 247 (N.Y.Sup.) A wife's claim for alimony, under a decree of divorce awarding its payment, dies with her, and no right to enforce the payment of any sum which had accrued before her death survives her.—*Faversham v. Faversham*, 146 N. Y. S. 569.

VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

§ 320 (N.Y.Sur.) A decree of divorce following 2 Rev. St. (1st. Ed.) pt. 2, c. 8, tit. 1, § 49, prohibiting the marriage of a defendant, divorced for adultery, prior to the complainant's death, prevented the remarriage of the same parties before the enactment in 1880 of Code Civ. Proc. § 1761 (Domestic Relations Law, § 8), authorizing the remarriage of such parties.—*In re Eichler*, 146 N. Y. S. 846.

DOCUMENTS.

See Discovery, § 89; Evidence, § 336.

DOMICILE.

See Taxation, § 867.

§ 4 (N.Y.Sur.) In order to constitute a change of domicile, both intent and the fact of residence must concur.—*In re Wise's Estate*, 146 N. Y. S. 789.

§ 8 (N.Y.Sur.) A man's domicile of origin or domicile of choice once established is presumptively retained until it is shown affirmatively that it was either abandoned or changed by him.—*In re Wise's Estate*, 146 N. Y. S. 789.

§ 9 (N.Y.Sur.) Intent, as applied to the principle of domicile, is susceptible of proof, and may be established prima facie by proof of declarations of the person whose domicile is in question.—*In re Wise's Estate*, 146 N. Y. S. 789.

§ 10 (N.Y.Sur.) In a proceeding to determine the last domicile of a decedent for the purpose of the transfer tax, evidence held not to show beyond doubt either the intent of decedent to change his domicile from New York to New Jersey, or the fact of his residence in New Jersey.—*In re Wise's Estate*, 146 N. Y. S. 789.

In a proceeding to determine for the purpose of the transfer tax whether a decedent a few months prior to his death changed his domicile from New York to New Jersey, acts and conduct of deceased inconsistent with animus manendi annulled his declarations to the contrary, or rendered them declarations only of an intent to be carried out in the future.—*Id.*

DOWER.

See Wills, § 784.

I. NATURE AND REQUISITES.

§ 14 (N.Y.Sup.) Where a husband furnished part of the purchase price for a conveyance to another under an agreement with the grantee that he (the grantee) should take possession of the property, collect the rents, and after reimbursing himself for disbursements made at the husband's death, that he should convey to the husband's appointees by will, an estate of inheritance was created under 3 Rev. St. (5th Ed.) pt. 2, c. 2, § 23, and dowerable under 3 Rev. St. (5th Ed.) pt. 2, c. 1, tit. 3, § 1.—*Lugar v. Lugar*, 146 N. Y. S. 37.

§ 15 (N.Y.Sup.) Where a husband furnished part of the consideration for a conveyance to another under an agreement that the grantee should reimburse himself for payments made and convey the property to the husband's appointees by will, the agreement was a mortgage, and hence, the husband's estate being that of mortgagor, his widow was entitled to dower therein.—*Lugar v. Lugar*, 146 N. Y. S. 37.

II. INCHOATE INTEREST.

(B) Bar, Release, or Forfeiture.

§ 38 (N.Y.Sup.) A wife cannot be deprived of her right of dower, secured to her by Real Property Law, § 190, without her consent.—*Meixel v. Meixel*, 146 N. Y. S. 537.

A wife's right of dower was not affected by the husband's oral agreement, several years after the land was purchased, that a third person would be given a mortgage for the amount of advances for taxes, water charges, etc.—*Id.*

DRAMSHOPS.

See Intoxicating Liquors.

DRUNKARDS.

See Homicide, § 294.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 255-302.

DURESS.

See Contracts, § 95.

EASEMENTS.

See Dedication; Highways.

I. CREATION, EXISTENCE, AND TERMINATION.

§ 23 (N.Y.Sup.) Easements of light, air, and access appurtenant to realty abutting on a public street, being inseparable from the dominant estate, pass to the grantee upon conveyance, notwithstanding the grantor's attempted reservation; and hence the grantor cannot maintain trespass against a railroad company which impairs such easements by reason of his attempted reservation.—*Drucker v. Manhattan Ry. Co.*, 146 N. Y. S. 410.

Where a grantor of land reserved all rights of action for injuries to the easements of light, air,

and access occasioned by an elevated railroad, his grantee's conveyance with full covenants of warranty gave the second grantee the estate free from all personal obligation to perform any act in relation to the trust.—*Id.*

§ 30 (N.Y.Sup.) An abandonment of W.'s right of way over another's land is not necessarily shown by W., who was keeping cattle on his land, nailing wires on his boundary line, across the passageway, to prevent the escape of his cattle.—*Blydenburgh v. Ely*, 146 N. Y. S. 259.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 58 (N.Y.Sup.) Many trespassers having used the passage over defendant's land, right of way over which was reserved to plaintiff, and cattle being at times turned out on the land, it is in the court's discretion to permit defendant to maintain gates at its termini.—*Blydenburgh v. Ely*, 146 N. Y. S. 259.

Defendant, over whose land plaintiff has a right of passage, reserved by deed, has no right to maintain locks on gates at the termini of the passage, though furnishing plaintiff with a key.—*Id.*

§ 61 (N.Y.Sup.) Grantees of lots conveyed by deeds implying a covenant of easement in land dedicated for a park by platting a map and sales under it may unite with the municipality in a suit to enjoin interference with the public use of the land.—*White v. Moore*, 146 N. Y. S. 593.

§ 64 (N.Y.Sup.) A reservation by grantor of land of all rights for injuries to the easements of light, air, and access occasioned by the construction of an elevated railroad *held* to give the grantor the right to maintain an action against his grantee, but not the railroad company.—*Drucker v. Manhattan Ry. Co.*, 146 N. Y. S. 410.

That the second grantee of premises who took it free from reservation by the original grantor of all rights of action for the injuries to easements of light, air, and access occasioned by the construction of an elevated railroad stipulated with the railroad company to receive certain compensation in case a release was executed, *held* not to give the grantor any right of action.—*Id.*

EJECTMENT.

III. PLEADING AND EVIDENCE.

§ 63 (N.Y.) Complaint in ejectment, for a strip of land on the shore of a lake and a boathouse and dock, *held* to state a cause of action as to the upland, assuming that the action was not maintainable as to the boathouse and dock, and hence it was improperly dismissed for insufficiency.—*Chism v. Smith*, 104 N. E. 181, 210 N. Y. 198.

A complaint in ejectment is not insufficient because plaintiffs may have claimed more than they can prove they are entitled to recover.—*Id.*

§ 66 (N.Y.) Complaint in ejectment to recover strip of upland and boathouse and dock *held* not subject to the construction that it alleged

defendant's possession only of the boathouse and dock.—*Chism v. Smith*, 104 N. E. 181, 210 N. Y. 198.

ELECTION.

See Wills, §§ 784, 788.

ELECTION OF REMEDIES.

§ 7 (N.Y.) An action for damages on an un-reformed contract was not such an election of remedies as would preclude a suit in equity to have the contract reformed.—*Baird v. Erie R. Co.*, 104 N. E. 614, 210 N. Y. 225.

ELECTRICITY.

§ 16 (N.Y.Sup.) Defendant electric company *held* not guilty of negligence, so as to make it liable for injuries to plaintiff, a boy who found a nail in the street and inserted it in a $\frac{3}{8}$ -inch hole in a post through which defendant's highly charged electric cables passed, thereby making a contact with the cables and injuring the boy.—*Roche v. New York Edison Co.*, 146 N. Y. S. 294.

ELEVATORS.

See Indemnity, § 13.

EMINENT DOMAIN.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 56 (N.Y.Sup.) In a railroad's proceeding to condemn a strip adjoining its right of way, facts *held* to show a necessity for the taking.—*New York Cent. & H. R. R. Co. v. Albany Steam Trap Co.*, 146 N. Y. S. 674.

§ 66 (N.Y.Sup.) The courts will not attempt to control the reasonable exercise of a railroad company's discretion in deciding what land is necessary to enable it to render its services.—*New York Cent. & H. R. R. Co. v. Albany Steam Trap Co.*, 146 N. Y. S. 674.

II. COMPENSATION.

(C) Measure and Amount.

§ 131 (N.Y.Sup.) An award of damages for land appropriated to widen a street cannot be for less than the value of the property actually condemned.—*People ex rel. Lyon v. Nelson*, 146 N. Y. S. 1035.

§ 133 (N.Y.Sup.) In a proceeding to condemn a strip of land with part of a building and the machinery therein, adjoining plaintiff's right of way, *held*, that such machinery, being attached only by screws to the floor, was properly valued as personal property.—*New York Cent. & H. R. R. Co. v. Albany Steam Trap Co.*, 146 N. Y. S. 674.

§ 149 (N.Y.Sup.) On evidence as to the value of a strip of land 36 feet wide with part of a building thereon adjoining plaintiff's right of way, *held*, that an award of \$13,600 was adequate.—*New York Cent. & H. R. R. Co. v. Albany Steam Trap Co.*, 146 N. Y. S. 674.

(D) Persons Entitled and Payment.

§ 153 (N.Y.Sup.) A claimant purchasing the property and acquiring whatever rights he claims to a damage award some months before the report of the commissioners was confirmed, and before it was signed, but subsequent to the time when a building thereon was destroyed by fire, had no standing as a bona fide purchaser of the award.—In re Harmon and Himrod Streets in City of New York, 146 N. Y. S. 297.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 205 (N.Y.Sup.) In view of Peekskill Village Charter, § 6, relating to awards for damage from public improvements an award by the commissioners of \$1 on each of two parcels as damages for appropriating property for widening a street held insufficient under the evidence.—People ex rel. Lyon v. Nelson, 146 N. Y. S. 1035.

§ 237 (N.Y.Sup.) Where it appears that, through a mistake, those upon whom the assessments for benefit are imposed are burdened with the payment of damages for a building which did not exist when title to damage parcels vested in the city, the Supreme Court may as to such parcels vacate the order confirming the report of the commissioners.—In re Harmon and Himrod Streets in City of New York, 146 N. Y. S. 297.

The award upon confirmation of the final report of the commissioners of estimate is not a vested right which cannot be destroyed by setting aside the order of confirmation.—Id.

The Supreme Court having power to set aside an order confirming the final report of commissioners of award may set it aside as to certain damage parcels, and is not bound to set it aside in toto.—Id.

§ 243 (N.Y.Sup.) Where the question whether land burdened with easements was entitled to more than a nominal award was determined against the city in a former proceeding, its contention that a damage parcel so burdened should receive only a nominal award could not be considered in a subsequent proceeding.—In re Van Alst Avenue in City of New York, Borough of Queens, 146 N. Y. S. 827.

IV. REMEDIES OF OWNERS OF PROPERTY.

§ 295 (N.Y.Sup.) Where land bordering on a navigable stream was condemned, and the landowner did not own the land under water, it would be presumed that the value of his riparian rights was included in the award for the upland.—In re West Farms Road in City of New York, 146 N. Y. S. 600.

EMPLOYERS' LIABILITY ACTS.

See Master and Servant, §§ 179, 289; Trial, § 251.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, §§ 239-250.

EQUITY.

See Account, Action on; Action, § 6; Costs, § 13; Courts, § 200½; Covenants, § 84; Estoppel; Fraudulent Conveyances; Injunction; Quietening Title; Reformation of Instruments; Specific Performance; Subrogation; Trusts.

IL LACHES AND STALE DEMANDS.

§ 76 (N.Y.Sup.) Laches cannot be imputed to one of unsound mind.—People ex rel. Jennings v. Johnson, 146 N. Y. S. 977.

ERROR, WRIT OF.

See Appeal.

ESTATES.

See Descent and Distribution; Dower; Executors and Administrators; Life Estates; Petuities; Remainders; Wills.

ESTOPPEL.

See Appeal, § 1195; Corporations, § 425; Election of Remedies, § 7; Judgment, §§ 641-717; Mortgages, § 260; Trusts, § 166; Wills, § 434.

III. EQUITABLE ESTOPPEL.**(B) Grounds of Estoppel.**

§ 65 (N.Y.Sup.) Where a party claimed the property in controversy as the heir of a husband, she was estopped to deny the inheritable nature of the estate and hence that the husband's widow was entitled to dower therein.—Lugar v. Lugar, 146 N. Y. S. 37.

EVIDENCE.

See Appeal, §§ 231, 837, 925, 927, 1003, 1050-1058; Attorney and Client, § 53; Bills and Notes, §§ 493, 496, 523; Boundaries, § 36; Brokers, § 88; Charities, § 50; Conspiracy, § 47; Contracts, §§ 45; 99, 322; Corporations, § 432; Covenants, § 121; Criminal Law, §§ 325-566, 834, 1073, 1134, 1159; Damages, §§ 40, 166; Dedication, § 44; Discovery; Divorce, § 129; Domicile, §§ 8-10; Eminent Domain, §§ 56, 149, 295; Executors and Administrators, §§ 221, 318; Habeas Corpus, § 85; Homicide, § 253; Husband and Wife, § 19; Indictment and Information, § 144; Insane Persons, § 64; Insurance, §§ 686, 817; Intoxicating Liquors, §§ 250, 255; Judgment, § 126; Landlord and Tenant, §§ 48, 116; Limitation of Actions, § 195; Malicious Prosecution, § 56; Marriage, §§ 40, 50; Master and Servant, §§ 40, 265-281, 330; Money Received, § 18; Mortgages, §§ 26, 270, 319; Municipal Corporations, §§ 819, 845; Negligence, §§ 121-134; New Trial, §§ 99, 108; Payment, § 65; Principal and Agent, §§ 22, 23; Railroads, § 222; Reformation of Instruments, § 45; Religious Societies, § 31; Sales, §§ 87, 181, 416; Taxation, §§ 251, 885; Trial, §§ 105, 140, 148, 243, 251, 252; Vendor and Purchaser, § 129; Wills, §§ 163, 166, 302, 303, 386, 703; Witnesses.

Reception of, see Criminal Law, § 662; Trial, § 105.

I. JUDICIAL NOTICE.

§ 13 (N.Y.Sup.) Judicial notice cannot be taken that "Delaware Reds" are not a common fruit.—Wood v. Sherwood, 146 N. Y. S. 465.

§ 37 (N.Y.Sur.) Whenever a foreign law is in issue, it is to be proved as any other fact.—In re Weekes, 146 N. Y. S. 1006.

II. PRESUMPTIONS.

§ 60 (N.Y.Sup.) Since suicide is unlawful and immoral, it is presumed that insured's death was not caused by suicide.—Benard v. Protected Home Circle, 146 N. Y. S. 232.

§ 60 (N.Y.Sup.) Policeman charged with receiving fee or gratuity from party whose boiler he inspected while detailed as inspector of boilers *held* entitled to the presumption of innocence; the alleged act being a misdemeanor under Penal Law, § 885.—People ex rel. Kelly v. Waldo, 146 N. Y. S. 581.

§ 63 (N.Y.Sup.) Sanity is presumed, that being the normal human condition.—Benard v. Protected Home Circle, 146 N. Y. S. 232.

§ 77 (N.Y.Sup.) Where a witness for defendant testified to making a complete examination of plaintiff in the presence of B., and plaintiff testified he made no such examination, but told B. he would take B.'s findings, there is no presumption, from plaintiff not calling B. as a witness, that his testimony would have been adverse to her.—Neale v. Nassau Electric R. Co., 146 N. Y. S. 263.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.**(E) Competency.**

§ 151 (N.Y.Sup.) While the meaning of the word "company," as used in a subscription agreement to pay to a "company to be organized" for building a plant, is properly left to the jury, a partnership and not a corporation being formed, testimony of a subscriber as to his understanding of its meaning when he signed is not material, in the absence of claim of fraud, misrepresentation, or mistake.—Locke v. Taylor, 146 N. Y. S. 256.

VII. ADMISSIONS.**(A) Nature, Form, and Incidents in General.**

§ 215 (N.Y.Sup.) An instrument in an executor's possession, signed by testator and acknowledging an indebtedness to the executor in a certain sum, which testator therein agrees to pay from the proceeds of certain properties, may be used by the executor as an admission by testator that he had received the sum stated from the executor, though it cannot be made the basis of a contract between them for want of a showing of delivery.—In re Narganes, 146 N. Y. S. 922.

(E) Proof and Effect.

§ 264 (N.Y.Sup.) In an action to recover for work, labor, and materials furnished in the reconstruction of a dumb-waiter shaft, which plaintiff agreed to erect according to law, and made it out of two-inch blocks, a concession

that the rules of the Tenant House Department require the outside of the shaft to be four-inch blocks was an admission that plaintiff did not comply with the law.—Bonagur v. Purificato, 146 N. Y. S. 1070.

IX. HEARSAY.

§ 318 (N.Y.Sup.) A statement purporting to be signed by a United States Commissioner and made under his official seal, reciting certain evidence given before him, cannot be considered as evidence in a divorce action, even if the facts contained therein were relevant.—Stetson v. Stetson, 146 N. Y. S. 245.

X. DOCUMENTARY EVIDENCE.**(A) Public or Official Acts, Proceedings, Records, and Certificates.**

§ 336 (N.Y.Sup.) Where the testimonium of a conveyance by a municipal corporation recited the affixing of corporate seal and that the deed was subscribed by the president of the board of trustees, the deed is admissible in evidence if duly sealed, even though it was subscribed by one describing himself as clerk.—Weeks v. Dorniny, 146 N. Y. S. 624.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.**(C) Separate or Subsequent Oral Agreement.**

§ 441 (N.Y.Sup.) Where a lease is in writing and is complete on its face and does not contain a declaration of trust, oral evidence is not admissible in an action to cancel an assignment of the lease made to defendant of statements accompanying its execution to show that it was taken in trust for plaintiffs.—Maltz v. Westchester County Brewing Co., 146 N. Y. S. 52.

XII. OPINION EVIDENCE.**(A) Conclusions and Opinions of Witnesses in General.**

§ 474 (N.Y.Sup.) Rental value of leased apartment *held* provable only by testimony of one familiar therewith.—Wertheimer v. Rosenbaum, 146 N. Y. S. 177.

(B) Subjects of Expert Testimony.

§ 517 (N.Y.Sup.) While foreign law is a question of fact, where it involves the construction of a statute, it may also be a question of law, but even then it is proper to receive the testimony of experts to construe the same.—Reilly v. Steinhart, 146 N. Y. S. 534.

(F) Effect of Opinion Evidence.

§ 568 (N.Y.Sup.) Testimony of plaintiff, who was not familiar with the rental value of certain apartments, would not support a judgment for failure to deliver possession, though uncontradicted.—Wertheimer v. Rosenbaum, 146 N. Y. S. 177.

XIV. WEIGHT AND SUFFICIENCY.

§ 594 (N.Y.Sup.) In an action for a balance due for sawing lumber, plaintiffs having testified that they sawed a certain number of feet,

etc., which evidence was uncontradicted, defendant was not entitled to a verdict because plaintiffs were illiterate and unable to keep an account of the lumber sawed.—*Beinkafner v. Fenderson-Baldwin Lumber Co.*, 146 N. Y. S. 310.

EXAMINATION.

See *Discovery*, § 38; *Witnesses*, § 269.

EXCEPTIONS.

See *Appeal*, § 263; *Criminal Law*, §§ 1056, 1060.

EXCEPTIONS, BILL OF.

See *Landlord and Tenant*.

EXECUTION.

See *Wills*, §§ 119, 303.

X. SUPPLEMENTARY PROCEEDINGS.

§ 360 (N.Y.Co.Ct.) Proceedings supplementary to execution under a void judgment are themselves void.—*In re Kopolinski*, 146 N. Y. S. 859.

§ 418 (N.Y.Sup.) Under Code Civ. Proc. § 2121, providing that certiorari shall not issue to review any determination in a civil action or special proceeding, certiorari will not issue to review a conviction for criminal contempt committed in proceedings supplementary to execution in a civil action.—*Hanbury v. Benedict*, 146 N. Y. S. 44.

Under Code Civ. Proc. § 2122, providing that certiorari shall not issue where there is an adequate remedy by appeal, and section 1358, authorizing appeals from any order affecting a substantial right made in a special proceeding, an appeal and not certiorari is the proper remedy to review a conviction for contempt committed in proceeding supplemental to execution in a civil action.—*Id.*

§ 419 (N.Y.Sup.) In a proceeding to punish a judgment debtor for contempt for failure to appear for examination in proceedings supplementary to execution, a fine equal to the sum plaintiff might have obtained by garnishment of the debtor's salary during the period between the order for examination and the order punishing for contempt cannot be imposed under Judiciary Law, § 773, limiting the court to a fine, unless the contempt caused an actual loss.—*Schwartz v. Sill*, 146 N. Y. S. 1068.

XI. EXECUTION AGAINST THE PERSON.

§ 443 (N.Y.Sup.) Failure to comply with Code Civ. Proc. § 572, relating to discharge from an order of arrest, held not ground for vacating an execution against the person of defendant in an action for breach of promise.—*Linder v. Feier*, 146 N. Y. S. 1066.

EXECUTORS AND ADMINISTRATORS.

See *Appeal*, § 1178; *Contempt*, § 82; *Contracts*, § 45; *Courts*, § 14; *Descent and Dis-*

tribution; *Discovery*, § 89; *Mandamus*, § 10; *Trusts*, § 166; *Wills*; *Witnesses*, §§ 143, 181.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 17 (N.Y.Sup.) The Surrogate's Court has no discretion as to the granting of letters of administration; its duty being limited to following the order prescribed by Code Civ. Proc. § 2660.—*In re Wolf's Estate*, 146 N. Y. S. 495.

Under Code Civ. Proc. § 2680, authorizing the granting of letters of administration to any next of kin "entitled to share in the distribution of the estate," the words quoted were words of limitation, so that a cousin of an intestate who was not entitled to share in the estate was not entitled to letters.—*Id.*

§ 35 (N.Y.Sur.) Where an executrix has been guilty of misconduct authorizing revocation of her letters under Code Civ. Proc. § 2685, subd. 2, the fact that her continuance in office can do no harm will not prevent revocation of her letters.—*In re Engel*, 146 N. Y. S. 793.

That at the institution of a proceeding to revoke letters testamentary there is before the court the account of the executors that they are amply responsible will not preclude their removal, where they have been guilty of misconduct authorizing removal under Code Civ. Proc. § 2685, subd. 2.—*Id.*

III. ASSETS, APPRAISAL, AND INVENTORY.

§ 39 (N.Y.Sup.) Where a grantor of land reserved to himself all rights of action for damages to the easements of light, air, and access caused by the construction of an elevated railroad, the covenant, if of any force, reserved an interest in real property which descended to the heirs at law of the grantor and not his personal representative.—*Drucker v. Manhattan Ry. Co.*, 146 N. Y. S. 410.

§ 45 (N.Y.Sup.) A gift of property in trust for certain purposes after the donor's death, although part of it is illegal, is not property of which the donor dies possessed, and the administrator is not entitled thereto.—*Casey v. Casey*, 146 N. Y. S. 348.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) In General.

§ 86 (N.Y.Sup.) Where the proceeds of the sale of a deceased infant's realty are deposited with the county treasurer, an order of the County Court is a prerequisite to payment of any portion to the infant's administratrix; such order being required by Code Civ. Proc. § 751, and section 2359 not being inconsistent therewith.—*People ex rel. Jenny v. Brown*, 146 N. Y. S. 123.

(B) Real Property and Interests Therein.

§ 148 (N.Y.Sup.) Executors have no right to purchase land, and, if they do, it is regarded as personality, which they may sell, and where the executors, with power to sell, purchased testator's real estate at foreclosure, they could sell it so as to pass title free from any claim of the testator's devisees or representatives;

the sale being doubly protected by the power of sale.—*McCarty v. Downes*, 146 N. Y. S. 973.

Where executors, with power to sell, purchased testator's realty at foreclosure, if a sale thereof by them to the wife of one was voidable, it was a matter to have been considered upon their accounting, and did not affect the title of those claiming thereunder, particularly after the lapse of more than ten years without any question being raised.—*Id.*

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

§ 221 (N.Y.Sup.) In an action for compensation for services rendered and supplies advanced to defendants' testatrix, under an agreement that at her death plaintiff should receive her property, evidence held to warrant a finding for plaintiff.—*Mead v. Herdman*, 146 N. Y. S. 353.

(B) Presentation and Allowance.

§ 241 (N.Y.Sup.) Under Code Civ. Proc. § 2552, providing that a decree directing payment by an executor is conclusive that there are sufficient assets, and section 2555, providing for enforcing such a decree by contempt proceedings, held that a final decree ordering executors to pay to themselves as trustees a certain sum was conclusive as to assets in proceedings for contempt.—*In re Scheuer*, 146 N. Y. S. 707.

(D) Priorities and Payment.

§ 263 (N.Y.Sup.) Costs against executors, administrators, assignees for the benefit of creditors, and receivers, are payable out of the estate and have priority over the claims of general creditors.—*In re Carnegie Trust Co.*, 146 N. Y. S. 809.

VII. DISTRIBUTION OF ESTATE.

§ 318 (N. Y. Sup.) A residuary legatee, who, before the winding up of the estate, receives money on account, must refund the money if it is thereafter determined that it is needed for the payment of debts.—*Clark v. Truslow*, 146 N. Y. S. 750.

Where executors pay a residuary legatee a sum of money to apply on account, the legatee need not refund the money to pay debts if through the negligence of the executors they are unable to meet such debts.—*Id.*

Executors held not negligent in leaving money in a bank which failed, so as to defeat their right to recover money paid in advance to a residuary legatee.—*Id.*

A residuary legatee who is compelled to refund an advance made to her is liable for interest thereon, where she expressly agreed in a refunding bond for interest, though such bond was not sued on.—*Id.*

In a suit to compel a residuary legatee to refund an advance made to her, a refunding bond executed by her, but not sued on, is admissible to show the prepayment and acceptance of the advance.—*Id.*

IX. INSOLVENT ESTATES.

§ 416 (N.Y.Sup.) During administration of an insolvent estate, no interest should be allowed to creditors as between themselves.—*United States Fidelity & Guaranty Co. v. Carnegie Trust Co.*, 146 N. Y. S. 804.

EXEMPTIONS.

See Taxation, §§ 242, 251.

EXPERT TESTIMONY.

See Evidence, §§ 474-568.

EXPULSION.

See Beneficial Associations, § 12; Insurance, § 694.

EXTRADITION.

See Habeas Corpus, § 85.

FACTORIES.

See Health, § 82.

FACTORS.

See Brokers; Trial, § 165.

FEES.

See Attorney and Client, §§ 130-165; Taxation, § 598.

FELLOW SERVANTS.

See Master and Servant, §§ 150-185.

FENCES.

See Nuisance, § 8.

§ 19 (N.Y.) In determining whether a barbed wire fence has been legally constructed pursuant to Town Law, § 369, the purpose for which the fence has been built is immaterial.—*Barr v. Green*, 104 N. E. 619, 210 N. Y. 252.

§ 24 (N.Y.) In an action for injuries to a child by running into defendant's barbed wire fence, separating his land from school grounds, whether defendant was negligent in constructing the fence held for the jury.—*Barr v. Green*, 104 N. E. 619, 210 N. Y. 252.

FINAL JUDGMENT.

See Appeal, § 74.

FINDINGS.

See Appeal, § 1010.

FINES.

See Execution, § 419.

FIRES.

See Woods and Forests, § 8.

FIXTURES.

See Mechanics' Liens, § 80.

FOREIGN CORPORATIONS.

See Corporations, § 640.

FOREIGNERS.

See Aliens.

FOREIGN JUDGMENTS.

See Judgment, § 822.

FORESTS.

See Woods and Forests.

FORFEITURES.

See Insurance, § 354; Intoxicating Liquors, §§ 106, 242.

FORGERY.

See Banks and Banking, §§ 148, 174.

FORMER ADJUDICATION.

See Judgment, §§ 641-717.

FORMER JEOPARDY.

See Criminal Law, §§ 168, 173.

FRANCHISES.

See Railroads, § 18; Taxation, §§ 117, 171½, 376.

FRAUD.

See Accord and Satisfaction, § 20; Contracts, § 99; Frauds, Statute of; Fraudulent Conveyances; Husband and Wife, § 281; Limitation of Actions, §§ 55, 100; Principal and Surety, § 42; Trusts, § 65; Wills, §§ 163, 166, 386.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 12 (N.Y.Sup.) Actionable false representations must be of existing facts.—Ball v. Gerard, 146 N. Y. S. 81.

II. ACTIONS.

§ 41 (N.Y.Sup.) Complaint alleging purchase of stock of a corporation in open market in reliance upon false representations contained in a prospectus published and distributed by defendant to the investing public *held* to state a cause of action for damages for deceit.—Reusens v. Gerard, 146 N. Y. S. 86.

§ 59 (N.Y.Sup.) Plaintiff *held* only entitled to recover nominal damages resulting from defendant's fraudulent representation to plaintiff that the owner of a theater for which plaintiff had contracted with defendant to procure a tenant was solvent and able to pay plaintiff's commissions.—Ochs v. Woods, 146 N. Y. S. 4.

FRAUDS, STATUTE OF.**V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.**

§ 45 (N.Y.Sup.) An agreement to pay a broker a commission on the rents accruing on renewal of a lease after a seven-year term if the tenant should exercise his option to renew is a contract not to be performed within one year within the statute of frauds (Personal Property Law, § 31).—Allwin Realty Co. v. Barth, 146 N. Y. S. 960.

VII. SALES OF GOODS.**(B) Acceptance of Part of Goods.**

§ 90 (N.Y.City Ct.) To satisfy the statute, there must be, subsequent to the sale, a delivery by the seller, with intent to surrender his control and lien, and to vest the right of possession in the buyer, and an acceptance by the buyer with intent to take possession as owner; mere words are not sufficient.—Gold v. Gross, 146 N. Y. S. 164.

Delivery of a piece of merchandise to the buyer that he might see that the other goods were of like quality, and for which he was to be charged, *held* not to take the case out of the statute, where the contract was then executory and dependent upon whether the seller's principal would authorize a sale at the price quoted.—Id.

Delivery of a sample, forming no part of the bulk sold and to be paid for, *held* not such a delivery and acceptance of part of the goods sold as to constitute a symbolical delivery which would satisfy the statute.—Id.

IX. OPERATION AND EFFECT OF STATUTE.

§ 120 (N.Y.Sup.) A parol option by which plaintiff agreed to convey to defendant a concession, lands, and property in Cuba pertaining to a railroad and power company for \$1,500,000 United States currency *held* unenforceable for want of protocolization in a public instrument as required by Cuban Civ. Code, arts. 1216, 1218, 1280.—Reilly v. Steinhart, 146 N. Y. S. 534.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 159 (N.Y.Sup.) Where, in an action for breach of an oral contract of employment plaintiff in his testimony made two contradicting statements as to dates of the contract, one of which would bring the contract within the statute of frauds, the court should have submitted the case to the jury.—Epstein v. Hiller, 146 N. Y. S. 305.

FRAUDULENT CONVEYANCES.**III. REMEDIES OF CREDITORS AND PURCHASERS.****(A) Persons Entitled to Assert Invalidity.**

§ 208 (N.Y.Sup.) A conveyance by a husband to his wife cannot be attacked by subsequent creditors as fraudulent, unless it caused insolvency upon the part of the husband as to his

existing creditors, or was made with the intent of defrauding subsequent creditors.—*Weinstock v. Hallenbeck*, 146 N. Y. S. 1047.

GAMING.

I. GAMBLING CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

§ 17 (N.Y.Sup.) In view of the declared policy of the state, as shown by Laws 1802, c. 41. §§ 1, 5, substantially embodied and continued in Revision of 1813, vol. 1, p. 222, 1 Rev. St. 1829, pt. 1, c. 20, tit. 8, art. 5, § 55, and article 3, § 8, which provisions were not repealed by the Percy-Gray Law (Laws 1895, c. 570), and are substantially embodied in Penal Law, §§ 987, 991, 992, *held*, that a contract to act as betting commissioner to wager on horse races for another is against public policy.—*Cahill v. Gilman*, 146 N. Y. S. 224.

III. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 68 (N.Y.Sp.Sess.) A machine for vending gum which gave, in addition to one cent's worth of gum for each penny inserted therein, a chance for additional gum or candy, is a gambling device which renders the proprietor of the place in which it is kept guilty of violating Penal Law, §§ 483, 973.—*People v. Stein*, 146 N. Y. S. 852. Same *v. Nahmias*, *Id.* 856.

GIFTS.

See Executors and Administrators, § 45; Taxation, § 879; Trusts, § 85.

GOOD FAITH.

See Bills and Notes, §§ 335-362; Brokers, § 88; Vendor and Purchaser, § 228.

GOOD WILL.

See Taxation, §§ 866, 895.

§ 1 (N.Y.Sup.) Good will defined.—*In re Ball's Estate*, 146 N. Y. S. 499.

GRAND JURY.

See Criminal Law, § 627½; Indictment and Information.

GUARANTY.

See Indemnity.

II. CONSTRUCTION AND OPERATION.

§ 36 (N.Y.Sup.) Where defendant guaranteed the payment of \$220 by a third party to plaintiff for building material, *held*, that the \$220 was not a limit for a standing credit, but was the limit upon the entire sale.—*Roake v. Di Marco*, 146 N. Y. S. 823.

GUARDIAN AND WARD.

See Contempt, § 20.

HABEAS CORPUS.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 85 (N.Y.Sup.) Where, in habeas corpus by a person held under a warrant of extradition, the preponderance of evidence sustains his contention that he was not in the demanding state when the crime was committed, and is not a fugitive from justice, he will be released.—*People ex rel. Fuchs v. Police Com'r of City of New York*, 146 N. Y. S. 781.

HARMLESS ERROR.

See Appeal, §§ 1050-1178; Criminal Law, § 1170½.

HEALTH.

II. REGULATIONS AND OFFENSES.

§ 32 (N.Y.Sup.) A portion of one floor of a building, though used for manufacturing purposes, is not a factory, within the purview of Labor Law, § 82, requiring every factory consisting of three or more stories in height to be equipped with fire escapes.—*Goetz v. Duffy*, 146 N. Y. S. 152.

HEARSAY.

See Evidence, § 818.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

See Certiorari, §§ 24-41.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(C) Alteration, Vacation, or Abandonment.

§ 77 (N.Y.Sup.) Under Highway Law, § 191, all papers in a proceeding by town officers to close highways, consisting of the application, consent of the town board, release from damages, and order of the town superintendent, must be recorded as well as filed in the town clerk's office.—*People ex rel. Simons v. Dowling*, 146 N. Y. S. 919.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

§ 113 (N.Y.) Coal sold to a state highway contractor for use in the boilers of road rollers and traction engines used in a highway construction contract *held* not materials furnished for the construction of the highway within Lien Law, § 5; and hence claimants were not entitled to a lien therefor.—*Shultz v. C. H. Quereau Co.*, 104 N. E. 621, 210 N. Y. 257.

§ 113 (N.Y.Sup.) Notwithstanding Highway Law, § 182, the determination of the State Highway Commissioner that a contract for the building of a state highway is not for the best interest of the public is conclusive upon the contractor, although it does not deprive him of his

right of action for breach of contract.—*Standard Bitulithic Co. v. Carlisle*, 146 N. Y. S. 386.

IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

§ 124 (N.Y.Sup.) Where notice of the acceptance of certain highways was given to the board of supervisors under Highway Law, § 172, that notice was not given until after the tax levy for 1912 was made did not relieve the board of the duty to include in the levy a tax for maintenance for that year under section 184.—*In re Carlisle*, 146 N. Y. S. 665.

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

§ 184 (N.Y.Sup.) In an action by one run down by an automobile, the question of whether the driver was negligent held under the evidence for the jury.—*Taylor v. Glens Falls Automobile Co.*, 146 N. Y. S. 699.

HISTORICAL SOCIETY.

See Taxation, § 876.

HOMICIDE.

See Criminal Law, §§ 339, 427, 655, 720, 722½, 811, 834, 1056, 1088, 1170½.

VI. INDICTMENT AND INFORMATION.

§ 128 (N.Y.Co.Ct.) An indictment for murder in the first degree does not state facts sufficient to charge the crime of murder in the first degree as defined by Penal Law, § 1044, when it fails to allege that the injury was inflicted with intent to cause death.—*People v. Antonello*, 146 N. Y. S. 799.

VII. EVIDENCE.

(B) Weight and Sufficiency.

§ 253 (N.Y.) Evidence, on a trial for homicide, held to support a conviction for murder in the first degree.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. S. 841.

VIII. TRIAL.

(B) Questions for Jury.

§ 268 (N.Y.) Evidence in a homicide case held to make defendant's guilt a question for the jury.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. S. 841.

(C) Instructions.

§ 294 (N.Y.) In a prosecution for homicide, an instruction that accused's intoxication could only be considered if it was so great that accused could not have formed an intent to commit murder is erroneous; Penal Code, § 1220, providing that voluntary intoxication shall not make the act less criminal but the jury may consider such fact where intent is essential.—*People v. Gervine*, 104 N. E. 129, 210 N. Y. S. 184.

HUSBAND AND WIFE.

See Appeal, § 959; Divorce; Dower; Estoppel, § 65; Fraudulent Conveyances, § 206;

Insurance, § 148; Marriage; Mortgages, § 28, 86; Principal and Surety, § 112.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 19 (N.Y.Sup.) Where goods furnished a wife were necessities, in the absence of contract limiting liability and of proof that the husband had already supplied similar articles or given notice not to extend credit, the presumption is that she contracted as agent for her husband, and he is liable.—*Baccaria v. Landers*, 146 N. Y. S. 153.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

§ 278 (N. Y. Sup.) A separation agreement whereby the husband is to make certain regular payments to the wife, is valid and binding.—*Randolph v. Field*, 146 N. Y. S. 247.

§ 278 (N.Y.Sup.) A release of all claims on her husband in a separation agreement, given by a wife in consideration of the payment to her of \$2,500 by her husband's mother, held not violative of Domestic Relations Law, § 51.—*Greenfield v. Greenfield*, 146 N. Y. S. 865.

§ 279 (N.Y.Sup.) The fact that a wife receiving payments under a separation agreement brings suit for a legal separation and obtains an allowance of alimony does not relieve the husband of his liability under the agreement.—*Randolph v. Field*, 146 N. Y. S. 247.

A wife's adultery before or after a separation agreement does not defeat her claim under such agreement.—*Id.*

§ 281 (N.Y.Sup.) In a wife's action to recover payments due under a separation agreement, defendant's allegation that before such agreement was signed she had committed adultery, which fact was unknown to him, was not equivalent to an allegation of fraud perpetrated either by direct representations or concealment.—*Randolph v. Field*, 146 N. Y. S. 247.

IMPEACHMENT.

See Witnesses, §§ 330-400.

IMPLIED CONTRACTS.

See Work and Labor.

IMPROVEMENTS.

See Municipal Corporations, §§ 366-492.

INCOMPETENT PERSONS.

See Insane Persons.

INCUMBRANCES.

See Covenants, § 121.

INDEMNITY.

See Contracts, § 810; Guaranty.

§ 9 (N.Y.Sup.) Where defendant agreed to indemnify a surety, which executed a bond for the defendant's performance of a contract with the federal government, for any liability incurred in its behalf, and the government, under

claim that defendant had not performed the contract, deducted a sum of money from the amount due the surety on other transactions, the act of the government constituted a liability within the terms of the indemnity contract.—*Emmet v. Sanitary Water Still Co.*, 146 N. Y. S. 343.

§ 13 (N.Y.Sup.) Where the tenant as well as the landlord knew of the dangerous condition of the elevator shaft which was not partitioned from the light shaft and of the method of operating the elevator, *held*, that the parties were in *pari delicto*, so that the tenant could not recover from the landlord the amount the tenant was required to pay for injuries to its employé from the negligent condition of the elevator shaft.—*Larkin Co. v. Terminal Warehouse Co.*, 146 N. Y. S. 380.

INDEPENDENT CONTRACTORS.

See Master and Servant, § 318.

INDICTMENT AND INFORMATION.

See Criminal Law, § 173; Homicide, § 128; Witnesses, § 21.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 79 (N.Y.) Under Code Cr. Proc. § 684, an indictment, though slovenly and ungrammatical, *held* sufficient to state an offense under Penal Law, § 1293.—*People v. Pindar*, 104 N. E. 133, 210 N. Y. 191.

§ 81 (N.Y.) It is not error, but is many times necessary or desirable as a matter of description, to give in an indictment the several names by which the person indicted is known.—*People v. Seidenshner*, 104 N. E. 420, 210 N. Y. 341.

§ 121 (N.Y.Sp.Sess.) Upon information under Penal Law, § 421, making it a misdemeanor to publish untrue and misleading advertisements, averring that a statement that the advertised article was a scientific combination of beneficial remedies and harmless, was calculated to mislead and that it was not harmless, *held*, that defendant was not entitled to a bill of particulars.—*People v. Dr. Kelly Medical Co.*, 146 N. Y. S. 856.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 137 (N.Y.Sup.) A motion to quash the indictment, on the ground that it was found solely upon the evidence of accomplice, was properly denied, where that fact did not appear from the face of the indictment, though all of the witnesses indorsed thereon were afterwards shown to be accomplices.—*People v. Sweeney*, 146 N. Y. S. 637.

§ 144 (N.Y.Sup.) Under Code Crim. Proc. §§ 258, 389, unless the evidence before the grand jury is sufficient, if unexplained or uncontradicted, to satisfy it beyond a reasonable doubt that defendants received the stolen goods knowing that they had been stolen, the indictment may be dismissed, but absolute knowledge need not be proved, and knowledge may be inferred

from the circumstances.—*People v. Ansteth*, 146 N. Y. S. 73.

Under Code Crim. Proc. § 399, where the only evidence before the grand jury tending to show a defendant's knowledge that goods received by him were stolen was that of an accomplice, the indictment will be dismissed.—*Id.*

The evidence of an accomplice and the corroborative evidence *held* sufficient to support an indictment for criminally receiving stolen goods, so as to prevent a dismissal of the indictment for insufficiency of the evidence before the grand jury.—*Id.*

INFANTS.

See Adoption; Fences, § 24; Intoxicating Liquors, § 66; Negligence, §§ 122, 136.

INFORMATION.

See Indictment and Information.

INHERITANCE.

See Descent and Distribution.

INJUNCTION.

See Easements, § 61.

I. NATURE AND GROUNDS IN GENERAL.

(B) Grounds of Relief.

§ 12 (N.Y.Sup.) Where one suing to restrain the holding of a special meeting of corporate directors because the call therefor was not properly issued merely sues individually, and alleges that he is president of the association and the holder of some certificates of indebtedness, but does not show that any thing proposed will injure the certificate holders or the association, he cannot maintain the action.—*Gillieran v. Springfield, L. I., Cemetery Society*, 146 N. Y. S. 828.

II. SUBJECTS OF PROTECTION AND RELIEF.

(C) Contracts.

§ 58 (N.Y.Sup.) An agreement not to rent property to competitors of the adjoining owner may be enforced by injunction, though it provides that the promisor shall "be liable in damages and breach of contract" in case of its violation.—*Feinstein v. Jacobson*, 146 N. Y. S. 525.

§ 59 (N.Y.Sup.) In action for accounting under contract giving exclusive sales agency to plaintiff, which defendant broke and refused to renew as agreed, plaintiff *held* not entitled to an injunction pendente lite restraining defendant from making sales itself.—*Redican v. Interchangeable Magnetic Sign Co.*, 146 N. Y. S. 596.

§ 62 (N.Y.) Where the owners of two city blocks entered into an agreement that the building erected should be set back from the street five feet for courtyards, the purpose being to make them desirable for residence, and later, because of the encroachment of business, the lots in time became wholly unsuitable for residences,

held, that a court of equity would not restrain the violation of the covenant as its object had failed.—*Batchelor v. Hinkle*, 104 N. E. 629, 210 N. Y. 243.

In determining whether a court of equity will compel observance of a covenant restricting the use and occupation of land, each case must depend upon its own facts, and it may be enforced against one person, while as to another violating the same covenant it will not.—*Id.*

§ 62 (N. Y. Sup.) Mandatory injunction is properly granted against one who, in spite of repeated warnings, and in violation of restrictive covenants of his deed, builds his house nearer the street than the other houses in the block.—*Lyons v. Edmonds*, 146 N. Y. S. 277.

(E) Public Officers and Boards and Municipalities.

§ 75 (N. Y. Sup.) The determination whether a prize fighter, who applied to the State Athletic Commission for permission to engage in a boxing contest, was capable of safely competing in such contest because of his age, physical condition, etc., was primarily for the State Athletic Commission, and the enforcement of its order, prohibiting the contest, will not be enjoined.—*Fitzsimmons v. New York State Athletic Commission*, 146 N. Y. S. 117.

III. ACTIONS FOR INJUNCTIONS.

§ 113 (N. Y. Sup.) One who stands by and suffers another to make large outlays cannot have injunctive relief.—*Thompson v. Diller*, 146 N. Y. S. 438.

Injunctive relief against breach of a covenant in a deed *held* not barred by laches.—*Id.*

§ 126 (N. Y. Sup.) A lot owner who breaks a restrictive building covenant in a deed made for the common advantage of all lot owners in a common tract has the burden of proving laches to defeat the right of an adjoining lot owner to injunctive relief against a breach of the covenant.—*Thompson v. Diller*, 146 N. Y. S. 438.

§ 129 (N. Y. Sup.) Where facts occurring after commencement of injunction suits, obviously render the trial thereof futile so far as it may affect the merits, plaintiffs are entitled to a discontinuance without costs to either party or prejudice to any rights under the bond.—*Hathorn v. Natural Carbonic Gas Co.*, 146 N. Y. S. 271.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

§ 136 (N. Y. Sup.) In a suit to enjoin defendants from giving exhibitions of moving pictures in a theater leased from plaintiff, on the ground that such use of the theater is contrary to the terms of the lease, requiring the premises to be used as a first-class theater, and not to be used for any business which is extrahazardous on account of fire, circumstances *held* to require the issuance of an injunction pendente lite.—*Hammerstein Opera Co. v. Belasco*, 146 N. Y. S. 341.

INNOCENCE.

See Evidence, § 60.

IN PAIS.

See Estoppel.

INSANE PERSONS.

See Equity, § 76; Evidence, § 63.

V. PROPERTY AND CONVEYANCES.

§ 64 (N. Y. Sup.) Before an allowance may be granted from an incompetent's estate to one to whom incompetent owes no duty of support, it must be shown that incompetent, if sane, would assume the duty; and a real need or necessity of applicant must be shown.—*In re Kernochan*, 146 N. Y. S. 1028.

The fees of an attorney for an unsuccessful competent applicant of independent means for an allowance from an incompetent's estate will not be allowed from the estate, but those of the counsel for the incompetent's committee will be so allowed.—*Id.*

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy; Banks and Banking, § 80; Contracts, § 310; Corporations, § 568; Executors and Administrators, § 416; States, § 110; Subrogation, §§ 33, 35.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF INSOLVENT'S ESTATE.

(F) Claims Against and Distribution of Estate.

§ 118 (N. Y. Sup.) A preference right as a creditor is not waived by filing a claim as a creditor and acceptance of a dividend thereon without complaint or protest.—*United States Fidelity & Guaranty Co. v. Borough Bank of Brooklyn*, 146 N. Y. S. 870.

INSPECTION.

See Discovery, § 89.

INSTRUCTIONS.

To jury, see Criminal Law, §§ 786-834; Trial, §§ 234-260.

INSURANCE.

See Contracts, §§ 131, 138; Corporations, §§ 425, 432; Criminal Law, § 1073; Limitation of Actions, § 96.

III. INSURANCE AGENTS AND BROKERS.

(A) Agency for Insurer.

§ 84 (N. Y. Sup.) Plaintiff having secured liability insurance under contract with defendant's agents, and the agency having been changed and the policies canceled and new ones issued for the balance of the term on the application of the insured, *held* not entitled to recover commissions on the new policies.—*Degnan v. General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland*, 146 N. Y. S. 300.

V. THE CONTRACT IN GENERAL.**(A) Nature, Requisites, and Validity.**

§ 143 (N.Y.Sup.) Plaintiff, who took out a policy upon the life of her husband, *held* entitled to have it reformed so that she would receive the proceeds whether her husband lived to the maturity of the policy or not; the issuance of an insurance policy different from that ordered being a constructive fraud.—*Ulman v. Newman*, 146 N. Y. S. 696.

Where it was the intention of a husband and wife that an endowment policy applied for by the husband should be payable to the wife at all events, and the insurer through mistake made the policy payable to the husband in case he survived until its maturity, a reformation of the instrument will be granted at the suit of the wife.—*Id.*

§ 144 (N.Y.Sup.) Where an insured exercised his privilege of exchange contained in a five-year renewable term policy, and exchanged it for an ordinary life policy bearing the date of the exchange, the second policy was not a mere continuation of the first, but created a new contract from its date; since term insurance and the ordinary life policy are essentially different, being based upon different considerations.—*Gans v. Aetna Life Ins. Co. of Hartford, Conn.*, 146 N. Y. S. 453.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

§ 182 (N.Y.Sup.) The clause, "Provided that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee shall, on demand, pay the same," being a part of the mortgage clause of the New York Standard policy, *held* a condition and not a covenant, and hence the mortgagee was not liable for the premiums.—*Coykendall v. Blackmer*, 146 N. Y. S. 631.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.**(E) Nonpayment of Premiums or Assessments.**

§ 354 (N.Y.Sup.) A notice that a premium was due *held* insufficient under Insurance Law, § 92, to warrant a forfeiture, because incumbered with suggestions and surplus advice.—*McCormack v. Security Mutual Life Ins. Co.*, 146 N. Y. S. 613.

§ 365 (N.Y.Sup.) Where a policy, containing a clause providing that it should be incontestable after one year, was re-instated after forfeiture for nonpayment of premiums, *held* that the reinstatement related back to the time of the forfeiture, and the reinstated policy became incontestable within one year from that date.—*McCormack v. Security Mutual Life Ins. Co.*, 146 N. Y. S. 613.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 378 (N.Y.Sup.) Where the field superintendent and local cashier of the defendant insurance

company consented to the reinstatement of a life policy after lapse in payment of premiums, knowing that the insured was hopelessly ill, such knowledge was chargeable to the company and it cannot defeat recovery on the ground that a statement signed by the insured recited that he was in good health.—*McCormack v. Security Mutual Life Ins. Co.*, 146 N. Y. S. 613.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.**(B) Insurance of Property and Titles.**

§ 508½ [New, vol. 4 Key-No. Series] (N.Y.Sup.) Where a guaranty company issued a bond to secure an employer against defalcations by his employé, and renewed the bond for several years, the bond and each renewal constituted different liabilities, rendering the insurer liable up to the limit fixed by the bond for the employé's defalcation each year.—*Alex. Campbell Milk Co. v. United States Fidelity & Guaranty Co.*, 146 N. Y. S. 92.

(C) Guaranty and Indemnity Insurance.

§ 513 (N.Y.) Liability insurer which elected to defend suit against insured instead of settling for the amount to which its liability was limited, and, after a judgment for four times this amount, refused to appeal or to pay the stipulated indemnity, except upon satisfaction of the judgment, *held* liable for insured's expenses in prosecuting an appeal resulting in a reversal.—*Brassil v. Maryland Casualty Co.*, 104 N. E. 622, 210 N. Y. 235.

XIX. REINSURANCE.

§ 679 (N.Y.Sup.) Where an insurance company issued successive accident policies, each for one year and each based upon a new application, and a reinsurance company executed separate contracts for each of the policies each based upon the policy and application, each reinsurance contract was a new and distinct contract.—*Casualty Co. of America v. United States Casualty Co.*, 146 N. Y. S. 957.

§ 686 (N.Y.Sup.) In an action upon a reinsurance contract, evidence *held* not to sustain a finding that a clause exempting the reinsured from liability for accidental injuries occurring to the insured while on a trip to Alaska was omitted from the reinsurance contract by mistake.—*Casualty Co. of America v. United States Casualty Co.*, 146 N. Y. S. 957.

XX. MUTUAL BENEFIT INSURANCE.**(A) Corporations and Associations.**

§ 694 (N.Y.) Proceeding to expel member of benefit society *held* not reviewable by courts except to determine whether the member was tried according to the law of the land.—*Wilcox v. Supreme Council of Royal Arcanum*, 104 N. E. 624, 210 N. Y. 370.

Expulsion of member of benefit society *held* subject to attack for disqualification of trial committee in action on certificate; there being no method of direct review.—*Id.*

On trial of member of benefit insurance society for making defamatory charges against Su-

preme Council and its officers, the truth of which charges was put in issue, members of the Supreme Council *held* disqualified to sit as members of the trial committee, and his expulsion was void where they did sit.—Id.

(E) Beneficiaries and Benefits.

§ 788 (N.Y.Sup.) "Suicide," as used in a suicide clause in a benefit certificate, implies a mental appreciation of the act of self-killing which an insane person could not have.—*Benard v. Protected Home Circle*, 146 N. Y. S. 232.

A clause of a mutual benefit certificate exempting from liability for death from suicide would not be applicable if insured took poison through mistake.—Id.

(F) Actions for Benefits.

§ 817 (N.Y.Sup.) The defense of self-destruction is an affirmative defense, the burden of proving which rests on the association in an action on a mutual benefit certificate, and hence it must show that poison taken by insured was not taken by mistake.—*Benard v. Protected Home Circle*, 146 N. Y. S. 232.

§ 825 (N.Y.Sup.) Evidence in an action on a mutual benefit certificate *held* to make it a jury question whether insured took poison by mistake or for suicidal purposes.—*Benard v. Protected Home Circle*, 146 N. Y. S. 232.

INTENT.

See Criminal Law, § 59; Domicile, §§ 4, 9, 10; Landlord and Tenant, § 37; Wills, § 682.

INTEREST.

See Banks and Banking, § 817; Contracts, § 159; Corporations, § 568; Executors and Administrators, § 416; Usury; Wills, § 734.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

See Constitutional Law, §§ 250, 271.

II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

§ 19 (N.Y.Sup.) No rights of a liquor dealer under the federal Constitution were impaired, because his license may be forfeited after a conviction, upon which sentence is suspended, under Liquor Tax Law, § 2, from which conviction he has no right of appeal, although a liquor dealer outside of Greater New York has a right of appeal by Code Cr. Proc. § 750, as amended by Laws 1907, c. 685, under similar circumstances.—*Dornhoefer v. Farley*, 146 N. Y. S. 891.

IV. LICENSES AND TAXES.

§ 66 (N.Y.Sup.) Within Liquor Tax Law, § 15, subd. 8 (Laws 1910, c. 503, § 2), requiring, with an application for a liquor tax certificate, the consents of the owners of at least two-thirds of the dwellings, within 300 feet of the property on which the traffic is to be carried on, consent can be given by infant owners.—In re *Farley*, 146 N. Y. S. 291.

§ 76 (N.Y.Sup.) Liquor Tax Law, § 27, subd. 1, providing for a writ of certiorari to be issued by a county "judge," gives no authority to the county "court" to issue such a writ.—*People ex rel. Cecere v. Slocum*, 146 N. Y. S. 556.

§ 106 (N.Y.Sup.) Where there was direct communication between respondent's barroom and a hallway and staircase leading to hotel rooms which were used for immoral purposes, in violation of Liquor Tax Law, § 30, subd. "e," his liquor tax certificate was subject to cancellation, without reference to whether respondent was interested in the conduct of the hotel.—In re *Farley*, 146 N. Y. S. 473.

§ 108 (N.Y.Sup.) Where proceedings were instituted to cancel a liquor tax certificate because respondent sold liquor on Sunday, it was error to refuse to try such issue because the certificate would expire by limitations on the day succeeding the trial.—In re *Farley*, 146 N. Y. S. 473.

VIII. CRIMINAL PROSECUTIONS.

§ 242 (N.Y.Sup.) The state may prescribe as a condition of the right to sell liquor that such right shall be forfeited by a conviction for the violation of the liquor tax law, even though sentence is suspended, and thereby the right of appeal be denied.—*Dornhoefer v. Farley*, 146 N. Y. S. 891.

IX. SEARCHES, SEIZURES, AND FORFEITURES.

§ 250 (N.Y.Co.Ct.) In proceedings by the state commissioner of excise for the seizure and forfeiture of liquors under Liquor Tax Law, § 33, the burden was on plaintiff to prove that the liquors seized were kept, stored, or deposited for unlawful distribution.—*Farley v. Certain Liquors Seized*, 146 N. Y. S. 1003.

Presumptions, arising under Liquor Tax Law, § 33, subd. 4, from possession of United States retail liquor dealers' license, and from storing of liquors, and from recent sale of liquor at the premises, *held* insufficient to authorize a finding, in proceedings for seizure and forfeiture of liquors, that the liquors seized were kept for unlawful sale.—Id.

§ 254 (N.Y.Co.Ct.) A claimant, prevailing in proceedings for seizure and forfeiture of liquors under Liquor Tax Law, § 33, *held* entitled to costs.—*Farley v. Certain Liquors Seized*, 146 N. Y. S. 1003.

§ 255 (N.Y.Co.Ct.) Where, in proceedings for seizure and forfeiture of liquors under Liquor Tax Law, § 33, the evidence was insufficient to authorize a finding that the liquors seized were being kept for an unlawful sale, claimant was entitled, under Laws 1913, c. 614, amending Liquor Tax Law, § 33, to judgment for delivery to him of the liquors seized.—*Farley v. Certain Liquors Seized*, 146 N. Y. S. 1003.

JEOPARDY.

See Criminal Law, §§ 168, 178.

JOINT ADVENTURES.

§ 4 (N.Y.Sup.) Where a contract between defendants for the production of a play provided

that they were to produce the play, not as partners, but with a mere sharing of the profits and losses, there was no relation between them which would prevent one of them from assigning a portion of his interest in the profits to another.—*Selwyn & Co. v. Waller*, 146 N. Y. S. 7.

JUDGES.

See Judgment, § 9.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 11 (N.Y.Sup.) In proceedings by the Bar Association of New York City against a justice of the Municipal Court, evidence held to sustain a finding of the official referee that respondent was not guilty of any violation of his duty as a judicial officer, and that his conduct and temperament generally did not unfit him for the office.—*In re Snitken*, 146 N. Y. S. 560.

IV. DISQUALIFICATION TO ACT.

§ 45 (N.Y.Sup.) That a judge was related within the sixth degree to a legatee under the wife's will held not to disqualify him under Judiciary Law, § 15, from sitting in an action where the sole issue was whether the wife had left any of the property which she received from her husband and the validity or construction of her will was not involved.—*Davis v. Seaward*, 146 N. Y. S. 981.

§ 47 (N.Y.Sup.) In an action involving only whether at a wife's death any property remained which she took under her husband's will, providing that it should go to plaintiff, a judge of the Appellate Division was not disqualified under Judiciary Law, § 15, merely because he had acted as attorney for the widow in the probate of her husband's will and her accounting as executrix, and at the execution of her will.—*Davis v. Seaward*, 146 N. Y. S. 981.

The provision of Judiciary Law, § 15, disqualifying a judge from sitting in any cause or matter in which he has been counsel cannot be enlarged by construction.—*Id.*

That the services were performed by clerks or other members of the firm of which a judge was a member will not prevent him from being disqualified, under Judiciary Law, § 15, from sitting in a case in relation to which the firm has performed legal services.—*Id.*

JUDGMENT.

See Adoption, § 16; Appeal; Contempt, § 20; Corporations, §§ 320, 640; Costs, § 9; Courts, §§ 189, 190; Execution; Executors and Administrators, § 241; Intoxicating Liquors, § 255; Mortgages, § 559; Wills, §§ 431, 434.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 9 (N.Y.Sup.) That the judgment of the Appellate Division is void because of disqualification of a judge will not invalidate a decision of the Court of Appeals, or subsequent proceedings in the Supreme Court upon a retrial, where the

law given by the Court of Appeals is applied.—*Davis v. Seaward*, 146 N. Y. S. 981.

III. ON CONSENT, OFFER, OR ADMISSSION.

§ 90 (N.Y.Sup.) A consent judgment entered under Municipal Court Act, § 1, subd. 16, held improperly set aside on the ground that defendant's attorney did not understand the amount which was claimed.—*Federal Sign System (Electric) v. Pescia*, 146 N. Y. S. 311.

IV. BY DEFAULT.

(A) Requisites and Validity.

§ 126 (N.Y.Sup.) A judgment for plaintiff on defendant's default will be reversed, where the testimony on the inquest did not disclose a cause of action, without reference to the merits of defendant's motion to open its default.—*Silverman v. Charles Jacobs Co.*, 146 N. Y. S. 1067.

(B) Opening or Setting Aside Default.

§ 153 (N.Y.Sup.) Under Code Civ. Proc. § 1282, providing for the setting aside of judgments for irregularity within a year, and sections 420, 1212, and 1213, providing for the entry of certain default judgments without application to the court, held, that the clerk's entry of a default judgment on a complaint stating one cause of action on contract, and one in tort, was a nullity and not an irregularity, so that it would be vacated after the expiration of a year.—*Bouker Contracting Co. v. Neale*, 146 N. Y. S. 894.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

§ 307 (N.Y.Sup.) In an action by a subcontractor to foreclose a mechanic's lien, where the contractor's assignee, a bank, was made a party, and at the trial there was evidence that the bank had assigned a portion of the claim, and the judgment failed to expressly provide which of the lienors was entitled to the small balance which remained, such failure could be corrected by motion.—*Coleman & Krause v. Security Bank of New York*, 146 N. Y. S. 622.

XI. COLLATERAL ATTACK.

(B) Grounds.

§ 506 (N.Y.Sup.) One sued on a judgment cannot impeach it collaterally by alleging that it is too large.—*Schwabe v. Herzog*, 146 N. Y. S. 644.

§ 517 (N.Y.Sup.) One sued on a judgment cannot impeach it collaterally by setting up a counterclaim involving the re-examination of transactions settled by the judgment.—*Schwabe v. Herzog*, 146 N. Y. S. 644.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) Judgments Operative as Bar.

§ 565 (N.Y.Sup.) The dismissal of an application for mandamus by the Special Term without prejudice on account of the failure of the Trial Term to try all the issues of fact does not bar

a subsequent application for the same relief.—*People ex rel. Weiss v. Philip Bernstein Sick & Benefit Society*, 146 N. Y. S. 886.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 585 (N.Y.Sup.) Where a member of a benefit society had been suspended from meetings, the refusal of mandamus to compel his reinstatement does not bar an application to compel his reinstatement from a subsequent complete expulsion from the society.—*People ex rel. Weiss v. Philip Bernstein Sick & Benefit Society*, 146 N. Y. S. 886.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

§ 641 (N.Y.Sup.) Decision of Interstate Commerce Commission on complaint filed with it pursuant to Act to Regulate Commerce, § 15, that a carrier could not lawfully pay for services rendered by a shipper in "spotting" cars on the shipper's tracks in its own yard held conclusive in a subsequent action by the carrier against the shipper, wherein the shipper set up counterclaim for such services.—*New York Cent. & H. R. R. Co. v. General Electric Co.*, 146 N. Y. S. 322.

(B) Persons Concluded.

§ 707 (N.Y.Sup.) In an action against attorneys for negligence in that sureties on an appeal bond were held discharged for failure to justify, after exceptions were filed to the sureties, the judgment in the action which determined the nonliability of the sureties was not res judicata in the action for negligence.—*Montrose v. Baggott*, 146 N. Y. S. 649.

(C) Matters Concluded.

§ 717 (N.Y.Sur.) As soon as it is found in a transfer tax proceeding that the interest of remaindermen in an estate is contingent, there no longer remains any question between them and the state to which the then existing value of the residuary estate is material; and hence a finding therein as to such value is not conclusive upon the remaindermen.—*In re Chappell's Estate*, 146 N. Y. S. 798.

XVII. FOREIGN JUDGMENTS.

§ 822 (N.Y.Sup.) That defendant, sued on a foreign judgment, had disputed the debt, but had allowed the judgment thereon to go against him under an agreement that it should not be enforced until he should be able to pay it, and that he is not so able, is no defense.—*Schwabe v. Herzog*, 146 N. Y. S. 644.

That the foreign judgment sued on is too large is no defense.—*Id.*

JUDICIAL NOTICE.

See Evidence, §§ 13, 87.

JURISDICTION.

See Appeal, §§ 1094, 1177; Appearance; Courts; Eminent Domain, § 237; Executors and Administrators, § 17.

JURY.

See Trial, §§ 140-260.

II. RIGHT TO TRIAL BY JURY.

§ 12 (N.Y.Sup.) Under Const. art. 1, § 2, the right of trial by jury is preserved in common-law actions in which a question of fact is raised, and must be accorded unless the right thereto is waived.—*Peterson v. Ocean Electric Ry. Co.*, 146 N. Y. S. 604, 611.

KNOWLEDGE.

See Indictment and Information, § 144; Insurance, § 378.

LACHES.

See Certiorari, § 41; Equity, § 76; Injunction, § 113; Mandamus, § 143.

LANDLORD AND TENANT.

See Appeal, § 1195; Damages, § 81; Evidence, §§ 441, 474; Indemnity, § 13; Injunction, § 88.

II. LEASES AND AGREEMENTS IN GENERAL.

(B) Construction and Operation.

§ 37 (N.Y.Sup.) An additional liability will not be imposed on a tenant unless clearly within the provisions of the lease.—*Ayer v. Bonwit*, 146 N. Y. S. 301.

The court will so construe a lease as to carry out the intent of the parties, if possible.—*Id.*

§ 48 (N.Y.Sup.) The measure of damages for a lessor's failure to deliver possession of a furnished apartment to a lessee thereof was the difference between the rental value of the apartment and the rent reserved in the lease.—*Wertheimer v. Rosenbaum*, 146 N. Y. S. 177.

In action for failure to deliver possession of leased apartment, plaintiff's testimony as to the comparative advantages to him of it and another apartment which he was compelled by such failure to take, held incompetent.—*Id.*

§ 49 (N.Y.Sup.) A company leasing a theater of plaintiff and a copartner could not defend an action brought by plaintiff in his own right and as assignee of his copartner, on the theory that by some other agreement to which the company was not a party a third party was interested with plaintiff in the subject-matter of the action.—*Weber v. Columbia Amusement Co.*, 146 N. Y. S. 53.

IV. TERMS FOR YEARS.

(C) Extensions, Renewals, and Options to Purchase or Sell.

§ 86 (N.Y.Co.Ct.) Under a lease giving the tenant "first privilege of renewal," he was entitled to such privilege only if the landlord gave a lease, and could not renew the lease by mere service of notice on the landlord, prior to the expiration of the term, of his election to remain and demanding a new lease.—*Walsh v. Ft. Schuyler Brewing Co.*, 146 N. Y. S. 160.

V. TENANCIES FROM YEAR TO YEAR AND MONTH TO MONTH.

§ 116 (N.Y.Sup.) Where a lease for a year provided for extension from year to year unless notice was given prior to June 1st of intention to surrender on October 1st following, the tenancy from year to year could be terminated only by the notice prescribed.—*Heyman v. Robertson*, 146 N. Y. S. 1076.

Where a lease provided for extension from year to year in the absence of written notice by registered mail prior to June 1st of intention to terminate the following October, evidence of parol notice, given by the tenant to persons claimed to represent the landlord, held irrelevant.—*Id.*

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(B) Possession, Enjoyment, and Use.

§ 129 (N.Y.Sup.) Where a tenant for a term of years, who has covenanted to pay all taxes so that a certain net rental shall be received by the landlord, has performed such condition, an additional liability for taxes, not payable before the term expired, cannot be imposed.—*Ayer v. Bonwit*, 146 N. Y. S. 301.

§ 129 (N.Y.Sup.) Though the tenant did not prove damage from the landlord's failure to put him in possession, he could recover a money deposit made when the lease was executed; such amount not having been tendered or paid a court by the landlord.—*Popiel v. Manhasset Mortgage Co.*, 146 N. Y. S. 1073.

§ 134 (N.Y.Sup.) An acceptance by the lessor of a theater of rent accruing after the lessee had commenced to use the theater for exhibiting moving pictures was not a consent to such use, if lessor then and afterwards insisted that lessee was so using the theater in violation of the lease.—*Hammerstein Opera Co. v. Belasco*, 146 N. Y. S. 341.

(D) Repairs, Insurance, and Improvements.

§ 152 (N.Y.Sup.) A promise by the landlord, made after the lease was executed, to make certain changes in the elevator shaft, was not supported by a consideration; the lease not being executed in reliance upon the performance of such promise.—*Larkin Co. v. Terminal Warehouse Co.*, 146 N. Y. S. 380.

E) Injuries from Dangerous or Defective Condition.

§ 165 (N.Y.Sup.) Where the tenant of a building sublet part of one story to be used as a factory, the owner did not become liable, under Labor Law, §§ 82, 94, for injuries to the servants of the subtenant, because, by reason of the partition placed in the building, access to the fire escape was rendered difficult and obstructed.—*Loetz v. Duffy*, 146 N. Y. S. 152.

The Labor Law not having imposed any liability on the lessee of one floor of a building, who sublet a portion of it to another manufacturing company, the lessee is not liable for the death of a servant of its subtenant who was

killed in a fire owing to the inaccessibility of the fire escape; there being no common-law duty upon the lessee to render the building safe.—*Id.*

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 296 (N.Y.Co.Ct.) That the landlord had obtained an order restraining his tenant and subtenant from abandoning traffic in liquor on the premises pursuant to the Liquor Tax Law as amended by Laws 1910, c. 494, did not preclude him from obtaining a warrant in summary proceedings directing the removal of the tenant and subtenant from the premises.—*Walsh v. Ft. Schuyler Brewing Co.*, 146 N. Y. S. 160.

§ 298 (N.Y.Sup.) Under Code Civ. Proc. § 2244, in summary proceedings a settlement of the claim for rent and an agreement to dismiss the proceeding was a valid defense.—*Cohen v. Hirsckowitz*, 146 N. Y. S. 195.

In summary proceedings for nonpayment of rent, the tenant may plead payment, or a general release, or that the landlord has accepted a note which is not yet due.—*Id.*

§ 305 (N.Y.Sup.) Under Code Civ. Proc. § 2244, an answer in summary proceedings, setting up a settlement of the claim for rent and an agreement to dismiss the proceeding, was not ineffectual because such matter was alleged by way of defense rather than by way of counterclaim.—*Cohen v. Hirsckowitz*, 146 N. Y. S. 195.

Where an answer in summary proceedings alleged a compromise and settlement of the claim for rent and an agreement to dismiss the proceeding, and that the tenants had performed their part of such agreement, the court could not assume that the tenants had violated the agreement, and it was improper to hold the answer insufficient.—*Id.*

LARCENY.

See Criminal Law, §§ 378, 390, 566, 1060; Witnesses, § 269.

LEASE.

See Landlord and Tenant.

LEGACIES.

See Wills.

LETTERS.

See Executors and Administrators, §§ 17, 35; Threats, § 1.

LEX LOCI.

See Marriage, § 3.

LIBEL AND SLANDER.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 1 (N.Y.Sup.) An action on the case to recover for the utterance of defamatory words, not actionable in themselves, cannot be sustained by proof of mental distress and physical pain

suffered by the complainant as a result thereof.—*Shepard v. Lamphier*, 146 N. Y. S. 745.

§ 7 (N.Y.Sup.) A written proposal from a married man, addressed and mailed to a married woman, looking to future immoral conduct, *held* not libelous per se; there being nothing therein charging past immoral conduct, but only an inquiry as to whether she would consent to it.—*Shepard v. Lamphier*, 146 N. Y. S. 745.

§ 9 (N.Y.Sup.) Words spoken about a person in relation to his business, calculated to injure him in that business are actionable per se.—*Aronivici v. Salant*, 146 N. Y. S. 527.

§ 12 (N.Y.Sup.) A publication charging ignorance and want of skill of a dentist in a particular case, in the absence of a showing of special damages, *held* not actionable.—*Twigg v. Ossining Printing & Publishing Co.*, 146 N. Y. S. 529.

The rule that a charge of ignorance or want of skill of a dentist, etc., in a particular case is not actionable without special damage is subject to the limitation that such words may, in themselves, imply unskillfulness or general ignorance in such calling.—*Id.*

§ 25 (N.Y.Sup.) A civil action for damages will not lie for furnishing libelous information in violation of Penal Law, § 1352.—*Aronivici v. Salant*, 146 N. Y. S. 527.

§ 25 (N.Y.Sup.) Where a man addressed and mailed a written proposal to a woman for future immoral conduct, and she, by her own act in laying it before the postal authorities, caused it to be made public, there was no publication by defendant.—*Shepard v. Lamphier*, 146 N. Y. S. 745.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

§ 46 (N.Y.Sup.) A publication by defendant *held* qualifiedly privileged under the rule that, where one has been libeled so as to have the right to reply thereto, his publication of a reply is also qualifiedly privileged as to the person publishing it.—*Preston v. Hobbs*, 146 N. Y. S. 419.

IV. ACTIONS.

(B) Parties, Preliminary Proceedings, and Pleading.

§ 80 (N.Y.Sup.) Allegations of complaint in action for slander and libel which charged that the slanderous statements were published of and concerning plaintiff and tended to injure him in his calling *held* not demurrable.—*Aronivici v. Salant*, 146 N. Y. S. 527.

§ 89 (N.Y.Sup.) Where a publication is not libelous per se, only special damages are recoverable, so that they must be pleaded.—*Twigg v. Ossining Printing & Publishing Co.*, 146 N. Y. S. 529.

§ 94 (N.Y.Sup.) Where complaint alleged charge by defendant that plaintiff had obtained money by false representations, with an innuendo that he meant that plaintiff was guilty of larceny, answer, alleging promissory representations by plaintiff, *held* insufficient, as they would support neither a criminal nor civil action.—*Block v. Nussbaum*, 146 N. Y. S. 55.

§ 97 (N.Y.Sup.) In action for libel, defense pleading general release, *held* not demurrable,

though plaintiff claimed it did not extend to the cause of action for libel.—*Block v. Nussbaum*, 146 N. Y. S. 55.

§ 97 (N.Y.Sup.) The question of whether a communication which the answer showed to be qualifiedly privileged was in fact privileged cannot be tried on demurrer.—*Preston v. Hobbs*, 146 N. Y. S. 419.

VI. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 147 (N.Y.Sup.) Penal Law, § 1352, making it a criminal offense to furnish libelous information, refers only to libels intended to be published in the state of New York.—*Aronivici v. Salant*, 146 N. Y. S. 527.

LICENSES.

See Intoxicating Liquors, §§ 66-106; Theaters and Shows, § 8.

LIENS.

See Highways, § 118; Mechanics' Liens; Mortgages, § 28; Municipal Corporations, § 373.

LIFE ESTATES.

See Dower; Remainders, § 17.

§ 4 (N.Y.Sup.) That a widow entitled to a life estate in certain real property, because of her aged and infirm condition left the same and went to her relatives in another state renting the property and living on the income, *held* not to constitute an abandonment of her life estate.—*Benham v. Boardman*, 146 N. Y. S. 434.

LIGHTS.

See Negligence, § 81.

LIMITATION OF ACTIONS.

See Adverse Possession; Criminal Law, § 147; Marriage, § 60; Remainders, § 17.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

§ 46 (N.Y.Sup.) Where an attorney contracted to render services for a contingent fee and was displaced before recovery, limitations did not begin to run against his right of action until a recovery had been had by the client, so that the amount of the attorney's compensation could be ascertained.—*Martin v. Camp*, 146 N. Y. S. 1041.

§ 55 (N.Y.Sup.) Limitations *held* to run against cause of action for deceit by which stock subscription was induced from the date of the subscription, though part of the price was not paid until later.—*Ball v. Gerard*, 146 N. Y. S. 81.

§ 55 (N.Y.Sup.) An action commenced January 16, 1913, for damages for deceit, in that in reliance upon defendant's prospectus, plaintiff on November 30, 1906, subscribed to shares of the capital stock of a development company, the last payment on which was made May 9, 1907, *held* barred by the statute of limitations.

out that an action based on the purchase of such stock on October 1, 1907, in open market in reliance on such prospectus, was not barred.—*Reusens v. Gerard*, 146 N. Y. S. 88.

§ 55 (N.Y.Sup.) A continuing nuisance arising from the operation of a railroad in an improper manner is not barred until the statutory period has run from the last repetition.—*Willson v. New York Cent. & H. R. R. Co.*, 146 N. Y. S. 208.

(B) Performance of Condition, Demand, and Notice.

§ 66 (N.Y.Sup.) Under Greater New York Charter, § 261, providing that no action shall be maintained against the city unless it appear from the pleadings that at least 30 days have elapsed since the demand has been presented to the comptroller for adjustment, and that he has neglected to make payment for 30 days after such presentment, the 6-year limitations would run only for 6 years and 30 days, as to a claim against the city.—*McCarthy v. City of New York*, 146 N. Y. S. 281.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 96 (N.Y.Sup.) Where a wife took out a 20-year endowment policy on the life of her husband, and insurer by mistake made it payable to the husband in case he survived until its maturity, limitations did not begin to run against the wife, who did not discover the error for more than ten years, where the policy had not matured and the husband had asserted no rights thereunder.—*Ulman v. Newman*, 146 N. Y. S. 696.

§ 100 (N.Y.Sup.) Limitations ran against a cause of action for damages for deceit by which plaintiff was induced to purchase corporate stock from the consummation of the fraud and not from the discovery thereof.—*Ball v. Gerard*, 146 N. Y. S. 81.

§ 100 (N.Y.Sup.) The ten years' limitations will not commence to run against an equitable action against the pledgees for an accounting as to a sale of the pledged property, without foreclosure of the lien or notice, until the pledgor earns of such sale.—*Beugger v. Ashley*, 146 N. Y. S. 910.

§ 100 (N.Y.Sup.) Under Code Civ. Proc. § 1743, subds. 4 and 5, and section 1752, an action to annul a marriage for physical incapacity cannot be brought within section 382, subd. 5, relative to actions on the ground of fraud, within six years after discovery of the fraud, by alleging fraudulent representations.—*Deitch v. Deitch*, 146 N. Y. S. 1019.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 180 (N.Y.Sup.) The defense of limitations can be raised only by answer, and not by motion to strike.—*Hanover Nat. Bank of City of New York v. Oriental Bank of New York*, 146 N. Y. S. 780.

§ 195 (N.Y.Sup.) The statute of limitations, being an affirmative defense, must be proved by the party invoking it.—*Beugger v. Ashley*, 146 N. Y. S. 910.

§ 197 (N.Y.Sup.) Evidence merely that a wrongful transfer of pledged property was made "some time in February, 1899," was insufficient to show that an equitable action based thereon and begun February 11, 1908, was barred by the ten years' statute of limitations.—*Beugger v. Ashley*, 146 N. Y. S. 910.

LIQUIDATED DAMAGES.

See Damages, §§ 76, 81.

LIQUOR SELLING.

See Intoxicating Liquors.

LITERARY PROPERTY.

See Contracts, §§ 94, 95, 99.

LOGS AND LOGGING.

See Sales, §§ 172, 416, 418.

LUNATICS.

See Insane Persons.

MACHINERY.

See Electricity, § 16; Eminent Domain, § 133.

MALICE.

See Malicious Prosecution, §§ 26-32; Threats, § 7.

MALICIOUS PROSECUTION.

See New Trial, § 81.

II. WANT OF PROBABLE CAUSE.

§ 15 (N.Y.City Ct.) Want of probable cause, as well as malice, is essential in order to maintain an action for malicious prosecution.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

§ 24 (N.Y.City Ct.) If a proceeding against defendant before a magistrate terminates in his favor, he may maintain an action for malicious prosecution, and the termination of a criminal proceeding in defendant's favor, though reversed by a higher tribunal, is held ground for an action for malicious prosecution.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

III. MALICE.

§ 26 (N.Y.City Ct.) In order to maintain an action for malicious prosecution plaintiff must show malice by defendant.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

§ 27 (N.Y.City Ct.) "Malice" as an element of malicious prosecution may consist of personal hatred or ill will, or any improper or sinister purpose or reckless disregard of the rights of others, which is inconsistent with good faith, but the mere existence of an ulterior purpose or of personal hostility does not necessarily show malice.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

§ 28 (N.Y.City Ct.) The malice necessary to maintain an action for malicious prosecution must be malice in fact, as distinguished from

presumptive malice, though if the proceeding was instituted from improper or wrongful motive, it is not essential that actual ill will be shown.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

§ 29 (N.Y.City Ct.) Malice may be implied in an action for malicious prosecution, in that it may be inferred by the jury from circumstances like any other fact, as by showing that defendant's conduct, considered as a whole, is inconsistent with proper motive.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

§ 31 (N.Y.City Ct.) Where defendant knew when he made a charge of grand larceny against plaintiff that such a crime had not been committed, because defendant's pocket only contained 30 or 40 cents when plaintiff attempted to pick it according to defendant, the making of the complaint charging grand larceny of itself constituted "malice" by defendant.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

§ 32 (N.Y.City Ct.) Proof of want of probable cause is not, as a matter of law, proof of malice in an action for malicious prosecution, though ordinarily malice may be inferred as a fact from proof of want of probable cause.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

IV. TERMINATION OF PROSECUTION.

§ 35 (N.Y.Sup.) Where the district attorney, after inquiring into the facts, stated that he would be obliged to dismiss the indictment for want of evidence, whereupon indictment was quashed on motion of plaintiff's counsel, *held*, that the prosecution was not terminated as a matter of favor.—*Reit v. Meyer*, 146 N. Y. S. 75.

The rule that an action for malicious prosecution will not lie where the termination of the prosecution is procured by defendant therein only applies where the prosecution is terminated as a matter of favor, as by defendant's request and not as a matter of right, or where it is terminated by compromise with a district attorney, or through accused's fraud.—*Id.*

The abandonment of a prosecution is a sufficient determination thereof in plaintiff's favor to lay the foundation of an action for malicious prosecution.—*Id.*

V. ACTIONS.

§ 56 (N.Y.City Ct.) The burden is on plaintiff, in an action for malicious prosecution, to prove want of probable cause, as well as malice by defendant.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

§ 66 (N.Y.City Ct.) The damages recovered, in an action for malicious prosecution, must be the direct and proximate result of the former proceeding.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

§ 67 (N.Y.City Ct.) Plaintiff, in malicious prosecution, is entitled to adequate compensation for all the elements of the injury suffered, including loss of time, peril to life and liberty, injury to reputation, character, and health, mental suffering, general impairment of social and business standing, actual injury to property or credit, and decrease in earning capacity.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

§ 69 (N.Y.City Ct.) Where plaintiff was charged by defendant with grand larceny in attempting to pick defendant's pocket, which contained only 30 or 40 cents, and was arrested and taken along the street for several blocks and placed in a patrol wagon and taken to the police station, and examined, etc., and discharged, *held* that a verdict for plaintiff for 6 cents, in an action for malicious prosecution, was inadequate.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

§ 71 (N.Y.City Ct.) The existence of malice is exclusively a question for the jury, in an action for malicious prosecution.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

MALPRACTICE.

See Trial, § 108½.

MANDAMUS.

See Beneficial Associations, § 12; Judgment, § 565, 585.

I. NATURE AND GROUNDS IN GENERAL.

§ 10 (N.Y.Sup.) Where, after the sale of infant's realty and deposit of the proceeds with the county treasurer, the infant dies and there has been no adjudication by the surrogate as to certain alleged debts in any proceeding in which the infant's heirs were cited, his administratrix's application for mandamus directing the county treasurer to pay over such proceeds, less fees, under an order of the surrogate under Code Civ. Proc. § 2359, will be denied.—*People ex rel. Jenny v. Brown*, 146 N. Y. S. 123.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 73 (N.Y.Sup.) The fire commissioner's order of retirement of a member of the force, fixing his pension at the amount he was entitled to under New York City Charter, § 790, having after it went into effect been changed to reduce the amount, without any attempted exercise of authority by the commission, the member is entitled to a peremptory writ of mandamus for correction thereof.—*People ex rel. Jennings v. Johnson*, 146 N. Y. S. 977.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 143 (N.Y.Sup.) The rule that a delay of four months is such laches as will ordinarily bar mandamus for reinstatement in the public service does not apply to mandamus to compel the payment of money which ordinarily may be granted within the time limited for an action to recover the money.—*People ex rel. Weiss v. Philip Bernstein Sick & Benefit Society*, 146 N. Y. S. 886.

§ 143 (N.Y.Sup.) One bringing mandamus for correction of the amount of his pension named in the order of his retirement from the fire department, to have it correspond to the amount to which he was entitled under the statute, is not to be charged with laches under the same rule as in case of application for reinstatement.

—People ex rel. Jennings v. Johnson, 146 N. Y. S. 977.

§ 160 (N.Y.Sup.) An application for mandamus to review the expulsion of a member from a benefit society for nonpayment of dues *held* to warrant the issuance of an alternative writ.—People ex rel. Weiss v. Philip Bernstein Sick & Benefit Society, 146 N. Y. S. 886.

§ 164 (N.Y.Sup.) After return by defendant in mandamus, he cannot object to defects of form, but only to want of title in relator to the relief sought, or other defects in substance.—People ex rel. Jennings v. Johnson, 146 N. Y. S. 977.

§ 187 (N.Y.Sup.) Verdict for relator in mandamus on all the facts contained in the alternative writ is, on appeal from the denial of a motion for a peremptory writ, conclusive on the facts litigated at the trial.—People ex rel. Jennings v. Johnson, 146 N. Y. S. 977.

MARRIAGE.

See Divorce; Husband and Wife; Limitation of Actions, § 100.

§ 3 (N.Y.Sur.) The marriage in New Jersey of one prohibited from marrying in New York, because divorced for adultery, will be recognized by the courts of New York; a marriage valid where performed being valid everywhere.—In re Eichler, 146 N. Y. S. 846.

§ 40 (N.Y.Sur.) Cohabitation between persons divorced and without right to remarry is presumed to be illicit, and, being illicit in its inception, will be presumed to so continue, unless a remarriage be shown by direct proof, or by circumstantial evidence which is strong, positive, and convincing.—In re Eichler, 146 N. Y. S. 846.

While in order to legitimize issue, or in the interest of order and decency, a marriage will, in a proper case, be presumed from cohabitation and reputation alone, where one party has married another, and would stand convicted of bigamy if a marriage were presumed, the presumption of innocence will prevail over the presumption of marriage.—Id.

§ 50 (N.Y.Sur.) Mere circumstances of cohabitation or common reputation of marriage, etc., do not constitute a valid marriage, but are only evidence of a marriage contract.—In re Eichler, 146 N. Y. S. 846.

Where a woman divorced for adultery cohabited with her former husband while their marriage was prohibited, the continuance thereof after the removal of the prohibition was not sufficient to show a remarriage, though they held themselves out as husband and wife, and executed conveyances as such, especially in view of her subsequent marriage to one who boarded with them.—Id.

In determining the existence of a marriage between persons cohabiting together, the character of the parties is of much importance, stronger evidence being required to establish a marriage circumstantially where the woman is of a loose and immoral character.—Id.

In establishing a marriage by circumstantial evidence, all the circumstances should be considered, and the decision should follow the line of the greatest probability.—Id.

§ 59 (N.Y.Sup.) Where, in an action to annul a marriage because defendant concealed the fact that he was an ex-convict, and falsely represented that he was a duly licensed attorney, the evidence shows that plaintiff's pregnancy, and not misrepresentations, was the inducing cause for the marriage, the complaint will be dismissed.—Berus v. Berus, 146 N. Y. S. 554.

§ 60 (N.Y.Sup.) The limitation of five years from marriage prescribed by Code Civ. Proc. § 1752, for bringing an action to annul a marriage for physical incapacity rests on public policy.—Deitch v. Deitch, 146 N. Y. S. 782.

Plaintiff, in an action to annul a marriage, subjoining a cause of action for misrepresentation, might, though there be no formal defense of limitations, have to account for her eight years of continued cohabitation.—Id.

MASTER AND SERVANT.

See Contracts, § 10; Corporations, § 432; Insurance, § 508½; Pleading, § 318; Set-Off and Counterclaim, § 57; Work and Labor.

I. THE RELATION.

(A) Creation and Existence.

§ 8 (N.Y.Sup.) An agreement to hire an employé, beginning on a certain date, from "month to month at the monthly wage of \$60," and providing that the employé may terminate it on certain notice, and for its automatic renewal from month to month, *held* not an indefinite employment at a certain rate per month, but a contract to work at least a full month, and for the additional months for which it was renewed.—Bozzone v. Stafford, 146 N. Y. S. 1078.

(C) Termination and Discharge.

§ 30 (N.Y.Sup.) A provision that in case either party should "neglect or fail to faithfully and truthfully perform * * * it will cease to be binding upon either party hereto" was merely declaratory of the right of the party not in default as against the one defaulting, and did not give the employer the right to arbitrarily discharge the employé.—Maune v. Unity Press, 146 N. Y. S. 127.

§ 30 (N.Y.Sup.) Failure of an employé to give a surety bond in compliance with his contract justifies his discharge.—Leopold v. Hotel Shelburne, 146 N. Y. S. 289.

§ 40 (N.Y.Sup.) Evidence, in an action for breach of contract of employment, *held* to show that it was a condition of plaintiff's employment that he should give a surety bond.—Leopold v. Hotel Shelburne, 146 N. Y. S. 289.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

§ 80 (N.Y.Sup.) Upon breach by the employer of a written contract by an employé to work for a month at a certain monthly wage, the employé may bring action either on an express contract or for quantum meruit, or adopt both remedies.—Bozzone v. Stafford, 146 N. Y. S. 1076.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§ 87 (N.Y.) Labor Law is to be liberally construed to accomplish its purpose of affording better conditions to workmen engaged in certain dangerous employments.—*Bohnhoff v. Fischer*, 104 N. E. 180, 210 N. Y. 172.

(B) Tools, Machinery, Appliances, and Places for Work.

§ 103 (N.Y.) Under Labor Law, § 18, making scaffolding a place to work which it is the employer's duty to furnish, *held*, that such duty was not delegable.—*Bohnhoff v. Fischer*, 104 N. E. 180, 210 N. Y. 172.

§ 117 (N.Y.Sup.) A master was not negligent because there was a space of 2¾ inches between the floor of an elevator and that of the hall, through which a heavy piece of iron slipped and injured plaintiff below, where it was not shown that such space was excessive or unusual.—*Brown v. United States Express Realty Co.*, 146 N. Y. S. 66.

§ 125 (N.Y.Sup.) A contractor with the city for filling in cellars after the buildings had been razed was not liable to plaintiff for injuries to his team, which fell through the apparent bottom of the cellar into a concealed subcellar.—*Gibney v. Rodgers & Hagerty*, 146 N. Y. S. 340.

§ 129 (N.Y.Sup.) Employer's violation of Labor Law, § 20, forbidding the hoisting of lumber outside of and above the fifth floor of a building under construction, *held* not the proximate cause of injury to his servant, and hence that no liability could be predicated thereon.—*Bergquist v. Oregon Apartments Co.*, 146 N. Y. S. 445.

(E) Fellow Servants.

§ 159 (N.Y.Sup.) Where a servant, working in an elevator shaft, was injured by a heavy piece of iron, which fell through a space between the elevator and the landing, he could not recover if the accident was caused by the negligence of other fellow servants.—*Brown v. U. S. Express Realty Co.*, 146 N. Y. S. 66.

§ 179 (N.Y.Sup.) A master's exemption from liability for the act of a fellow servant has not been abolished by the Employers' Liability Act.—*Horgan v. Rapid Transit Subway Const. Co.*, 146 N. Y. S. 219.

§ 182 (N.Y.Sup.) The direction and control contemplated by Railroad Law, § 64 (42a) providing that railroad employes intrusted with the authority of superintendence, control, or command of other employes or with authority to direct or control any other employe in the performance of such employe's duty, are vice principals, must emanate from superior authority.—*Keane v. Sea Beach Ry. Co.*, 146 N. Y. S. 205.

§ 185 (N.Y.Sup.) In an action by a servant for injuries sustained while working in an elevator shaft caused by an iron plate falling through the space, between the elevator floor and the landing, it was proper to charge that the master was not responsible for the failure of his servant in charge of the work to anticipate an accident which a reasonably prudent man would not have anticipated.—*Brown v.*

United States Express Realty Co., 146 N. Y. S. 66.

A superior servant, who directed plaintiff to work in an elevator shaft, and promised to hold the elevator, was bound to take the necessary precautions to prevent the car from being so operated as to injure him, but it was not negligence to direct its use to carry to the floor above plaintiff an iron plate, which fell between the elevator and the landing while it was being unloaded.—*Id.*

(F) Risks Assumed by Servant.

§ 209 (N.Y.Sup.) An employe who shaped boards, at a machine consisting of a wheel set with knives, assumes only those risks which remain after full performance by his employer of all obligations to safeguard the machine.—*Sigel v. American Seating Co.*, 146 N. Y. S. 350.

(G) Contributory Negligence of Servant.

§ 236 (N.Y.Sup.) In an action for injuries to a night watchman while placing certain warning lanterns about a space where defendant's street railroad track was being repaired, plaintiff *held* guilty of contributory negligence as a matter of law.—*Duffy v. Lynch*, 146 N. Y. S. 384.

(H) Actions.

§ 252 (N.Y.) Under Labor Law, § 201, relating to notice of injuries to an employe, a letter, stating that an employe while cleaning a belt in defendant's boiler room on a certain street, was injured and has not been able to work, is insufficient.—*Rodzorski v. American Sugar Refining Co. of New York*, 104 N. E. 616, 210 N. Y. 262.

The notice in such case must be signed by the employe or some one in his behalf.—*Id.*

§ 265 (N.Y.Sup.) The master has the burden of proving contributory negligence.—*Sigel v. American Seating Co.*, 146 N. Y. S. 350.

§ 276 (N.Y.Sup.) In an action for injuries to plaintiff by being struck by a street car approaching him from the rear, proof *held* insufficient to warrant a finding that he was struck by a car belonging to defendant.—*Duffy v. Lynch*, 146 N. Y. S. 384.

§ 278 (N.Y.) In an employe's action for injuries from the sudden starting of a coal conveyor belt which he was cleaning, evidence *held* sufficient to show the negligence of the master's superintendent in sending the employe to clean the belt without adopting measures for his protection.—*Rodzorski v. American Sugar Refining Co. of New York*, 104 N. E. 616, 210 N. Y. 262.

§ 278 (N.Y.Sup.) Evidence, in a motorman's action for injuries from collision with a train of work cars, *held* not to sustain a finding of negligence in that the brakes on plaintiff's car were defective.—*Keane v. Sea Beach Ry. Co.*, 146 N. Y. S. 205.

§ 281 (N.Y.) Evidence *held* to show that an employe injured by the sudden starting of a coal conveyor belt which he was cleaning was free from contributory negligence.—*Rodzorski v. American Sugar Refining Co. of New York*, 104 N. E. 616, 210 N. Y. 262.

§ 286 (N.Y.) Evidence *held* sufficient to go to the jury on the question of the master's negli-

gence in failing to remedy a dangerous situation of which he had knowledge and ordering plaintiff to work in a place of danger without warning.—*Carponoano v. Pomeranz*, 104 N. E. 124, 210 N. Y. 188.

§ 286 (N.Y.Sup.) Evidence of the master's negligence in failing to properly guard a planing machine *held* sufficient to go to the jury.—*Sigel v. American Seating Co.*, 146 N. Y. S. 350.

§ 289 (N.Y.Sup.) On evidence in an action under the Employers' Liability Act for personal injuries, *held* that, notwithstanding plaintiff's testimony that he thought he was in a position of safety, the question of his contributory negligence was for the jury.—*Horgan v. Rapid Transit Subway Const. Co.*, 146 N. Y. S. 219.

§ 289 (N.Y.Sup.) In a personal injury action by a servant hurt while using a planing machine, the question of his contributory negligence *held*, under the evidence, for the jury.—*Sigel v. American Seating Co.*, 146 N. Y. S. 350.

§ 295 (N.Y.Sup.) In view of the Labor Law, it was error to instruct that the defense of assumption of risk was neither a question of law nor of fact.—*Horgan v. Rapid Transit Subway Const. Co.*, 146 N. Y. S. 219.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

§ 301 (N.Y.Sup.) In determining whether one using a vehicle, hired from a truckman, for delivering goods, was liable for the negligence of the driver, the controlling question is whether the contract between the truckman and the hirer of the vehicle placed the driver under the hirer's exclusive control as to the general management of the team so as to make the driver the hirer's servant for the time being.—*Hanatssek v. Wilson*, 146 N. Y. S. 1016.

Where defendant contracted with a truckman for wagons for the delivery of defendant's goods, but had no control over the driver, who merely drove as directed by defendant's servant accompanying it, *held* that the driver was not defendant's employé so as to make him liable for injuries caused by the driver's negligence.—*Id.*

(B) Work of Independent Contractor.

§ 318 (N.Y.Sup.) A mechanic employed to overhaul or repair an automobile, the owner reserving no right to control or direct the work, *held* an independent contractor and not a servant.—*Woodcock v. Sartle*, 146 N. Y. S. 540.

(C) Actions.

§ 330 (N.Y.Sup.) That defendant's name plate was on a wagon hired by defendant from a truckman for the delivery of defendant's goods was, at most, only prima facie evidence that the driver of the wagon was defendant's employé.—*Hanatssek v. Wilson*, 146 N. Y. S. 1016.

§ 332 (N.Y.Sup.) Evidence *held* to make question for jury as to whether workman on building in course of construction who permitted piece of wood to fall and strike plaintiff was de-

fendant's employé.—*Strnad v. William Messer Co.*, 146 N. Y. S. 129.

Whether it was negligence for a workman on a building to drop a piece of wood into an adjoining yard where children were at play was a question for the jury.—*Id.*

MECHANICS' LIENS.

See Appeal, § 151; Bankruptcy, § 192; Highways, § 118.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

§ 5 (N.Y.Sup.) The rights given by the Mechanic's Lien Law have been jealously guarded by the courts.—*Hildreth Granite Co. v. City of Watervliet*, 146 N. Y. S. 449.

II. RIGHT TO LIEN.

(A) Nature of Improvement.

§ 30 (N.Y.Sup.) Under Lien Law, § 3, there can be no lien for fixtures furnished an office building which were of standard make, where the lease did not provide that the fixtures would belong to the owner on termination of the term.—*Wahle-Phillips Co. v. Fitzgerald*, 146 N. Y. S. 562.

Under Lien Law, § 3, a lien existed for fixtures installed in a theater erected by virtue of a lease from the owner, where the fixtures for the most part were made from special designs to harmonize with the interior construction and decoration of the theater.—*Id.*

(C) Agreement or Consent of Owner.

§ 73 (N.Y.Sup.) A requirement in a lease that a tenant shall make improvements upon the premises is sufficient consent of the owner to charge his property with liens for labor and material supplied in making such improvements.—*Wahle-Phillips Co. v. Fitzgerald*, 146 N. Y. S. 562.

§ 75 (N.Y.Sup.) A lease combined with other facts *held* sufficient to show the consent of the owner to the installation of lighting fixtures in a theater building.—*Wahle-Phillips Co. v. Fitzgerald*, 146 N. Y. S. 562.

III. PROCEEDINGS TO PERFECT.

§ 139 (N.Y.Sup.) A notice of lien, setting forth the labor performed and to be performed and the materials furnished and to be furnished, the agreed price and value of the labor and material, and a total agreed price and value of the labor and material and the amount unpaid, *held* sufficient under the Lien Law.—*Barrett v. John V. Schaefer, Jr., & Co.*, 146 N. Y. S. 1056.

§ 146 (N.Y.Sup.) Under Lien Law, §§ 3, 9, 10, a notice of a lien by a materialman for millwork for a building *held* sufficient, notwithstanding the reference to time of performing the items of work, or furnishing the material was in the alternative.—*Barrett v. John V. Schaefer, Jr., & Co.*, 146 N. Y. S. 1056.

V. ASSIGNMENT OF LIEN OR CLAIM.

§ 202 (N.Y.Sup.) An assignee of a contractor of a specified sum of the balance and final

payments due under building contracts *held* not entitled to assert a mechanic's lien.—*Barrett v. John V. Schaefer, Jr., & Co.*, 146 N. Y. S. 1053.

An assignment by a building contractor of a sum in the balance and final payments due under the contract *held* invalid under Lien Law, § 15, though treated as an equitable assignment.—*Id.*

MEMORANDA.

See Appeal, § 1052; Boundaries, § 36; Trial, § 106.

MINES AND MINERALS.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(B) Conveyances in General.

§ 53 (N.Y.Sup.) In an option to purchase mining property, time is always considered to be of the essence of the contract, on account of the liability of the property to great fluctuation in value.—*Beebe v. Worth*, 146 N. Y. S. 146.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

(C) Rights and Liabilities Incident to Working.

§ 118 (N.Y.Sup.) Where the accident in a mine was caused by the negligent failure of a worker in the mine to give warning of the approach of a car by which the injured person was struck, the proximate cause of the accident was within the control of the mining foreman, employed under the statute.—*Bigus v. Lehigh & Wilkes-Barre Coal Co.*, 146 N. Y. S. 107.

That a person, injured from being struck by a car in a mine, was there seeking employment did not preclude the mineowner from being relieved from liability because the accident was due to negligence in matters under the control of a certified mine foreman.—*Id.*

MISCONDUCT.

See Attorney and Client, § 44.

MISREPRESENTATION.

See Accord and Satisfaction, § 20; Fraud.

MISTAKE.

See Courts, § 189; Reformation of Instruments, § 30.

MONEY PAID.

See Appeal, § 281.

MONEY RECEIVED.

§ 18 (N.Y.Sup.) In an action to recover the proceeds of a note which plaintiff claimed to have transferred to defendant for safe-keeping, and which she also claimed she lent defendant to collect and keep the proceeds as a loan, evidence *held* insufficient to support a judgment for plaintiff.—*Goldstein v. Maltinsky*, 146 N. Y. S. 1074.

MORTGAGES.

See Contracts, §§ 9, 159; Corporations, § 30; Covenants, § 121; Dower, § 15; Reformation of Instruments, § 45.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 28 (N.Y.Sup.) Where a husband furnished part of the consideration for a conveyance to another under an agreement that the grantee should reimburse himself for payments made, and convey the property to the husband's appointees by will, the agreement was a mortgage.—*Lugar v. Lugar*, 146 N. Y. S. 37.

§ 28 (N.Y.Sup.) A lien cannot be created on land by an oral agreement to give a mortgage.—*Meixel v. Meixel*, 146 N. Y. S. 537.

§ 33 (N.Y.Sup.) Deed and written agreement providing for reconveyance on payment of advances secured by such deed *held* to create the relation of mortgagor and mortgagee, and not to create any relation involving any special trust or confidence.—*Dickey v. Goertner*, 146 N. Y. S. 204.

(D) Validity.

§ 86 (N.Y.Sup.) Evidence *held* to show that the note and mortgage involved which were signed by a married woman were executed by her through duress.—*Orth v. Anderson*, 146 N. Y. S. 689.

V. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 260 (N.Y.Sup.) Where the assignee of a mortgage took the assignment relying on the promise of the mortgagee that an estoppel certificate from the corporate owner of the property would be furnished, and not on the certificate, the assignee cannot set up the certificate as an estoppel against the suit of the corporation to cancel the mortgage for fraud.—*Hyde Park Terrace Co. v. Jackson Bros. Realty Co.*, 146 N. Y. S. 1037.

§ 264 (N.Y.Sup.) An assignee of a mortgage who took the assignment in reliance on the record of a prior assignment was not protected by the recording act, where the prior assignment was a forgery.—*Stainton v. Jacob Kaiser Improvement Co.*, 146 N. Y. S. 915.

§ 270 (N.Y.Sup.) Evidence *held* to support finding that alleged assignment of mortgage was a forgery.—*Stainton v. Jacob Kaiser Improvement Co.*, 146 N. Y. S. 915.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 319 (N.Y.Sup.) In an action to foreclose a mortgage which was in the possession of the defendant, evidence *held* insufficient to rebut the presumption that the mortgage had been canceled, and to show that the mortgagor had, by way of gift, released defendant from the obligation.—*Hall v. O'Brien*, 146 N. Y. S. 551.

X. FORECLOSURE BY ACTION.**(B) Right to Foreclose and Defenses.**

§ 417 (N.Y.Sup.) If defendant was really the debtor and plaintiff merely signed for defendant's accommodation, the fact that plaintiff's name appeared upon a renewal note as maker with defendant's name as indorser would not entitle plaintiff, as the payer of the renewed note, which defendant's wife had made for defendant's accommodation and which plaintiff had indorsed for the same reason, to foreclose a mortgage given by the wife to secure her note.—*Orth v. Anderson*, 146 N. Y. S. 689.

(E) Parties and Process.

§ 427 (N.Y.Sup.) Where real estate was devised to testator's children, and upon foreclosure of a second mortgage all were made defendants, and two who were the executors, with power to sell, bought it in as such and later sold it, the others were not proper or necessary parties to the subsequent foreclosure of the first mortgage.—*McCarty v. Downes*, 146 N. Y. S. 973.

(J) Sale.

§ 510 (N.Y.Sup.) Grantor, who sued for accounting under deed which judgment foreclosed as a mortgage, *held* entitled to service of the notice of sale upon himself or his attorney separate and distinct from the published notice.—*Dickey v. Goertner*, 146 N. Y. S. 264.

§ 529 (N.Y.Sup.) Inadequacy of price *held* not ground for vacating foreclosure sale, but to be considered where the mortgagee is the purchaser.—*Dickey v. Goertner*, 146 N. Y. S. 264.
A foreclosure sale will be set aside upon slighter grounds, where the mortgagee purchases, than where the purchaser is an outsider.—*Id.*

§ 534 (N.Y.Sup.) The purchaser at a foreclosure sale which was void as against the owner of the equity of redemption *held* to have become the mortgagee in possession so that the owner of the equity could not regain possession by ejectment.—*Herrmann v. Cabinet Land Co.*, 146 N. Y. S. 777.

§ 534 (N.Y.Sup.) Where the executors, with power to sell, who purchased testator's realty at foreclosure of a second mortgage, to which the devisees were parties defendant, and who later sold it, were subsequently made parties to the foreclosure of the first mortgage along with the purchaser from them, the purchaser at the foreclosure sale under the first mortgage took title free from any claims of the testator's devisees or representatives.—*McCarty v. Downes*, 146 N. Y. S. 973.

(K) Deficiency and Personal Liability.

§ 559 (N.Y.Sup.) Where a deed absolute in form given to secure a loan is foreclosed as a mortgage, a deficiency judgment is authorized.—*Dickey v. Goertner*, 146 N. Y. S. 264.

MOTIONS.

See Damages, § 206; Indictment and Information, §§ 137, 144; Judgment, § 307; Pleading, §§ 211, 343-358.

MOTOR VEHICLES.

See Sales, §§ 371, 384.

MOVING PICTURES.

See Theaters and Shows, §§ 1, 3.

MUNICIPAL CORPORATIONS.

See Contracts, §§ 54, 187, 380; Courts, §§ 189, 190; Dedication, § 33; Eminent Domain, § 205; Evidence, § 336; Limitation of Actions, § 66; New Trial, § 66; Street Railroads; Theaters and Shows, §§ 1, 3; Waters and Water Courses, §§ 183½, 203.

III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES.

§ 76 (N.Y.Sup.) In view of the Building Code's adoption by the municipal assembly of the city of New York pursuant to Greater New York Charter, § 647, and its ratification by the Legislature by Revised Charter, § 407, as amended by Laws 1904, cc. 602, 628, it should be given the same force within the corporate limits as the statute passed by the Legislature.—*People ex rel. Van Beuren & New York Bill Posting Co. v. Miller*, 146 N. Y. S. 403.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.**(B) Ordinances and By-Laws in General.**

§ 116 (N.Y.Sup.) Labor Law, § 83b, added by Laws 1912, c. 332, requiring the owner of every factory building over seven stories high, in which more than 200 people are employed above the seventh floor, to install an automatic sprinkler system, did not impliedly repeal all other laws or ordinances, requiring owners of various kinds of buildings to install such fire extinguishers as the Fire Commissioner might direct.—*People v. Kaye*, 146 N. Y. S. 398.

V. OFFICERS, AGENTS, AND EMPLOYEES.**(B) Municipal Departments and Officers Thereof.**

§ 185 (N.Y.Sup.) Evidence *held* insufficient to support police commissioner's determination removing policeman for violating rule against receiving fee or gratuity.—*People ex rel. Kelly v. Waldo*, 146 N. Y. S. 581.

On certiorari to review a police commissioner's determination in removing a policeman, the court was not bound to credit the testimony of a witness against the policeman, though no reason appeared why he should have fabricated the testimony.—*Id.*

§ 185 (N.Y.Sup.) A specification of a charge of neglect of duty by a patrolman *held* not sufficient to show what constituted the neglect of duty, and insufficient to warrant the dismissal of the patrolman.—*People ex rel. Shenfield v. Waldo*, 146 N. Y. S. 880.

§ 185 (N.Y.Sup.) A policeman may not be dismissed for disobedience of an order violating

the Three Platoon Law.—People ex rel. Macnish v. Waldo, 146 N. Y. S. 1050.

§ 189 (N.Y.Sup.) Under the Three Platoon Law, §§ 1, 3, a member of the police force may not be required to drill during his 16 hours a day of time off, or while on reserve duty.—People ex rel. Macnish v. Waldo, 146 N. Y. S. 1050.

(C) Agents and Employees.

§ 220 (N.Y.Sup.) Under New York City Charter, § 1543, the superior of a telephone operator in the Public Works Department could deduct the salary of such employé absent without leave on account of illness.—Downey v. City of New York, 146 N. Y. S. 145.

IX. PUBLIC IMPROVEMENTS.

(C) Contracts.

§ 366 (N.Y.Sup.) Where a city, in accordance with the contract, notified the contractor to discontinue work because of delay, and that the work would be completed at its expense, such notice operated as a termination of the employment rather than a cancellation of the contract, and the contractor was entitled to the balance of the contract price after deducting cost of finishing the work.—E. F. Keating Co. v. City of New York, 146 N. Y. S. 222.

§ 373 (N.Y.Sup.) A subcontractor could establish his lien upon a municipal improvement to the extent of the sum due the contractor; his rights being measured by those of the contractor.—E. F. Keating Co. v. City of New York, 146 N. Y. S. 222.

In an action against a city to foreclose a subcontractor's lien upon public improvements, liquidated damages for delay, not claimed in the answer, should not be allowed.—Id.

(E) Assessments for Benefits, and Special Taxes.

§ 407 (N.Y.Sup.) Greater New York Charter, § 902, as amended by Laws 1910, § 548, providing that, if any owner of land within a street conveys to the city without compensation and such conveyance is accepted, the land fronting on that part of the street shall not be chargeable with expenses of opening the remainder of the street, held not unconstitutional as increasing the burden of assessment upon those not making such cessions.—In re Newkirk Ave. in City of New York, 146 N. Y. S. 216.

§ 467 (N.Y.Sup.) The commissioner of assessment in street opening proceedings should take into account the enhancement of value resulting from the improvement in assessing benefits.—In re Newkirk Ave. in City of New York, 146 N. Y. S. 216.

§ 492 (N.Y.Sup.) Where an assessment exceeds one-half of the value of the parcels assessed, contrary to Greater New York Charter, § 980, the proper practice is to refer the report back to the commissioner of assessment with directions to report the date as of which he fixed the value of the parcels for the purpose of determining whether he took into account the enhancement of value from the improvement.—In re Newkirk Ave. in City of New York, 146 N. Y. S. 216.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent, and Exercise of Power.

§ 603 (N.Y.Sup.) An ordinance requiring the owners of manufacturing buildings, etc., to provide such "fire hose, fire extinguishers, etc., and other means of preventing and extinguishing fires" as the fire commissioner may direct, held to authorize the commissioner to order the installation of automatic sprinklers in a manufacturing building.—People v. Kaye, 146 N. Y. S. 398.

§ 625 (N.Y.Sup.) Greater New York Building Code, §§ 2, 4, 143, 144, held a reasonable and valid exercise of the police power.—People ex rel. Van Beuren & New York Bill Posting Co. v. Miller, 146 N. Y. S. 403.

(B) Violations and Enforcement of Regulations.

§ 630 (N.Y.Sup.) In view of Laws 1911, c. 899, amending Greater New York Charter by adding section 775 to title 3, art. 15, authorizing the fire commissioner to require the installation, as prescribed by ordinance, of automatic fire extinguishers, and section 773 of the charter, making the violation of any regulation made under the title a misdemeanor, held that it was a misdemeanor to refuse to comply with an order of the fire commissioner, requiring the installation of automatic fire extinguishers pursuant to ordinance.—People v. Kaye, 146 N. Y. S. 398.

XII. TORTS.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 763 (N.Y.Sup.) A city is required to use reasonable care to keep its streets safe, in view of the extent of territory over which such care is to be exercised, but is not liable because the surface of the street is such that it is possible for one to stub his toe and fall.—Engel v. City of New York, 146 N. Y. S. 307.

§ 763 (N.Y.Sup.) A city has a right to remove the asphalt in the streets to make repairs, and is not liable for injuries to persons tripping on a street car rail exposed by the removal of the paving, if it took all reasonable precautions to make the place safe.—Heaphy v. United States Wood Preserving Co., 146 N. Y. S. 377.

§ 768 (N.Y.Sup.) Municipalities are not liable as for negligence by reason of slight depressions or differences of grade in the street.—Faber v. City of New York, 146 N. Y. S. 295.

§ 768 (N.Y.Sup.) A city was not liable for injuries from a fall caused by plaintiff's stubbing her toe where there was a drop in the sidewalk, which plaintiff's witnesses estimated at 3 to 4 inches, but which other witnesses, who made actual measurements, testified was only 1½ inches.—Engel v. City of New York, 146 N. Y. S. 307.

§ 803 (N.Y.Sup.) Where unusual or dangerous conditions prevail in a highway where repair work is going on, a pedestrian must exercise such unusual care as the unusual conditions call for.—Maloney v. Bradley Contracting Co., 146 N. Y. S. 242.

§ 805 (N.Y.Sup.) Where plaintiff, who was injured by tripping over a street car rail at a point where the asphalt had been removed for repairing the street, knew that the changes were being made, and had previously noticed the rail, and the place was well lighted on the night he was injured, *held*, that he was guilty of contributory negligence.—*Heaphy v. United States Wood Preserving Co.*, 146 N. Y. S. 377.

§ 809 (N.Y.Sup.) A contractor engaged in building a subway, who tears up the sidewalk and replaces it with boards, while chargeable with knowledge of actual defects in construction, is chargeable only as would be the municipality with implied notice of defects arising thereafter.—*Maloney v. Bradley Contracting Co.*, 146 N. Y. S. 242.

§ 812 (N.Y.Sup.) Under Owego Village Charter, § 52, and the Village Law, §§ 341, 380, relating to the notice of injuries on sidewalks, a verified notice of injury was not required to be given to the Owego village trustees.—*Haner v. Village of Owego*, 146 N. Y. S. 475.

§ 819 (N.Y.Sup.) In an action against a contractor, engaged in building a subway, for injuries sustained while plaintiff was traveling over a temporary sidewalk laid by the contractor, evidence *held* insufficient to show that the injuries were inflicted as claimed.—*Maloney v. Bradley Contracting Co.*, 146 N. Y. S. 242.

§ 819 (N.Y.Sup.) In an action against a city and others for injuries from tripping over a street car rail at a place where the asphalt had been removed for repairing the street, evidence *held* not to show negligence by the city or company making the repairs for it.—*Heaphy v. United States Wood Preserving Co.*, 146 N. Y. S. 377.

§ 821 (N.Y.Sup.) In an action for the death of the driver of a truck by a fall occasioned by the wheel of the truck running into a depression in the street, evidence *held* to require the dismissal of the complaint for failure to show negligence of the city.—*Faber v. City of New York*, 146 N. Y. S. 295.

(D) Defects or Obstructions in Sewers, Drains, and Water Courses.

§ 845 (N.Y.Sup.) In an action for injuries to plaintiffs by water flowing on premises occupied by them from a broken water main, evidence *held* insufficient to warrant a finding that the break in the main was caused by the negligence of defendant's servants.—*Breidbart v. Empire City Subway Co.*, 146 N. Y. S. 1064.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(D) Taxes and Other Revenue, and Application Thereof.

§ 971 (N.Y.Sup.) Under Charter of New York, § 910, the placing of the amount of the tax in the fourth column of the tax roll *held* not error, though the section required it to be placed in the fifth column.—*Lancaster Sea Beach Improvement Co. v. City of New York*, 146 N. Y. S. 734.

Notwithstanding Laws 1892, c. 542, requiring tax maps to be made, *held* that it would be pre-

sumed that a tax map on which the tax was based, made in conformity to New York Charter, §§ 890, 891, was the only map made.—*Id.*

§ 972 (N.Y.Sup.) Tax books constituting the annual record need not embody the oath of the deputy commissioner in assessing taxes required by New York Charter, § 889.—*Lancaster Sea Beach Improvement Co. v. City of New York*, 146 N. Y. S. 734.

§ 974 (N.Y.Sup.) Under New York Charter, § 896, a deputy commissioner, or the board of taxes and assessments, in reducing a tax assessment need not hear testimony as to the reduction, in the absence of a request of the applicant for the reduction.—*Lancaster Sea Beach Improvement Co. v. City of New York*, 146 N. Y. S. 734.

The board of taxes and assessments need not keep a minute book to show its official action in passing on an application for a reduction of a tax assessment, as the record of the assessment roll and the annual record is sufficient.—*Id.*

§ 977 (N.Y.Sup.) In a suit to recover taxes paid, based on the invalidity of the assessment, evidence *held* sufficient to show that a reduction of the assessment was passed upon by the board of taxes and assessments, and not by one commissioner only.—*Lancaster Sea Beach Improvement Co. v. City of New York*, 146 N. Y. S. 734.

A taxpayer, suing to recover a tax paid on the ground that the assessment was invalid because reduced by one commissioner only, and not by the board of taxes and assessments, has the burden of proof.—*Id.*

§ 980 (N.Y.Sup.) Under Greater New York Charter, §§ 1032, 1035, an allegation of the answer, in an action to foreclose a tax lien, that defendants have failed to pay the taxes that became due on the property, as required by statute, *held* not a sufficient allegation of non-payment so as to accelerate the time when plaintiff's lien could be foreclosed; three years not having elapsed between the date of the sale and the commencement of the action.—*Altman v. Bungay Co. of New York*, 146 N. Y. S. 949.

The complaint, in an action to foreclose a tax lien, was defective for not alleging that, at the time of the sale, there were unpaid taxes, assessments, or water rents for which the city of New York had a lien which it could sell.—*Id.*

The complaint, in an action to foreclose a tax lien for property sold by the city of New York for taxes, should allege that the necessary statutory proceedings were duly had before the sale, the statute being the city's only authority for selling and transferring its lien.—*Id.*

Under Greater New York Charter, § 1032, *held* that the complaint, in an action to foreclose a tax lien, should allege that plaintiff, the holder of the transfer of tax lien, has elected to consider the amount thereof due for failure to pay taxes, etc.—*Id.*

MURDER.

See Homicide, §§ 128, 253.

MUTUAL AID SOCIETIES.

See Beneficial Associations.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 694-825.

NAMES.

See Courts, § 189; Criminal Law, §§ 339, 655, 713; Indictment and Information, § 81.

NATURALIZATION.

See Aliens, § 68.

NAVIGABLE WATERS.

See Eminent Domain, § 295; Waters and Water Courses.

II. LANDS UNDER WATER.

§ 37 (N.Y.Sup.) A deed by a municipal corporation of uplands adjoining a navigable creek, describing the land as running along the creek for a distance, thence by and with the creek for another distance, etc., did not pass the land under water to the middle of the stream.—In re West Farms Road in City of New York, 146 N. Y. S. 600.

NEGLIGENCE.

See Attorney and Client, §§ 106-129; Banks and Banking, §§ 148, 154, 190; Electricity, § 16; Executors and Administrators, § 318; Fences, § 24; Highways, § 184; Indemnity, § 233; Landlord and Tenant, § 165; Master and Servant, §§ 87-332; Mines and Minerals, § 118; Municipal Corporations, §§ 763-845; Railroads, §§ 216-350; Street Railroads, §§ 98, 99; Trial, §§ 234, 251.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(C) Condition and Use of Land, Buildings, and Other Structures.

§ 31 (N.Y.City Ct.) Under Tenement House Law, § 76, relating to lights in the public halls of tenement houses, and Laws 1912, c. 13, the owner of an apartment house is negligent in failing to maintain the required lights.—Faerber v. 969 Park Avenue, 146 N. Y. S. 783.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

§ 68 (N.Y.City Ct.) A person attempting to find his way through a darkened hallway of an apartment house without any light, and without requesting an employé accompanying him with a light in entering to lead him out, *held* guilty of contributory negligence.—Faerber v. 969 Park Avenue, 146 N. Y. S. 783.

IV. ACTIONS.

(A) Right of Action, Parties, Preliminary Proceedings, and Pleadings.

§ 119 (N.Y.Sup.) Where the complaint and bill of particulars in an action for damage from a horse running away alleged "defective harness" as the cause of the accident, the court properly refused to narrow the issue to the question of a defect in the snap-hook attaching the jaw-straps to the bit-rings.—Larkin v. Reid Ice Cream Co., 146 N. Y. S. 230.

(B) Evidence.

§ 121 (N.Y.Sup.) The falling of a bit from a horse's mouth when the driver attempted to restrain it, *held* prima facie proof of negligence.—Larkin v. Reid Ice Cream Co., 146 N. Y. S. 230.

§ 122 (N.Y.Sup.) In action by child injured while playing in the yard in the rear of the tenement house in which she lived, by a piece of wood falling from an adjoining building, ownership of the yard *held* immaterial, and dismissal for failure to prove title, or show that plaintiff was not a trespasser, was erroneous.—Strnad v. William Messer Co., 146 N. Y. S. 129.

§ 134 (N.Y.Sup.) In a servant's action against his employer and the owner of the building upon which he was employed, where there was nothing to connect such owner or any of its employes with the injury, a verdict against it *held* not justified.—Bergquist v. Oregon Apartments Co., 146 N. Y. S. 445.

(C) Trial, Judgment, and Review.

§ 136 (N.Y.Sup.) Where child in defendant's store fell down a stairway covered by a curtain, defendant's negligence and the negligence of the child's mother, *held* questions for the jury.—Ewing v. Farley, 146 N. Y. S. 549.

NEGOTIABLE INSTRUMENTS.

See Assignments, § 49; Banks and Banking, § 174; Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

See New Trial, §§ 99, 108.

NEWSPAPERS.

§ 1 (N.Y.Sup.) The relative strength of political parties is to be determined, for the purpose of designating newspapers for the publication of the Session Laws under County Law, § 20, by the vote at the last annual election, not the vote at the last election for governor, notwithstanding the definition of a political party contained in Election Law, § 3, subd. 8.—In re Pearsall, 146 N. Y. S. 1021.

Where two political parties nominated the same candidates, the strength of one of the parties for the purpose of designating a newspaper the publication of the session laws, is to be determined, not by the total number of votes cast upon both tickets for the candidates of that party, but by the number of votes cast upon the ticket of that party.—Id.

NEW TRIAL.

See Appeal, §§ 281, 977, 1177.

II. GROUNDS.

(C) Rulings and Instructions at Trial.

§ 40 (N.Y.Sup.) Where plaintiff's contention at the trial was that defendant's measure of damages on his counterclaim for breach of contract in not taking the full number of cars agreed was the difference between the contract

and the market price, he cannot urge, first, on motion for new trial, that defendant's recovery must be limited to the amount of plaintiff's deposit as liquidated damages.—*Poppenberg v. R. M. Owen & Co.*, 146 N. Y. S. 478.

(D) Disqualification or Misconduct of or Affecting Jury.

§ 52 (N.Y.Sup.) Where, in an action for breach of a contract, plaintiff was entitled to recover a total of \$2,015, *held*, that a verdict for \$455 will be set aside as being the result of compromise.—*Feinblatt v. Unterberg*, 146 N. Y. S. 188.

(F) Verdict or Findings Contrary to Law or Evidence.

§ 66 (N.Y.Sup.) Where notice of injury was not served on the municipality within the time required by its charter, but plaintiff on the trial gave evidence of mental and physical condition to relieve her of the default, the jury's finding in her favor will not be disturbed on motion for new trial.—*Haner v. Village of Owego*, 146 N. Y. S. 475.

§ 81 (N.Y.City Ct.) Where plaintiff in a malicious prosecution did not request a charge that under the uncontroverted evidence he was entitled to substantial damages, the court cannot, on motion, set aside a verdict for him for nominal damages, though he was entitled, as a matter of law, to substantial damages.—*Linitzky v. Gorman*, 146 N. Y. S. 313.

(H) Newly Discovered Evidence.

§ 99 (N.Y.Sup.) Where newly discovered evidence was merely cumulative, and the expectation of a different result on a new trial would only hang on the presumption that another jury might give credence to eight witnesses instead of four, the motion should have been overruled.—*Sachs v. Gasdorf*, 146 N. Y. S. 186.

§ 108 (N.Y.Sup.) Where the issue was as to the terms of a contract of employment, testimony of witnesses, who were present and heard the contract, could not be considered newly discovered evidence on motion for new trial.—*Sachs v. Gasdorf*, 146 N. Y. S. 186.

NEXT OF KIN.

See Descent and Distribution; Wills, § 697.

NOTES.

See Bills and Notes.

NOTICE.

See Bills and Notes, §§ 335-362; Compromise and Settlement, § 2; Courts, § 190; Covenantants, §§ 84, 121; Highways, § 124; Insurance, §§ 354, 378; Landlord and Tenant, § 116; Master and Servant, § 252; Mechanics' Liens, §§ 139, 146; Mortgages, § 510; Municipal Corporations, §§ 366, 812; Vendor and Purchaser, § 228; Wills, § 307.

NUISANCE.

See Limitation of Actions, § 55; Railroads, § 222.

I. PRIVATE NUISANCES.

(A) Nature of Injury and Liability Therefor.

§ 3 (N.Y.) A barbed wire fence between defendant's land and the grounds of a country school is not a nuisance as a matter of law.—*Barr v. Green*, 104 N. E. 619, 210 N. Y. 252.

(D) Actions for Damages.

§ 50 (N.Y.Sup.) A private nuisance, consisting of a gas plant emitting black smoke heavily charged with soot, which settled on plaintiff's adjoining houses, entitles plaintiff to nominal damages.—*Gibbons v. New York Cent. & H. R. Co.*, 146 N. Y. S. 288.

§ 53 (N.Y.Sup.) Where plaintiff proved that the rental value of his houses had decreased by defendant's maintenance of a gas plant close by, which was a nuisance, the proof was sufficient to take the question of plaintiff's right to compensatory damages to the jury, and was not affected by the fact that the neighborhood was devoted largely to manufacturing.—*Gibbons v. New York Cent. & H. R. Co.*, 146 N. Y. S. 288.

OBJECTIONS.

See Courts, § 87.

OBLIGATION OF CONTRACTS.

See Constitutional Law, § 120.

OBSTRUCTING JUSTICE.

See Conspiracy, § 47.

OBSTRUCTIONS.

See Easements, §§ 58-64.

OFFICERS.

See Corporations, §§ 283-320, 413-432, 640; Judges; Mandamus, §§ 10, 73.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 107 (N.Y.Sup.) Where an administrative officer is clothed by statute with judicial or quasi judicial powers, such powers can be exercised only in the manner and under the circumstances prescribed by the statute, and any attempted exercise thereof, in any other manner or under different circumstances, is a nullity.—*Bandler v. Hill*, 146 N. Y. S. 98.

OPINION EVIDENCE.

See Evidence, §§ 474-568.

OPTIONS.

See Frauds, Statute of, § 120; Mines and Minerals, § 53.

ORDERS.

See Appeal.

ORDINANCES.

See Municipal Corporations, §§ 116, 603.

PARENT AND CHILD.

See Adoption.

PAROL EVIDENCE.

See Evidence, § 441.

PARTIES.

See Appeal, § 151; Bills and Notes, §§ 496, 523; Contracts, §§ 186, 187, 330; Criminal Law, § 59; Mortgages, § 427; Wills, § 697.

I. PLAINTIFFS.

(A) Persons Who may or must Sue.

§ 7 (N.Y.Sup.) Partners leasing a theater to an amusement company, and thereafter taking in another partner, on the company's breach held entitled to sue alone as trustees of an express trust in favor of such subsequent partner.—Weber v. Columbia Amusement Co., 146 N. Y. S. 53.

IV. DESIGNATION AND DESCRIPTION.

§ 66 (N.Y.Co.Ct.) Where a debtor uses two given names, he may be sued by either.—In re Korpilinski, 146 N. Y. S. 859.

§ 67 (N.Y.Co.Ct.) Where a judgment debtor whose given name was "Maryian" was named in the summons and complaint as "Mike," which name he gave to the judgment creditor and was the one by which he was generally known, the court acquired jurisdiction of his person.—In re Korpilinski, 146 N. Y. S. 859.

PARTNERSHIP.

See Attorney and Client, § 44; Contracts, § 159; Joint Adventures, § 4; Parties, § 7.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Representation of Firm by Partner.

§ 153 (N.Y.) The members of a copartnership are civilly liable for torts committed by any member of the firm in the course of the partnership business, though they have no knowledge thereof.—Kavanaugh v. McIntyre, 104 N. E. 135, 210 N. Y. 176.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

(C) Distribution and Settlement Between Partners and Their Representatives.

§ 310 (N.Y.Sup.) Where partners on dissolution divided the business between themselves, plaintiff taking the Albany office, which was the main and most important one, and defendant organizing a corporation to operate the New York office, he was not liable to account to the receiver of the firm for the good will of the

old firm, alleged to have been appropriated by him.—Somers v. Harris, 146 N. Y. S. 572.

(D) Actions for Dissolution and Accounting.

§ 327 (N.Y.Sup.) Pleadings in proceedings for the dissolution of a partnership held not to present an issue as to plaintiff's right to recover from defendant the alleged good will of the business, alleged to have been appropriated by him.—Somers v. Harris, 146 N. Y. S. 572.

PASSENGERS.

See Carriers, § 314.

PAVING.

See Street Railroads, §§ 38-58.

PAWNBROKERS.

See Weapons, § 4.

PAYMENT.

See Accord and Satisfaction; Bills and Notes, § 430; Contribution, §§ 4, 9; Subrogation: Tender.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 63 (N.Y.Sup.) A plea of payment renders admissible evidence of payment in any form as by any agreement between the parties which would operate as an extinguishment of the debt, such as provision by a will which has been accepted, admissible.—Newcomb v. La Roe, 146 N. Y. S. 133.

§ 65 (N.Y.Sup.) The law assumes that an evidence of debt given by one person to another will be found in the possession of the creditor, and when it is in the possession of the debtor, there is a strong presumption that the debt has been canceled by payment or gift.—Hall v. O'Brien, 146 N. Y. S. 551.

§ 65 (N.Y.Sup.) Where a cause of action for the recovery of a distinct sum is based upon nonpayment, the burden of pleading and proving nonpayment is upon plaintiff, so that the fact of nonpayment is put in issue by a denial.—Altman v. Bungay Co. of New York, 146 N. Y. S. 949.

PENALTIES.

See Carriers, § 20; Damages, §§ 76, 81.

PENSIONS.

See Mandamus, § 143.

PERJURY.

See Attorney and Client, § 53.

PERPETUITIES.

§ 6 (N.Y.Sup.) A devise of a testator's real and personal property, in trust for the benefit of his minor children, held not to create a trust for their maintenance during their lives, unlawfully suspending alienation, but to create a mere passive trust; the property vest-

ing immediately in the minors.—*Steinert v. Steinert*, 146 N. Y. S. 106.

§ 6 (N. Y. Sup.) A trust of property to be held for the benefit of children of the maker of the trust who were sick is an illegal trust as suspending the power of alienation for more than two lives.—*Casey v. Casey*, 146 N. Y. S. 348.

§ 6 (N. Y. Sup.) Where testator devised his property in trust for at least 25 years to pay the income to C., for life held that, though the limitation of 25 years was invalid, there was a valid trust for C. during her life.—*Davis v. McMahon*, 146 N. Y. S. 657.

§ 7 (N. Y. Sup.) A devise of corporate stock in a trust for a fixed period of 25 years held invalid as a perpetuity in contravention of Personal Property Law, § 11, in so far as it was sought to suspend power of alienation for a fixed period of 25 years.—*Davis v. McMahon*, 146 N. Y. S. 657.

PERSONAL INJURIES.

See Appeal, §§ 1008, 1050, 1174, 1177; Carriers, § 314; Compromise and Settlement, § 2; Electricity, § 16; Fences, § 24; Highways, § 184; Indemnity, § 18; Landlord and Tenant, § 165; Master and Servant, §§ 87-332; Mines and Minerals, § 118; Statutes, § 47; Street Railroads, §§ 98, 99; Trial, §§ 127, 251.

PEWS.

See Religious Societies, §§ 26, 31.

PHYSICIANS AND SURGEONS.

See Libel and Slander, § 12.

PICTURES.

See Statutes, § 217; Torts, § 8.

PLEADING.

See Appeal, §§ 888, 889; Attorney and Client, § 165; Banks and Banking, § 80; Carriers, § 374; Contribution, § 9; Corporations, § 320; Courts, §§ 189, 190; Death, § 48; Ejectment, §§ 63, 66; Fraud, § 41; Husband and Wife, § 281; Indictment and Information; Landlord and Tenant, §§ 298, 305; Libel and Slander, §§ 80-97; Limitation of Actions, § 180; Negligence, § 119; Partnership, § 327; Payment, § 63; Specific Performance, § 114; Tender, §§ 9, 22.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 8 (N. Y. Sup.) In an action for breach of contract, the complaint held to state a cause of action under Code Civ. Proc. § 533, authorizing a party to plead performance of a contract without stating the facts, and also because it contained a detailed statement of the performance of conditions precedent.—*Moghabghab v. Sherman & Sons Co.*, 146 N. Y. S. 392.

§ 8 (N. Y. Sup.) Allegations of an answer relating to transactions in which defendant claimed an interest with plaintiff held to state a mere conclusion.—*Schwabe v. Herzog*, 146 N. Y. S. 644.

§ 34 (N. Y. Sup.) Upon demurrer the complaint is to be favorably construed for the pleader.—*Page v. United Traction Co.*, 146 N. Y. S. 530.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(C) Traverses or Denials and Admissions.

§ 121 (N. Y. Sup.) A denial of knowledge or information sufficient to form a belief as to allegations of the complaint in an action to foreclose a tax lien that the purchaser at the sale duly assigned the transfer of the tax lien and all moneys due thereunder to plaintiff held not frivolous, and not objectionable as raising no issue.—*Altman v. Bungay Co. of New York*, 146 N. Y. S. 949.

(E) Set-Off, Counterclaim, and Cross-Complaint.

§ 142 (N. Y. Sup.) In an action by a domestic corporation for goods sold, an answer alleging that defendant and others had subscribed \$25 to a co-operative association, and were to receive that amount back either in money or trade on electing to withdraw, and that they had traded with plaintiff company, held not to constitute a defense.—*G. H. McGill Co. v. Underwood*, 146 N. Y. S. 362.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§ 165 (N. Y. Sup.) Where several matters were set up in defendant's affirmative defense, it is improper, under Code Civ. Proc. § 516, for the court to direct plaintiff to reply to only one paragraph of the special defense.—*Paterno Bros. v. Frazee*, 146 N. Y. S. 1072.

V. DEMURRER OR EXCEPTION.

§ 211 (N. Y.) A motion to dismiss the complaint at the opening of the trial without receiving any proof is equivalent to a demurrer; and the sole question is whether the complaint was sufficient to give plaintiff a standing sufficient to enable him to make out his case by proof.—*Chism v. Smith*, 104 N. E. 131, 210 N. Y. 198.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 248 (N. Y. Sup.) Where the contract sued on, as well as plaintiffs' contentions, and the opinion on a former appeal, indicated that plaintiffs' cause of action was based upon a contract to manufacture and deliver goods, held, that defendant could not claim to have been surprised by an amendment of the complaint upon a second trial so as to allege an action for damages for defendants' failure to deliver goods it had agreed to manufacture.—*Goldowitz v. Henry Kupfer & Co.*, 146 N. Y. S. 189.

IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

§ 318 (N.Y.Sup.) Where the master set up the servant's contributory negligence, negligence of fellow servants, and assumption of risks, a bill of particulars may be required setting forth the negligence of the plaintiff and of his fellow servants, and the risks assumed.—*Fernet v. James Stewart & Co.*, 146 N. Y. S. 1.

A defendant will not be ordered to furnish a bill of particulars of allegations in his answer which are wholly superfluous.—*Id.*

§ 323 (N.Y.Sup.) An order for a bill of particulars should not require the defendant to disclose to the plaintiff substantially all the evidence necessary to support his claim.—*Fernet v. James Stewart & Co.*, 146 N. Y. S. 1.

X. FILING, SERVICE, AND WITHDRAWAL.

§ 339 (N.Y.Sup.) Where, in replevin by a foreign corporation having no agent on whom process might be served in New York, plaintiff filed a reply to a counterclaim for fraud, it could not withdraw the same to demur to the counterclaim, on the ground that the matters pleaded were not available as a counterclaim in replevin.—*Williams Patent Crusher & Pulveriser Co. v. Lythe Tile Co.*, 146 N. Y. S. 306.

XI. MOTIONS.

§ 343 (N.Y.Sup.) Where the petition set out two causes of action not separately stated or numbered, and there was no demurrer on the ground of improper joinder of actions, and where one of such causes of actions was not within the statute of limitations, a motion for judgment on the pleadings *held* properly denied.—*Reusens v. Gerard*, 146 N. Y. S. 86.

§ 345 (N.Y.Sup.) Where the complaint contained three causes of action, though not separately stated and numbered, judgment for defendant on the pleadings could not be granted if any of the causes accrued within the statutory period of limitations.—*Ball v. Gerard*, 146 N. Y. S. 81.

§ 350 (N.Y.Sup.) The issues of fact raised by the pleadings cannot be determined on a motion for judgment on the pleadings.—*Theobald v. United States Rubber Co.*, 146 N. Y. S. 597.

§ 358 (N.Y.Sup.) In action against a corporation on contract, answer, denying knowledge or information as to making or breach of contract, denying its execution, and alleging that if signed in defendant's name it was signed without authority, *held* improperly stricken as frivolous.—*Sam v. Mohawk Clothing Co.*, 146 N. Y. S. 567.

PLEDGES.

See Limitation of Actions, § 100; Weapons, § 4.

§ 25 (N.Y.Sup.) A pledgee does not destroy the pledge or affect his rights under it by prosecuting his debt to judgment.—*Hills v. Flynn*, 146 N. Y. S. 508.

§ 33 (N.Y.Sup.) Pledgor *held* entitled to sue the pledgees for an accounting, where they had disposed of the pledged contract without foreclosing the lien or giving notice.—*Beugger v. Ashley*, 146 N. Y. S. 910.

§ 33 (N.Y.Sup.) Plaintiff, in replevin for his stock pledged as security for the loan by defendant to C. on C.'s note, *held* entitled to the arrangement made between C. and defendant, when on the day said note matured defendant accepted C.'s demand note, as any arrangement extending payment or changing the relation of the parties would discharge the lien.—*Nixon v. Carnegie Trust Co.*, 146 N. Y. S. 954.

POISONS.

See Insurance, §§ 788, 817, 825.

POLICE.

See Municipal Corporations, §§ 185-189.

POLICE POWER.

See Constitutional Law, §§ 81, 255, 274.

POLICY.

See Insurance.

POOR LAWS.

See Army and Navy, § 50.

POSSESSION.

See Adverse Possession; Landlord and Tenant, §§ 129, 134.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PREFERENCES.

See States, § 110; Subrogation, §§ 33, 35.

PREMIUMS.

See Insurance, § 182.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRESUMPTIONS.

See Appeal, § 925; Criminal Law, § 325; Evidence, §§ 60-77.

PRINCIPAL AND ACCESSORY.

See Criminal Law, § 59.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Corporations, §§ 283-320, 413-432; Husband and Wife, § 19; Insurance, § 84.

I. THE RELATION.

(A) Creation and Existence.

§ 22 (N.Y.Sup.) The testimony of an alleged agent that he had authority to act for defendant in employing plaintiff was a mere conclusion and not competent proof of such authorization.—*Powers v. New York Headquarters Knights of Columbus*, 146 N. Y. S. 193.

§ 23 (N.Y.Sup.) In an action by a person not a broker by occupation to recover commissions for procuring a tenant, in which defendant denied that plaintiff was employed to procure a tenant, a verdict for plaintiff *held* contrary to the weight of the evidence.—Weinberg v. Steel, 146 N. Y. S. 1012.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(B) Compensation and Lien of Agent.

§ 81 (N.Y.Sup.) An agent employed to carry out an unlawful transaction cannot recover compensation from his principal either upon an express or implied contract, in view of the common-law maxim, "*Frustra legis auxilium quaerit qui in legem committit*."—Cahill v. Gilman, 146 N. Y. S. 224.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

§ 136 (N.Y.Sup.) An alleged agent, who signed a note personally, the name of his principal not appearing, was liable thereon, though the payee knew that he was merely an agent.—Scantlebury v. Talcott, 146 N. Y. S. 184.

(B) Undisclosed Agency.

§ 143 (N.Y.Sur.) Where claimant's father, who was formerly in the undertaking business, made over his business to his son, but sometimes acted as his son's agent in receiving orders for funerals, etc., and so acted in contracting for decedent's funeral, claimant could enforce such contract against the estate for such funeral expenses.—In re Pfeiffer's Estate, 146 N. Y. S. 1080.

§ 146 (N.Y.Sup.) Where the principal is not disclosed by the written contract, which was signed by defendant as agent, plaintiff may proceed personally against the agent as the ostensible principal.—Beebe v. Worth, 146 N. Y. S. 146.

PRINCIPAL AND SURETY.

See Appeal, § 1227; Attorney and Client, §§ 106-129; Contracts, § 810; Courts, § 190; Guaranty; Indemnity; Subrogation.

I. CREATION AND EXISTENCE OF RELATION.

(A) Between Individuals.

§ 41 (N.Y.Sup.) The obligees in a bond given to secure them against damage on a contract were not bound by fraudulent representations made to the surety by the other party to the contract, without their knowledge or participation.—Damon v. Empire State Surety Co., 146 N. Y. S. 996.

§ 42 (N.Y.Sup.) The obligee, before accepting the bond of a surety, is bound to disclose facts within his knowledge, the concealment of which would amount to a suppressio veri, and, to defeat liability, the concealment thereof need not inure to the benefit of the obligee, if it operates

to the prejudice of the surety.—Damon v. Empire State Surety Co., 146 N. Y. S. 996.

Surety on bond given to secure party to contract against damage *held* relieved of liability by the obligee's nondisclosure of facts concerning the contract and notes recited therein, as accepted by the other party to the contract.—Id.

III. DISCHARGE OF SURETY.

§ 104 (N.Y.Sup.) An extension of the time of payment to the debtor discharges a surety who did not consent to such extension.—Orth v. Anderson, 146 N. Y. S. 689.

§ 112 (N.Y.Sup.) Where, after a note signed by defendant's wife for his accommodation was due, defendant and the payee, as principal and surety, executed a new note to take its place, which note the payee placed to his credit in a bank, giving the bank his check for the amount of the original note which was marked "paid," *held*, that the wife's obligation as surety was thereby extinguished.—Orth v. Anderson, 146 N. Y. S. 689.

PRIORITIES.

See Executors and Administrators, § 263.

PRIVATE ROADS.

See Constitutional Law, § 302; Easements.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, § 46; Witnesses, § 202.

PRIZE FIGHTING.

See Constitutional Law, §§ 120, 274; Injunction, § 75; Theaters and Shows, § 1.

§ 1 (N.Y.Sup.) The offense of prize fighting was not known at common law, though persons engaged in such contest were answerable for assault and battery, breach of the peace, or riot; "prize fighting" being defined as the act of fighting for a prize or boxing in public for a reward or wager.—Fitzsimmons v. New York State Athletic Commission, 146 N. Y. S. 117.

PROBATE.

See Wills, §§ 302-484.

PROCESS.

See Appearance; Execution; Injunction.

PROHIBITION.

See Intoxicating Liquors.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

See Adverse Possession; Dedication; Eminent Domain; Good Will; Woods and Forests, § 8.

PROVINCE OF COURT AND JURY.

See Criminal Law, § 742.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 366-492.

PUBLIC LANDS.**IV. COLONIAL AND PROPRIETARY GRANTS.**

§ 192 (N.Y.Sup.) A colonial grant patent to Q. and others, for and on behalf of themselves and their associates, the freeholders and inhabitants of Westchester, vested ownership in the town in its corporate capacity.—In re West Farms Road in City of New York, 146 N. Y. S. 600.

PUBLIC POLICY.

See Contracts, §§ 108, 187.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads.

PUBLIC USE.

See Dedication; Eminent Domain.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, §§ 183½, 203.

PUNISHMENT.

See Contempt, § 82.

QUANTUM MERUIT.

See Work and Labor.

QUASHING.

See Indictment and Information, §§ 187, 144.

QUESTIONS OF LAW AND FACT.

See Trial, §§ 140, 148.

QUIETING TITLE.**I. RIGHT OF ACTION AND DEFENSES.**

§ 10 (N.Y.Sup.) A party's possession of land under color of title warrants him in maintaining a suit to quiet his title.—Weeks v. Dominy, 146 N. Y. S. 624.

RAILROADS.

See Carriers; Constitutional Law, §§ 246, 302; Contracts, §§ 54, 187, 330; Easements, §§ 23, 64; Eminent Domain, §§ 56, 66; Reformation of Instruments, § 26; Street Railroads; Taxation, §§ 117, 171½; Woods and Forests, § 8.

II. RAILROAD COMPANIES.

§ 18 (N.Y.Sup.) The validity of the franchise under which a railroad company is operating, can be attacked only in a proper proceeding by the state and not in a property owner's action

for injunction and damages as for a nuisance.—Willson v. New York Cent. & H. R. R. Co., 146 N. Y. S. 208.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

§ 79 (N.Y.Sup.) Whether a terminal company is exceeding its corporate powers in attempting to operate tracks through certain public streets is a matter to be determined in an action by the Attorney General in the name of the people.—People ex rel. East River Terminal R. R. v. State Board of Tax Com'rs, 146 N. Y. S. 112.

X. OPERATION.**(A) Duty to Operate.**

§ 216 (N.Y.Sup.) A contract under which a private siding has been connected with a railroad, no time being fixed for its continuance, is terminable at the carrier's election, when interest of the public demands.—New York Cent. & H. R. R. Co. v. General Electric Co., 146 N. Y. S. 322.

§ 222 (N.Y.Sup.) Where there was no allegation in the complaint that the nuisance was the result of negligent, unskillful, or improper operation of a railroad, plaintiff could only recover damages resulting from unlawful operation.—Willson v. New York Cent. & H. R. R. Co., 146 N. Y. S. 208.

Evidence, in a property owner's action for a nuisance in the operation of a railroad, held to show that the railroad was not laid out and operated on park land, as alleged by plaintiff.—Id.

Where tracks have been located for over 50 years under grant from a city without any question being raised by the city as to the correctness of the location, it will be presumed that the tracks are properly located.—Id.

Where, in an action for a nuisance in the operation of a railroad, plaintiff's land was about 400 feet from defendant's track and separated therefrom by a driveway and park land, he was not entitled to the rights of an abutting owner.—Id.

Where it is shown that, though plaintiff is not an abutting owner, his premises are injured by noises, smoke, soot, and odors arising as claimed, from the operation of defendant's railroad, the burden is on defendant to prove its authority to commit the nuisance.—Id.

A railroad operating under a franchise on land legally acquired is not responsible to the owners of neighboring property for merely consequential damages necessarily incident to the operation of its trains.—Id.

That a railroad company was operating on its own property under a franchise held not to relieve it from liability for nuisances arising from its use of soft coal and storing of live stock in the vicinity of a residential district.—Id.

In a property owner's action for a nuisance in the operation of a railroad, the fact that plaintiff's property was owned by the grantor of defendant's right of way at the time of the grant was no defense as to acts not within the contemplation of the parties to the conveyance.—Id.

Where no permanent injury was done to plaintiff's freehold by the improper operation of de-

fendant's railroad, and there was no actual damage for which recovery could be had, he was entitled to merely nominal damages in connection with an injunction.—*Id.*

(F) Accidents at Crossings.

§ 350 (N.Y.Sup.) In an action for damages to an automobile which became stalled on a railroad crossing and was struck by a train, evidence *held* to make questions for the jury as to the negligence of the railroad company and of the driver of the automobile.—*Packard v. New York, O. & W. Ry. Co.*, 146 N. Y. S. 878.

RATIFICATION.

See Corporations, §§ 308, 312; Municipal Corporations, § 76.

REAL ACTIONS.

See Ejectment; Quieting Title.

REASONABLE DOUBT.

See Criminal Law, § 1078.

RECEIVERS.

See Banks and Banking, § 317; Corporations, § 568.

RECEIVING STOLEN GOODS.

See Indictment and Information, § 144.

RECEPTION OF EVIDENCE.

See Criminal Law, § 662; Trial, § 105.

RECORDS.

See Appeal, § 569; Criminal Law, §§ 1048, 1088, 1134; Highways, § 77.

§ 6 (N.Y.Sup.) A "record" of a written instrument, the object of which is not only perpetuity but publicity, implies an actual transcription by the proper officer.—*People ex rel. Simons v. Dowling*, 146 N. Y. S. 919.

REFERENCE.

See Costs, §§ 9, 57.

REFORMATION OF INSTRUMENTS.

See Election of Remedies, § 7; Insurance, § 143.

I. RIGHT OF ACTION AND DEFENSES.

§ 13 (N.Y.Sup.) A deed intended to convey premises bounded by a blazed and monumented line, but which by mistake described such line as within and wholly on the grantee's land, should be reformed so as to express and carry out the true agreement of the parties.—*Myer v. Idlewood Ass'n*, 146 N. Y. S. 469.

§ 18 (N.Y.Sup.) Where parties, intending to reduce a parol agreement to writing, make a contract different from that intended, because of a misunderstanding of the terms used, equity will relieve by reforming the instrument,

whether such mistake is of law or of fact.—*Myer v. Idlewood Ass'n*, 146 N. Y. S. 469.

§ 26 (N.Y.) Where a switching contract was intended to be for the benefit of certain blast furnaces on the owner's premises by whomsoever operated, and also in the interest of the owner, but the contract, as written, did not express such intent, but limited the benefit of the contract to the then lessee of the furnaces, the owner's assignee of one of the furnaces could have the contract reformed.—*Baird v. Erie R. Co.*, 104 N. E. 614, 210 N. Y. 225.

II. PROCEEDINGS AND RELIEF.

§ 30 (N.Y.) Equity has jurisdiction to correct mistakes in written instruments occurring by accident, fraud, or otherwise at the suit of the party injured by the mistake.—*Baird v. Erie R. Co.*, 104 N. E. 614, 210 N. Y. 225.

§ 45 (N.Y.Sup.) In an action to reform a trust deed conveying property in trust to pay plaintiff a certain sum upon the sale of the premises, evidence *held* not to show that a provision for the payment of interest to plaintiff upon such sum was omitted by fraud or mutual mistake.—*Disbrow v. Disbrow*, 146 N. Y. S. 63.

To authorize the reformation of a written instrument, it must appear by clear and convincing evidence that the mutual agreement, claimed to have been made, was in fact made, and that the instrument fails to express such agreement, either by mutual mistake or by mistake of one party induced by the fraud of the other.—*Id.*

§ 45 (N.Y.Sup.) In a suit to reform an endowment insurance policy, evidence *held* to show that the policy was taken out wholly for the wife's benefit with intent for her to receive the proceeds whether her husband lived or died.—*Ulman v. Newman*, 146 N. Y. S. 696.

REINSURANCE.

See Insurance, §§ 679, 686.

RELEASE.

See Accord and Satisfaction; Husband and Wife, § 278.

RELIGIOUS SOCIETIES.

See Waters and Water Courses, § 203.

§ 26 (N.Y.Sup.) A pewholder has no title to the soil nor to the edifice, but possesses only a limited usufructuary right to use the pew when the building is open for services, subject to the reasonable regulations of the church.—*Witthaus v. St. Thomas' Church in City and County of New York*, 146 N. Y. S. 279.

The rights of a pewholder exist only so long as the church stands, and, when the church edifice becomes so dilapidated that it must be removed or is destroyed by fire, his rights are gone and he is entitled to no indemnity.—*Id.*

Conveyance of a pew, so long as the "church" should endure, *held* to refer to the church edifice and not to the denomination as an ecclesi-

astical body, and hence pewholder's rights ceased upon destruction of the building by fire.—Id.

§ 31 (N.Y.Sup.) Where a pewholder is deprived of his pew for convenience or from expediency and not from necessity, his remedy is by an action at law for damages.—Witthaus v. St. Thomas' Church in City and County of New York, 146 N. Y. S. 279.

In pewholder's action to compel allotment of pews in new building, unaccepted and withdrawn offer to pay plaintiff the value of his pews held not admissible to show his absolute ownership thereof.—Id.

REMAINDERS.

See Judgment, § 713; Wills, § 634.

§ 17 (N.Y.Sup.) Where an heir of a remainderman having a vested interest in the property of a trust subject to a life estate assigned his interest therein, limitations did not run against the assignee's right to enforce the pledge until the death of the life tenant.—Hills v. Flynn, 146 N. Y. S. 508.

REMOVAL.

See Executors and Administrators, § 35; Municipal Corporations, § 185.

REPAIRS.

See Landlord and Tenant, § 152.

REPEAL.

See Statutes, §§ 162, 170.

REPLEVIN.

See Pleading, § 339.

I. RIGHT OF ACTION AND DEFENSES.

§ 8 (N.Y.Sup.) One has only an equitable right or lien against cars, which can be reduced to possession only by suit in equity, and so cannot maintain replevin for them, the owners having merely assigned to him as collateral security their right, title, and interest therein, and not turned over the possession.—Gandy v. Collins, 146 N. Y. S. 89.

III. PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY.

§ 25 (N.Y.Sup.) Proceedings in rem to gain possession of or sell cars, which remained in New York in the possession of the owners, notwithstanding they assigned their right, title, and interest therein as security for their note, a contract of another state, must be governed by the *lex rei sitæ*.—Gandy v. Collins, 146 N. Y. S. 89.

REPLICATION.

See Pleading, § 165.

REPLY.

See Pleading, § 165.

REQUESTS.

See Criminal Law, § 884; Trial, § 260.

RESIDENCE.

See Domicile.

RES JUDICATA.

See Judgment, §§ 641-717.

RESTITUTION.

See Criminal Law, § 890.

RESTRICTIONS.

See Covenants, §§ 51, 79, 84, 108.

RESULTING TRUSTS.

See Trusts, §§ 65, 68.

RETAINER.

See Attorney and Client, §§ 63-77.

REVENUE.

See Taxation.

REVIEW.

See Appeal; Certiorari; Criminal Law, §§ 1184-1170½.

REVIVAL.

See Abatement and Revival.

REVOCATION.

See Dedication, § 38; Trusts, § 166.

RIGHT OF WAY.

See Easements.

RISKS.

Assumption, see Master and Servant, §§ 209, 295.

ROADS.

See Highways.

ROBBERY.

See Criminal Law, § 566.

RUNNING WITH THE LAND.

See Covenants, §§ 79, 84.

SALES.

See Bankruptcy, § 424; Brokers; Corporations, § 376; Deeds; Executors and Administrators, § 148; Frauds, Statute of, § 90; Intoxicating Liquors; Mortgages, §§ 510-534; Taxation, §§ 685, 691, 770½; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 21 (N.Y.Sup.) If a contract of sale was valid, an agreement by the buyer's agent to pay a higher price than that agreed upon was without consideration.—Kuhmarker Mfg. Co. v. Hills, 146 N. Y. S. 1013.

II. CONSTRUCTION OF CONTRACT.

§ 87 (N.Y.Sup.) Where no time of payment for goods sold is fixed, the law presumes that payment was to be made upon delivery.—*Baccaria v. Landers*, 146 N. Y. S. 153.

§ 88 (N.Y.Sup.) Where contract for the sale of goods to be imported provided that orders were subject to reasonable delay in delivery, whether there was an unreasonable delay held a jury question.—*Salinger v. Stern*, 146 N. Y. S. 309.

IV. PERFORMANCE OF CONTRACT.**(C) Delivery and Acceptance of Goods.**

§ 152 (N.Y.Sup.) When the buyer of goods to be manufactured and sold to it requested to be permitted to select the colors in which the goods were to be furnished, as required by the contract, and the seller refused to permit such selection and stated that he would not comply with his contract, the buyer had sufficiently performed the condition requiring him to select the color of the goods.—*Goldowitz v. Henry Kuper & Co.*, 146 N. Y. S. 189.

§ 172 (N.Y.Sup.) Where a contract for the sale of green spruce timber contemplated a delivery thereof from a specified tract of land, the seller was not liable for failure to further perform after the destruction of the timber on the land by fire without his fault.—*International Paper Co. v. Rockefeller*, 146 N. Y. S. 371.

§ 181 (N.Y.Sup.) Evidence, in an action for breach of contract of sale of young apple trees, they to be three certain varieties, held insufficient to show a substantial breach thereof, as to varieties.—*Wood v. Sherwood*, 146 N. Y. S. 465.

VII. REMEDIES OF SELLER.**(F) Actions for Damages.**

§ 371 (N.Y.Sup.) Under the terms of a contract for the purchase of a certain number of motor cars in consideration of an exclusive agency therefor, held upon a claim for damages for the agent's breach that a physical tender of the cars purchased was not a necessary condition of recovery.—*Poppenberg v. R. M. Owen & Co.*, 146 N. Y. S. 478.

§ 384 (N.Y.Sup.) Under Personal Property Law (Consol. Laws, c. 41) § 145, as added by Laws 1911, c. 571, prescribing the measure of damages for nonacceptance of goods, held that on breach of an agent's contract to buy a certain number of motor cars of the distributor handling the manufacturer's entire output, he was entitled to recover the difference between the agreed price and the cost to him of furnishing such cars.—*Poppenberg v. R. M. Owen & Co.*, 146 N. Y. S. 478.

VIII. REMEDIES OF BUYER.**(C) Actions for Breach of Contract.**

§ 405 (N.Y.Sup.) Provision in a contract of sale of young apple trees, "Any stock that does not prove to be true to name as labeled is to be replaced free or purchase price refunded," applies only to incidental errors, and does not bar

recovery of damages for substantial breach of the contract as to kinds of trees furnished.—*Wood v. Sherwood*, 146 N. Y. S. 465.

§ 416 (N.Y.Sup.) In an action for breach of a contract for the sale of spruce timber on a specified tract, defendant held entitled to show his understanding of the amount of green spruce on the tract when the contract was made.—*International Paper Co. v. Rockefeller*, 146 N. Y. S. 371.

§ 418 (N.Y.) The buyer's measure of damages for a delivery of unmerchantable goods is the difference between the value of the goods delivered and what their value would have been had they corresponded to the contract.—*Clarke v. Schmidt*, 104 N. E. 613, 210 N. Y. 211.

§ 418 (N.Y.Sup.) The measure of damages for a seller's breach of a contract to deliver spruce wood for the making of paper pulp was the difference between the contract price and the price at which wood could be purchased or procured at the place of delivery.—*International Paper Co. v. Rockefeller*, 146 N. Y. S. 371.

SATISFACTION.

See Accord and Satisfaction.

SCAFFOLDS.

See Master and Servant, § 103.

SEALS.

See Contracts, § 330.

SEARCHES AND SEIZURES.

See Intoxicating Liquors, §§ 250-255.

SEPARATION.

See Husband and Wife, §§ 278-281.

SERVANTS.

See Master and Servant.

SERVICES.

See Work and Labor.

SERVITUDE.

See Easements.

SET-OFF AND COUNTERCLAIM.

See Judgment, § 517.

I. NATURE AND GROUNDS OF REMEDY.

§ 8 (N.Y.Sup.) Where plaintiff's vendor, to give the land a fictitious value, executed a mortgage thereon without consideration, which plaintiff assumed as a part of the price, the vendor being insolvent, plaintiff was entitled to recover damages to be set off against the mortgage, which was a cloud on his title.—*Worcester-Brooklyn Realty Co. v. Bailey*, 146 N. Y. S. 59.

II. SUBJECT-MATTER.

§ 31 (N.Y.Sup.) In an action by a trustee in bankruptcy, a judgment for costs recovered against the bankrupt after the trustee's appointment, in an action by the bankrupt on the same claim, could not be offset.—*Hoeft v. American Laundry Machinery Mfg. Co.*, 146 N. Y. S. 621.

III. OPERATION AND EFFECT.

§ 57 (N.Y.Sup.) In an action for wages, where defendant admitted the claim, but interposed a counterclaim for a less amount, plaintiff was, at all events, entitled to a judgment for the difference, and a dismissal of the complaint was erroneous.—*Gasparowicz v. Oshinsky*, 146 N. Y. S. 1080.

SETTLEMENT.

See Accord and Satisfaction; Account Stated.

SIGNATURES.

See Banks and Banking, § 148.

SMOKE.

See Nuisance, § 50.

SOCIETIES.

See Associations.

SPECIFIC PERFORMANCE.**II. CONTRACTS ENFORCEABLE.**

§ 47 (N.Y.Sup.) An oral contract for the gift or conveyance of property, which the donee has accepted and partly performed by going into possession and making improvements, will be specifically enforced in order to prevent a fraud being practiced upon him by inducing him to expend money upon improvements upon the faith of the contract.—*Messiah Home for Children in City of New York v. Rogers*, 146 N. Y. S. 711.

IV. PROCEEDINGS AND RELIEF.

§ 114 (N.Y.Sup.) Complaint *held* to state a cause of action for the specific performance of an oral contract to give and convey to plaintiff a lot and a building thereon to be used as a childrens' house free from any cloud or lien.—*Messiah Home for Children in City of New York v. Rogers*, 146 N. Y. S. 711.

SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

STARE DECISIS.

See Courts, § 89.

STATEMENT.

See Witnesses, §§ 388-400.

STATES.

See Subrogation.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

§ 110 (N.Y.Sup.) State *held* entitled to a preference upon the liquidation of an insolvent trust company, designated as a state depository, in which state funds were deposited.—*United States Fidelity & Guaranty Co. v. Carnegie Trust Co.*, 146 N. Y. S. 804.

§ 110 (N.Y.Sup.) The state's common-law right of preference as a creditor is not so inherent or exclusive in the state as a sovereignty that it cannot be assigned.—*United States Fidelity & Guaranty Co. v. Borough Bank of Brooklyn*, 146 N. Y. S. 870.

STATUTES.

See Frauds, Statute of; Limitation of Actions. For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 47 (N.Y.Sup.) Though Judiciary Law, § 480, added by Laws 1913, c. 603, relative to settlement of actions for personal injuries, is incomplete, the legislative intent is sufficiently indicated, and the defect may be remedied by construction.—*Sweeney v. Nassau Electric R. Co.*, 146 N. Y. S. 1064.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 162 (N.Y.Sup.) A general statute will repeal special or local acts without expressly naming them, if inconsistent therewith and it appears that the Legislature intended by the general act to establish a uniform rule and abolish the special provisions, but the question of repeal is always one of intention.—*People v. Kaye*, 146 N. Y. S. 398.

§ 170 (N.Y.Sup.) Under General Construction Law, § 96, the provisions of Tax Law 1909, §§ 132, 140, 158, which substantially re-enacted the provisions of Tax Law of 1896, §§ 132, 140, 157, are to be deemed a continuation of the prior law, notwithstanding its formal repeal, and to have been in force continuously from the time the Tax Law of 1896 took effect.—*Bandler v. Hill*, 146 N. Y. S. 98.

VI. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

§ 183 (N.Y.Sup.) The spirit of a statute controls over its letter, and an equitable and uniform construction should be adopted, rather than a technical and narrow one.—*McCarthy v. City of New York*, 146 N. Y. S. 281.

§ 189 (N.Y.) When a statute is expressed in clear language, the court must enforce it according to its letter; the responsibility for the result being with the Legislature.—*In re De Peyster's Estate*, 104 N. E. 714, 210 N. Y. 216.

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§ 57 (N.Y.Sup.) Under Railroad Law, § 178, relative to liability of street, railroad companies for repaving of streets, street railroads using the street when notice is given *held* liable, without regard to length of prior use, or equities; and a receiver may be held liable at law, and it is not necessary to proceed by petition, in order that the equities between him and the company may be adjusted.—City of New York v. Linch, 146 N. Y. S. 357.

§ 58 (N.Y.Sup.) Under Railroad Law, § 178, receiver of street railroad company *held* not liable for repaving portion of street, where he never took possession of or exercised control over the tracks on such streets, though the company asserted ownership thereof, or rights

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§ 98 (N.Y.Supp.) In an action for injuries to a pedestrian by being struck by a street car as she was crossing the tracks, plaintiff *held* guilty of contributory negligence as a matter of law.—*Peterson v. Ocean Electric Ry. Co.*, 146 N. Y. S. 604, 611.

§ 99 (N.Y.Supp.) Plaintiff, who obeyed a motorman's order to drive his horse across the track, *held* not negligent in so doing, since the motorman knew the condition of his car and his ability to control it so as to permit the execution of his order.—*Willensky v. Nassau Electric R. Co.*, 146 N. Y. S. 142.

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§ 7 (N.Y.Supp.) A surety company by virtue of its payment to the state of the amount for which it was liable was subrogated to the state's right to reimbursement out of the assets of a state depositary in liquidation.—*United States Fidelity & Guaranty Co. v. Carnegie Trust Co.*, 146 N. Y. S. 804.

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§ 33 (N.Y.Supp.) Under Code Civ. Proc. § 746, allowing the State Comptroller to designate a depositary for court funds, Banking Law, § 189, and section 190 as amended by Laws 1909, c. 240, requiring such depositary to give a surety bond and giving debts due from it as depositary a preference. *held*, that a surety who had paid the amount of its liability was subrogated to such preference.—*United States Fidelity & Guaranty Co. v. Carnegie Trust Co.*, 146 N. Y. S. 801.

Surety company entitled to a preference against the assets of a trust company in liquidation *held* to have no preference as to the accruing interest thereon, as to which it was entitled to share ratably with the unpreferred creditors.—*Id.*

§ 33 (N.Y.Supp.) A surety company which on liquidation of its principal, a trust company designated as a depositary of state funds, paid the amount of its liability to the state, *held* thereby subrogated to the state's preference in the distribution of the trust company's funds.—

United States Fidelity & Guaranty Co. v. Carnegie Trust Co., 146 N. Y. S. 804.

Surety for state depositary in liquidation paying the amount of its liability to the state and filing its subrogated preference claim against the depositary *held* not entitled to a preference for the accrued interest upon its claim, but only to interest ratably with other creditors.—*Id.*

§ 33 (N.Y.Supp.) A subrogee of the state is entitled to assert the state's preference in the payment of a debt due it from an insolvent over other creditors without prior specific liens.—*United States Fidelity & Guaranty Co. v. Borough Bank of Brooklyn*, 146 N. Y. S. 870.

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§ 35 (N.Y.Supp.) Surety for a state depositary paying the amount of its liability to the state, but not claiming a preference until after the Court of Appeals had sustained the state's claim to a preference, *held* not to have waived its right to be subrogated to the state's preference.—*United States Fidelity & Guaranty Co. v. Carnegie Trust Co.*, 146 N. Y. S. 804.

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§ 5 (N.Y.Supp.) A subscription agreement to pay a sum to parties rebuilding a certain plant, being acted on, by the owners of the site and wreckage of the plant rebuilding it, is supported by a consideration, making it a valid contract.—*Locke v. Taylor*, 146 N. Y. S. 256.

§ 15 (N.Y.Supp.) The subscription paper not showing a subscription was made on condition of another equal subscription by certain other persons, such condition, not communicated to the persons for whose benefit the subscription was made, and who acted on it, may not be asserted in an action on the subscription.—*Locke v. Taylor*, 146 N. Y. S. 256.

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III. LIABILITY OF PERSONS AND PROPERTY.

A) Private Persons and Property in General.

§ 80 (N.Y.Supp.) An association erecting a building upon part of a university campus under the expectation of a lease at a nominal rent or a reasonably long term of years held, so far as the question of taxation was concerned, to be a tenant at a nominal rent for a reasonably long term to be agreed upon by the parties or fixed by the court.—*People ex rel. Walcott v. Parker*, 146 N. Y. S. 753.

(B) Corporations and Corporate Stock and Property.

§ 115 (N.Y.) To determine the nature of a corporation and to ascertain the purposes for which it was incorporated for purposes of taxation, recourse must be had to the act by which it was incorporated or to its charter and the statute under the authority of which it was framed.—*In re De Peyster's Estate*, 104 N. E. 14, 210 N. E. 216.

§ 117 (N.Y.Supp.) Under Tax Law § 2, subd. 1, declaring railroad tracks, switches, etc., operated in public streets by permission of public authorities to constitute a special franchise, a terminal company operating tracks in public streets under permission of municipal authority held to be subject to a special franchise tax.—*People ex rel. East River Terminal R. R. v. State Board of Tax Com'rs*, 146 N. Y. S. 112.

§ 123 (N.Y.Supp.) The "surplus" of a corporation is the accumulation of moneys or property in excess of the par value of the stock issued by it.—*People ex rel. McClure Publications v. Purdy*, 146 N. Y. S. 646.

§ 171½ (N. Y. Supp.) A terminal company which did not affirmatively assent to the contention of city authorities that some of the streets used by it were public streets, and which acted as if it acquiesced in such contention and under the permission of such authorities, held stopped, in a proceeding to assess a special franchise, from claiming that they were not public streets.—*People ex rel. East River Terminal R. R. v. State Board of Tax Com'rs*, 146 N. Y. S. 112.

(D) Exemptions.

§ 242 (N.Y.Supp.) The statute exempting charitable and educational institutions from taxation should be read in the light of the policy of the state, established early in its history and increasing in liberality as time passed, to encourage education.—*People ex rel. Walcott v. Parker*, 146 N. Y. S. 753.

Under Tax Law, § 4, subd. 7, primarily exempting real property of associations, etc., used exclusively for educational or charitable purposes and also exempting the personal property, the object and use in the case of personal property must be the same as in the case of real property.—*Id.*

That a charitable and educational association invested its endowment fund in securities of commercial enterprises held in view of Tax Law, § 4, subd. 7, not to prevent its purposes

from being exclusively charitable or educational.

—*Id.*

Charitable and educational association without any principal place of business or office, having an association house located in the state of New York, subject to visitation and control by the state, held to have a residence for the purpose of taxation and exemption in the state of New York and in every state where its work was carried on.—*Id.*

Under Tax Law, § 3, and section 4, subd. 7, exempting the real and personal property of associations, etc., used exclusively for educational or charitable purposes, held, that a building of an association upon a university campus with a lease thereof for a reasonably long term of years was used exclusively for such purposes, and was exempt from taxation either as personal property or as leasehold interest.—*Id.*

§ 251 (N.Y.Supp.) Taxation is the rule and exemption the exception, and the burden of showing exemption rests on the one claiming it.—*People ex rel. Walcott v. Parker*, 146 N. Y. S. 753.

V. LEVY AND ASSESSMENT.

(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

§ 376 (N.Y.Supp.) Where a street railway was operated by a second company under an agreement requiring the second company to pay the interest on the bonds of the first, amounting to \$20,000 annually, this annual payment, being over and above all operating expenses, must be regarded as earnings, and may be taken as earnings for the purpose of estimating the taxable value of the franchise.—*People ex rel. Fulton St. R. Co. v. State Board of Tax Com'rs*, 146 N. Y. S. 80.

Where a street railway company ran its cars over tracks which did not belong to it, revenue received from such operation, after deducting the operating expenses, must be considered as part of the earnings on which to estimate the value of its franchise for the purposes of taxation.—*Id.*

In assessing the special franchise of a street railway company, a fair and reasonable return must be deducted from the net earnings of the company, and the balance gives the earnings attributable to the enjoyment of the franchise, which is to be capitalized at a fair rate.—*Id.*

In assessing the franchise tax of a street railway company under the net earnings rule, there must be a deduction on account of the depreciation of the company's physical property.—*Id.*

(E) Assessment Rolls or Books.

§ 421 (N.Y.Supp.) Where the annual record and assessment roll gave the ward, block number, lot number, and relative location as to the streets stated, though not the name of the owner, of an outlying parcel of land never subdivided into city lots, but within the limits of New York City, and from which description the premises could be found by reference to the description in the tax map, the description is sufficient.—*Lancaster Sea Beach Improvement Co. v. City of New York*, 146 N. Y. S. 734.

§ 442 (N.Y.Sup.) Where the formal tax record shows that a tax assessment was reduced by the board of taxes and assessments, the presumption against the contention that one commissioner only reduced the assessment, rendering it invalid, is very strong, and direct negative proof is called for.—*Lancaster Sea Beach Improvement Co. v. City of New York*, 146 N. Y. 734.

(G) Review, Correction, or Setting Aside of Assessment.

§ 496 (N.Y.Sup.) A petition for a writ of tax certiorari, alleging that a corporation had, in fact, a surplus of less than 10 per cent. of its capital stock which should have been deducted held to present no issue, where it had filed a statement showing that it had no surplus.—*People ex rel. McClure Publications v. Purdy*, 146 N. Y. S. 646.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR REAL PROPERTY.

(B) Summary Remedies and Actions.

§ 598 (N.Y.Sup.) The claim of the county attorney's firm for defending, with the consent of the Attorney General, an action against the county recording officer to recover the one-half per cent. recording tax on a mortgage, imposed by Laws 1906, c. 532, and paid under protest, should be allowed, out of such tax moneys, as a necessary expense of such collecting officer, within Tax Law, § 262.—*People ex rel. Frost v. Woodbury*, 146 N. Y. S. 889.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 685 (N.Y.Sup.) Granting of motion of purchaser at tax lien foreclosure sale to be relieved from his bid because the premises were affected by certain easements held error, where every owner of an easement was made a party, and that hence his interest would be vested in the purchaser under Charter of New York, § 1039.—*Tax Lien Co. of New York v. Schultze*, 146 N. Y. S. 902.

§ 691 (N. Y. Sup.) Expenditures made in searching and examining title cannot be taxed as costs in an action to foreclose a tax lien, if such searches were not official or not made by an abstract or title insurance company; Code Civ. Proc. § 3256, only providing for taxing as costs disbursements in making official searches and searches by abstract companies, etc.—*Friedman v. Borchardt*, 146 N. Y. S. 896.

Under the substantially direct provisions of Code Civ. Proc. § 3252, made applicable to actions to foreclose a tax lien by Greater New York Charter, § 1035, as amended by Laws 1908, c. 490, plaintiff, in an action to foreclose a tax lien which was settled before judgment, is only entitled to one-half of the percentages allowed by section 3252 upon the amount found due.—Id.

XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

§ 733 (N.Y.Sup.) Under Laws 1902, c. 559, §§ 9 and 10, providing for the enforcement of taxes levied by Oneida county, the city of Utica

having failed to redeem from subsequent county taxes levied on land within its boundaries, as authorized by the city's charter as amended by Laws 1901, c. 577, the sale of such land for such subsequent taxes discharged it from the lien of prior city tax certificates.—*Pickell v. City of Utica*, 146 N. Y. S. 81.

(B) Tax Deeds.

§ 745 (N.Y.Sup.) Tax Law 1896, § 140, re-enacted in the Tax Law of 1909, § 140, authorizing the cancellation of tax sales and the refund of the purchase price, where such sale is invalid or ineffectual to pass title, is prospective in its language, and has no retrospective application.—*Bandler v. Hill*, 146 N. Y. S. 98.

The provision of Tax Law 1896, § 132, re-enacted in Tax Law 1909, § 132, regarding the effect to be given tax deeds, certificates, etc., theretofore executed, is wholly retrospective, but the provision regarding cancellation of tax sales held prior or subsequent to its enactment is prospective, as well as retrospective, in its operation.—Id.

§ 770½ (N.Y.Sup.) Under Tax Law 1896, § 140, re-enacted in Tax Law 1909, § 140, authorizing the cancellation of tax sales on certain grounds upon application by the owner, or any person in interest "at the time of the tax sale," neither the successor of the owner nor of the purchaser may apply for a cancellation.—*Bandler v. Hill*, 146 N. Y. S. 98.

Under Tax Law 1896, § 140, re-enacted in Tax Law 1909, § 140, authorizing the cancellation of tax sales on certain grounds upon application "by the owner at the time of the tax sale," parties to whom the owner subsequently quitclaimed the property could not, by joining him with them in their application, have the sale canceled.—Id.

Tax Law 1896, § 132, re-enacted in Tax Law 1909, § 132, authorizing application to cancel a tax sale within a certain time, is a statute of limitations, but the bar of the statute need not be alleged in order to defeat an application to the county treasurer for the cancellation of a tax sale after the prescribed time.—Id.

Under Tax Law 1896, § 132, re-enacted in Tax Law 1909, § 132, authorizing application for the cancellation of a tax sale within a certain time, the county treasurer was without jurisdiction to cancel a tax sale upon an application filed after the prescribed time.—Id.

XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

§ 861 (N.Y.Sup.) Where one to whom property was given by appointment under a will, and thereby became subject to the transfer tax, imposed by Tax Law, § 220, subsec. 6, declined to take under the appointment and elected to take under the will creating the power which became effective before the enactment of the transfer tax law, the property was not subject to the transfer tax.—*In re Hoffman's Estate*, 146 N. Y. S. 898.

§ 866 (N.Y.Sup.) Good will is property and taxable as such under the Tax Transfer Law, §§ 220, 243, amended by Laws 1910, c. 706, and Laws 1911, c. 732.—*In re Ball's Estate*, 146 N. Y. S. 490.

§ 867 (N.Y.Sur.) Unless a decedent's last domicile was in New York, his intangible personal property in New York is not subject to the transfer tax.—In re Wise's Estate, 146 N. Y. S. 789.

§ 876 (N.Y.) The New York Historical Society incorporated for purposes, as expressed in its charter (Laws 1809, c. 26) and by-laws, exclusively historical, *held* not an educational corporation within Transfer Tax Law, § 221, exempting such corporations from the tax.—In re De Peyster's Estate, 104 N. E. 714, 210 N. Y. 216.

§ 879 (N.Y.Sup.) A gift of shares of stock not intended to become complete in either enjoyment or possession until after the death of the donor is subject to transfer tax on his death.—In re Ball's Estate, 146 N. Y. S. 499.

§ 893 (N.Y.) Where, in a proceeding to determine the character of a corporation for the purpose of the transfer tax, the purposes of the corporation, as stated in its charter and by-laws, were unambiguous, oral testimony was not admissible to show the character of the work undertaken pursuant to the powers expressly given.—In re De Peyster's Estate, 104 N. E. 714, 210 N. Y. 216.

§ 895 (N.Y.Sup.) Method of appraising value of good will of a firm to determine the amount of transfer tax determined.—In re Ball's Estate, 146 N. Y. S. 499.

Evidence *held* not to show an absolute gift of shares of stock by decedent to his sons, but that the shares were subject to the transfer tax as against his estate.—Id.

TENANCY.

See Landlord and Tenant.

TENDER.

§ 9 (N.Y.) At common law a tender could only be made before bringing the action.—Browning King & Co. v. Chamberlain, 104 N. E. 627, 210 N. Y. 270.

At common law, after suit brought, a party might bring money into court and pay the costs under a rule granted, as a matter of course, before plea and under a special order after plea.—Id.

§ 22 (N.Y.) At common law a tender was not available unless pleaded.—Browning King & Co. v. Chamberlain, 104 N. E. 627, 210 N. Y. 270.

§ 24 (N.Y.) In order to render a tender available at common law, the money must have been paid into court.—Browning King & Co. v. Chamberlain, 104 N. E. 627, 210 N. Y. 270.

§ 26 (N.Y.) A deposit made with the clerk of the court of the amount which a tenant in dispossess proceeding admitted was due cannot be recovered by the landlord under Code Civ. Proc. §§ 2244, 2254; no tender having been pleaded, and the warrant having been issued after final order.—Browning King & Co. v. Chamberlain, 104 N. E. 627, 210 N. Y. 270.

THEATERS AND SHOWS.

See Assignments, § 128; Injunction, § 136; Parties, § 7.

§ 1 (N.Y.Sup.) In view of the power given to the New York State Athletic Commission by Laws 1911, c. 779, § 3, to regulate boxing contests, under which the Commission adopted rules giving it the control of all contestants, etc., *held* that the court would not interfere with the Commission's decision that a prize fighter, 51 years of age, could not take part in a contest, in absence of a showing that the Commission acted from improper motives.—Fitzsimmons v. New York State Athletic Commission, 146 N. Y. S. 117.

§ 1 (N.Y.Sup.) Where a city authorized a building to be made into a moving picture theater, and the owner incurred expenses in reconstructing it, the city had power only to regulate and not to prohibit its use for moving picture purposes.—In re Walker, 146 N. Y. S. 519.

§ 3 (N.Y.Sup.) Under ordinance providing in section 2 for licensing moving picture shows not built and in use prior to December 1, 1912, and in section 3 for the licensing of buildings or premises used prior to that date for such purposes, mayor *held* to have power to license theaters or buildings located and constructed prior to that date, though not in actual use on that date.—In re Walker, 146 N. Y. S. 519.

Under city ordinance, though it used the word "may" *held* that the mayor did not have an absolute discretion to withhold licenses for moving picture shows.—Id.

THREATS.

§ 1 (N.Y.Mag.Ct.) Under Penal Law, § 551, making it a misdemeanor to send or deliver any letter or writing, with or without a name, with intent to cause annoyance, *held* in the absence of privilege that the sending of anonymous letters to the police department, complaining of complainant's conduct of his saloon, constituted an offense.—People ex rel. Lesniak v. Mikulski, 146 N. Y. S. 829.

It is against public policy for police officers to disclose their source of information of the commission of crime, and hence the act of the police in communicating the contents of such letters to the complainant did not operate to complete the offense as denominated by the statute.—Id.

Under such statute the writing must be calculated to cause real annoyance, and not a whimsical or capricious annoyance, and a bona fide complaint of the commission or suspicion of crime is not inhibited.—Id.

One charged with an offense under such statute *held* entitled to a strict construction thereof.—Id.

Under such statute the sending of anonymous letters to the police department, complaining of complainant's illegal conduct of his saloon, were privileged, and constituted no offense.—Id.

§ 7 (N.Y.Mag.Ct.) The people, charging that accused was actuated by malice in informing administrative authorities of the crime or supposed crime, in violation of such act, have the

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burden of proving such malice.—People ex rel. Lesniak v. Mikulski, 146 N. Y. S. 829.

Under such statute the intent to annoy may be inferred from all the circumstances of the case.—Id.

§ 8 (N.Y.Mag.Ct.) Where a person, interested in the maintenance of law and good order, in good faith furnishes the administrative authorities with information as to a crime or a supposed crime, and was prosecuted under Penal Law (Consol. Laws 1909, c. 40, § 551), the question of qualified privilege is one of law for the court, while the questions of malice, good faith, etc., are questions of fact.—People ex rel. Lesniak v. Mikulski, 146 N. Y. S. 829.

TIME.

See Certiorari, § 40; Contracts, § 300; Courts, § 87; Insurance, § 365; Mines and Minerals, § 53; Principal and Surety, § 104.

TITLE.

See Adverse Possession; Bills and Notes, § 362; Deeds, § 8; Quieting Title; Taxation, § 733; Trusts, § 68; Vendor and Purchaser, §§ 129, 130, 228.

TORTS.

See Fraud; Libel and Slander; Malicious Prosecution; Master and Servant, §§ 87-332; Municipal Corporations, §§ 763-845; Negligence; Nuisance; Partnership, § 153; Trover and Conversion.

§ 8 (N.Y.Sup.) Where a man, in mailing to a woman a proposal for future immoral conduct, violated the federal statute against mailing obscene matter, and the woman, in instituting prosecution, brought herself into publicity, injuring her reputation, and causing her great mental distress, she had no right of action since the statute conferred no right of action in favor of individuals.—Shepard v. Lamphier, 146 N. Y. S. 745.

§ 8 (N.Y.Sup.) Publication of portrait in daily, weekly, or periodical paper or magazine, though it contains much advertising, held not a use thereof for advertising purposes, or purposes of trade, within Civil Rights Law, §§ 50, 51.—Colyer v. Richard K. Fox Pub. Co., 146 N. Y. S. 999.

TOWNS.

See Public Lands, § 192.

TRADE-MARKS AND TRADE-NAMES.

See Courts, § 489.

I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.

§ 21 (N.Y.Sup.) Under ten-year proviso of Trade-Mark Act, § 5, the geographical name "Italian," used by applicant or his predecessors for a trade-mark for underwear for more than ten years before the passage of the act, held entitled to registration and protection.—Julius Kayser & Co. v. Italian Silk Underwear Co., 146 N. Y. S. 22.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(B) What Competition Unlawful.

§ 70 (N.Y.Sup.) Defendant's use of the word "Italian" as identifying an inferior grade of underwear manufactured and sold by it held unfair competition and a violation of the rights of plaintiff who had by many years' use established that word as identifying a superior grade manufactured and sold by him.—Julius Kayser & Co. v. Italian Silk Underwear Co., 146 N. Y. S. 22.

TRANSFER TAX.

See Taxation, §§ 861-895.

TREES.

See Woods and Forests.

TRESPASS.

See Easements, § 58.

TRIAL.

See Appeal, §§ 231-281; Attorney and Client, § 129; Banks and Banking, § 154; Costs; Criminal Law, §§ 627½-900; Fences, § 24; Frauds, Statute of, § 159; Highways, § 184; Homicide, §§ 268, 294; Insurance, § 825; Jury; Malicious Prosecution, § 71; Master and Servant, §§ 286-295, 332; Municipal Corporations, § 821; Negligence, § 136; New Trial; Nuisance, § 53; Railroads, § 350; Sales, § 88; Stipulations; Street Railroads, §§ 98, 99; Trial, § 148; Usury, § 119; Wills, §§ 307, 324.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 29 (N.Y.Sup.) The issue being the authority of K. to act for defendant, the statement of the judge, after one of defendant's witnesses had testified, and while three other witnesses, who were subsequently called, were waiting to testify, that he would believe K. against defendant's five witnesses was reversible error.—Powers v. New York Headquarters Knights of Columbus, 146 N. Y. S. 193.

IV. RECEPTION OF EVIDENCE.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 105 (N.Y.Sup.) In a suit involving a disputed boundary, where defendant did not make proper objection to the testimony of a surveyor's use of notes made by an earlier surveyor, and himself introduced the notes in evidence, the jury is entitled to consider the notes in connection with their use by the second surveyor.—Wightman v. Campbell, 146 N. Y. S. 686.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 108½ (N.Y.Sup.) In an action for malpractice, the action of plaintiff's counsel, in asking the jurors whether they were interested in any company insuring against liability for injuries, and in stating that he knew of companies which insured against liability for in-

juries from malpractice, *held* ground for reversal, where the evidence made a close case.—*Rothenberg v. Collins*, 146 N. Y. S. 762.

§ 127 (N.Y.) In a personal injury action by an employé, the eliciting of evidence that the employer was protected by insurance *held* improper and to necessitate reversal.—*Rodzboraki v. American Sugar Refining Co. of New York*, 104 N. E. 618, 210 N. Y. 262.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

§ 140 (N.Y.Sup.) The credibility of the witnesses is a question for the jury.—*Sigel v. American Seating Co.*, 146 N. Y. S. 350.

§ 148 (N.Y.) Defendant's request to have issues raised by the evidence submitted to the jury was in time when made directly after the court had directed a verdict for plaintiff on motion and defendant had excepted thereto.—*Charles H. Brown Paint Co. v. Reinhardt*, 104 N. E. 124, 210 N. Y. 162.

A request by defendant "to have the questions raised by the evidence submitted to the jury," made after a verdict was directed for plaintiff, was sufficiently specific without stating the particular questions which defendant desired to be submitted; the court having stated, in denying such request, that, when defendant moved to dismiss and plaintiff moved for a verdict, "all questions of fact" were before the court.—*Id.*

(C) Dismissal or Nonsuit.

§ 165 (N.Y.Sup.) While, under Code Civ. Proc. § 1187, the court may, after a special verdict, pass upon a motion for nonsuit or direct such general verdict as either party is entitled to, it would ordinarily direct a general verdict conforming to the special verdict, unless it was clearly against the weight of the evidence, or the motion for nonsuit should be granted notwithstanding the verdict.—*Cahill v. Gilman*, 146 N. Y. S. 224.

§ 165 (N.Y.Sup.) Where, in an action for breach of an oral contract of employment, plaintiff in his testimony made two contradicting statements as to dates, the court on motion to dismiss should have adopted the theory most favorable to plaintiff.—*Epstein v. Hiller*, 146 N. Y. S. 305.

VII. INSTRUCTIONS TO JURY.

(C) Form, Requisites, and Sufficiency.

§ 234 (N.Y.Sup.) In an action for negligence of driver of wagon, instruction that plaintiff's failure to call a butcher, whose shop he visited just before the accident, but who did not see the accident, and to produce his books, might be considered, *held* erroneous.—*Rosenberg v. Goldstein*, 146 N. Y. S. 1009.

§ 243 (N.Y.) A charge as to the burden of proof resting on plaintiff and defendant in a suit for goods sold *held* to be so contradictory as to require a reversal.—*Clarke v. Schmidt*, 104 N. E. 613, 210 N. Y. 211.

(D) Applicability to Pleadings and Evidence.

§ 251 (N.Y.Sup.) In an action under the Employers' Liability Act for personal injuries, where there was nothing in the record upon which the jury might base a conclusion in response thereto, a charge upon defendant's negligence, given after completion of the main charge and after passing on requests of counsel, injected a new issue and was reversible error.—*Horgan v. Rapid Transit Subway Const. Co.*, 146 N. Y. S. 219.

§ 252 (N.Y.Sup.) An instruction based on an hypothesis which has no basis in the evidence is properly refused.—*Sigel v. American Seating Co.*, 146 N. Y. S. 350.

§ 252 (N.Y.Sup.) Instruction that defendant was not responsible for his driver's error of judgment or miscalculation *held* misleading; there being no evidence or claim of error of judgment or miscalculation.—*Rosenberg v. Goldstein*, 146 N. Y. S. 1009.

(E) Requests or Prayers.

§ 260 (N.Y.Sup.) In an action for broker's commissions on a sale made by the owner, the court having fully charged the law of the case, it was not error to refuse an instruction that if defendant sold personally in continuation of negotiations begun before plaintiff entered into the matter, plaintiff could not recover.—*Comeisky v. Fellows*, 146 N. Y. S. 275.

TROVER AND CONVERSION.

See Bankruptcy, § 429.

II. ACTIONS.

(E) Trial, Judgment, and Review.

§ 64 (N.Y.Sup.) Any equities of the parties cannot be inquired into in an action at law for conversion.—*Gandy v. Collins*, 146 N. Y. S. 89.

TRUST COMPANIES.

See Banks and Banking, § 317.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Assignments for Benefit of Creditors; Corporations, § 30; Costs, § 99; Wills, §§ 81, 682-687.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

§§ 17, 18 (N.Y.Sup.) Where property was conveyed to one person, and part of the consideration paid by another under an oral trust agreement, and the grantee expressly recognized and adopted the agreement in court and failed to appeal from a decree charging him with the trust, the relations of the parties were as firmly established as though by a written agreement.—*Lugar v. Lugar*, 146 N. Y. S. 37.

§ 35 (N.Y.Sup.) One who accepts a gift upon promise to make certain disposition thereof after the donor's death is deemed to hold such property in trust for the purpose of making such disposition.—*Casey v. Casey*, 146 N. Y. S. 348.

§ 61 (N.Y.Sup.) Certain deeds construed and held that the trust created by the second for the benefit of the grantor's son terminated on the son's death, leaving his wife surviving, whereupon the fee reverted to the grantor subject to the life estate created in favor of the son's wife by the first deed.—*Benham v. Boardman*, 146 N. Y. S. 434.

(B) Resulting Trusts.

§ 65 (N.Y.Sup.) If there be any defect in the manner of the creation of a trust, one will be implied for the purpose of preventing fraud.—*Casey v. Casey*, 146 N. Y. S. 348.

§ 68 (N.Y.Sup.) Where a donor made a gift of property on the promise that it was to be used for a certain purpose after his death which was illegal, title reverts to the heirs of the donor, and there is an implied trust for the payment of the money to such heirs.—*Casey v. Casey*, 146 N. Y. S. 348.

III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

§ 166 (N.Y.Sur.) While the fact that an executrix is abundantly able to respond for any default, and that it may be liquidated on an accounting, will not preclude revocation of her letters testamentary for misconduct pursuant to Code Civ. Proc. § 2685, subd. 2, such circumstances may authorize permitting her to remain as trustee under the will.—*In re Engel*, 146 N. Y. S. 793.

UNDUE INFLUENCE.

See Wills, §§ 163, 166, 386.

UNFAIR COMPETITION.

See Trade-Marks and Trade-Names, § 70.

UNITED STATES.

See Public Lands; Trade-Marks and Trade-Names.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

§ 28 (N.Y.Sup.) Under General Business Law, §§ 380, 381, relating to brokerage fees for the procuring of loans, one who merely guarantees a note so as to induce a third person to make a loan can charge any amount he sees fit so long as the transaction is not a cover for usury or the collection of unlawful brokerage fees.—*Grannis v. Temple*, 146 N. Y. S. 239.

(B) Rights and Remedies of Parties.

§ 119 (N.Y.Sup.) In a suit to recover money claimed by plaintiff to have been collected as an unlawful brokerage fee and by defendant to

have been collected as compensation for guaranteeing the loan, the question as to what the money was paid for held for the jury.—*Grannis v. Temple*, 146 N. Y. S. 239.

VACATION.

See Execution, § 443; Highways, § 77; Judgment, § 153; Mortgages, § 529.

VENDOR AND PURCHASER.

See Brokers; Deeds; Mortgages, §§ 510-534; Sales; Set-Off and Counterclaim, § 8; Taxation, §§ 685, 691, 770½.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 18 (N.Y.Sup.) A covenant to pay money as consideration for an option is a contract subject to the general rules pertaining to such engagements, whether it be regarded as an agreement to keep an offer open or a complete unilateral contract.—*Reilly v. Steinhart*, 146 N. Y. S. 534.

IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

§ 129 (N.Y.) Where a defect in a vendor's title can only be supplied by a resort to parol evidence and the title may depend on questions of fact, the purchaser will not be required to perform.—*Cerf v. Diener*, 104 N. E. 126, 210 N. Y. 156.

§ 130 (N.Y.) A purchaser is entitled to a marketable title, and will not be compelled to take property the possession of which he may be obligated to defend.—*Cerf v. Diener*, 104 N. E. 126, 210 N. Y. 156.

V. RIGHTS AND LIABILITIES OF PARTIES.

(C) Bona Fide Purchasers.

§ 228 (N.Y.Sup.) A grantee with notice of the claim of one owning and occupying a gore of land between the boundary marked by a fence and the line described by his deed must be deemed to have taken title subject to the rights and equities of such owner.—*Myer v. Idlewood Ass'n*, 146 N. Y. S. 469.

VERDICT.

See Appeal, §§ 1006, 1008.

VESTED REMAINDERS.

See Wills, § 634.

WAGERS.

See Gaming, § 17.

WAGES.

See Master and Servant, § 80.

WAIVER.

See Appeal, §§ 1177, 1178; Estoppel; Insolvency, § 118; Wills, § 718; Witnesses, § 181.

WATERS AND WATER COURSES.

See Navigable Waters.

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

§ 183½ (N.Y.Sup.) Under Transportation Corporations Law, § 81, and Village Law, § 80, a town board establishing a water supply district of territory not including an incorporated village may not after the incorporation of a village in the territory make a contract for water supply for territory including the village.—*Villa Park Ass'n of Great Neck v. Town of North Hempstead*, 146 N. Y. S. 1047.

§ 203 (N.Y.Sup.) Under Laws 1907, c. 185, §§ 1, 2, providing that religious corporations shall receive water free from the city of New York for purposes for which it was used at the time of the enactment of the law, the city cannot recover for water used by a church in the operation of its pipe organ, where it was so used at the time of the enactment of the statute.—*Bay Ridge Reformed (Dutch) Church v. City of New York*, 146 N. Y. S. 1014.

WAYS.

See Easements.

WEAPONS.

See Criminal Law, § 1073.

§ 4 (N.Y.Sup.) Penal Law, § 1897, as amended by Laws 1911, c. 195, relative to the possession of firearms of a size which may be concealed, *held* not to apply to pawnbrokers receiving revolvers prior to September 1, 1911, and holding them as unredeemed pledges, in view of section 1914, as amended by the same act, relative to the sale of such firearms by pawnbrokers or others.—*People ex rel. Prince v. Fallon*, 146 N. Y. S. 253.

WIDOWS.

See Dower.

WILLS.

See Charities, §§ 2, 50; Descent and Distribution; Executors and Administrators; Judges, § 45; Perpetuities, §§ 6, 7; Taxation, § 861; Trusts, § 166; Witnesses, § 202.

IV. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Testamentary Dispositions.

§ 72 (N.Y.Sur.) The act of a testator in calling a paper signed and executed by him a will establishes *animus testandi*, and an invitation to witness a will implies *animus testandi*.—*In re Mittnacht's Will*, 146 N. Y. S. 171.

§ 81 (N.Y.Sup.) Where a will contains invalid and valid trusts which are independent, the invalid trusts may be annulled and the valid trusts sustained.—*Davis v. McMahon*, 146 N. Y. S. 657.

(C) Execution.

§ 119 (N.Y.Sur.) Where a testator produces a paper personally drawn and subscribed by him, with the subscription in plain sight, declares to the witnesses that it is his will, and asks them to sign as witnesses, there is a sufficient publication of the will and acknowledgment of his subscription.—*In re Bassett's Will*, 146 N. Y. S. 842.

(F) Mistake, Undue Influence, and Fraud.

§ 163 (N.Y.Sup.) The burden of proving undue influence in the execution of a will is upon the party who asserts it.—*Eckert v. Page*, 146 N. Y. S. 513.

§ 166 (N.Y.Sup.) While undue influence in the execution of a will is seldom susceptible of direct proof, nevertheless there must be affirmative evidence of the facts from which such influence can fairly and reasonably be inferred.—*Ekert v. Page*, 146 N. Y. S. 513.

Evidence, in a will contest, *held* to sustain a finding that the will was procured by undue influence.—*Id.*

Where the disposition made by a will is unnatural, less evidence is required to establish undue influence in the absence of evidence showing the reason of such unnatural disposition.—*Id.*

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(H) Evidence.

§ 302 (N.Y.Sur.) Evidence *held* sufficient to show that testator told the witnesses that it was his will and asked them to sign as witnesses thereto, and that, when the will was presented to them, testator's subscription thereto was in plain sight.—*In re Bassett's Will*, 146 N. Y. S. 842.

§ 303 (N.Y.Sur.) The production of attesting witnesses to a paper purporting to be a will and their deposition as to all the acts and things required by the statute of wills for the execution of a will, and which, standing alone, entitled the paper to probate, *held* not overcome by evidence of contradictory statements of such witnesses.—*In re Mittnacht's Will*, 146 N. Y. S. 171.

§ 303 (N.Y.Sur.) If the circumstances surrounding the execution of a paper show that it was executed as a will, it may be probated against the testimony of the subscribing witnesses, or on the testimony of one contrary to that of the other.—*In re Bassett's Will*, 146 N. Y. S. 842.

(I) Hearing or Trial.

§ 307 (N.Y.Sup.) Order discontinuing action to set aside probate *held* not to be vacated on motion of defendant against whom no personal judgment was demanded, whose time for bringing a similar action had expired, and who was not served with process, though she had attempted to voluntarily appear.—*White v. White*, 146 N. Y. S. 368.

Assuming that defendant was entitled to notice of a motion to discontinue, motion to vacate order of discontinuance will be denied,

where it appeared that the discontinuance would have been granted, even though she had opposed it.—*Id.*

§ 324 (N.Y.Sup.) Questions of fact in will contests are to be determined the same as in other actions, and if different inferences may fairly be drawn from the testimony, the question should be submitted to the jury.—*Eckert v. Page*, 146 N. Y. S. 513.

(K) Review.

§ 386 (N.Y.Sup.) The Appellate Court will not hesitate to set aside a finding of undue influence in the execution of a will where there is no satisfactory evidence to sustain it.—*Eckert v. Page*, 146 N. Y. S. 513.

(M) Operation and Effect.

§ 431 (N.Y.Sup.) Under Code Civ. Proc. § 2853a, daughter of testator *held* to share the benefits of a judgment setting aside probate in a suit by a son, though her time for bringing a similar action expired before the son's action was brought.—*White v. White*, 146 N. Y. S. 368.

§ 434 (N.Y.Sur.) A decree of the Surrogate's Court in New Jersey admitting decedent's will to probate, not being an adjudication of decedent's domicile, does not prevent a Surrogate's Court in New York from making an independent inquiry into the question of domicile for the purpose of the domestic taxing act.—*In re Wise's Estate*, 146 N. Y. S. 739.

VI. CONSTRUCTION.

(A) General Rules.

§ 448 (N.Y.Sup.) That construction which sustains the validity in whole or part and avoids partial or total intestacy is favored.—*Davis v. McMahon*, 146 N. Y. S. 657.

(B) Nature of Estates and Interests Created.

§ 612 (N.Y.Sup.) Where testator bequeathed property to his wife with an absolute power of disposition and devise over of any part remaining at her death, the fact that the wife changed the money part of the property from one bank to another and turned into cash that part consisting of government bonds did not amount to an absolute disposition of it, so as to preclude it being applied as provided by her husband's will.—*Davis v. Seaward*, 146 N. Y. S. 981.

(F) Vested or Contingent Estates and Interests.

§ 634 (N.Y.Sup.) Will construed, and *held* that a child of one of testator's remaindermen was possessed of an assignable vested remainder in one-sixth of certain trust property, conditioned on the life tenant dying without issue, and on this event occurring, the interest passed to the assignee.—*Hills v. Flynn*, 146 N. Y. S. 508.

§ 634 (N.Y.Sup.) Under a devise of a remainder to three grandchildren, *held* that the grandchildren on surviving the testator acquired a vested remainder in fee.—*Swan v. Packer*, 146 N. Y. S. 557.

§ 634 (N.Y.Sup.) Will construed, and *held* to express a gift of the corpus of the estate and

to postpone merely the time of enjoyment.—*Knapp v. Clark*, 146 N. Y. S. 926.

Where a remainderman died, before the life tenant, without descendants, *held* that her vested interest in testator's residuary estate passed as provided by her will, though testator's will provided that if a remainderman was not surviving at the death of the life tenant, her estate should go to her descendants.—*Id.*

(H) Estates in Trust and Powers.

§ 682 (N.Y.Sur.) In determining the persons entitled to dividends on stock held in trust pursuant to a will, the testator's intention, when clear, must be carried out so far as it does not result in any unlawful accumulation of income.—*In re Affleck*, 146 N. Y. S. 835.

§ 684 (N.Y.Sur.) Ordinary dividends on stock held under a testamentary trust should be paid to the life beneficiary regardless of when the surplus out of which they are payable was accumulated.—*In re Affleck*, 146 N. Y. S. 835.

Extraordinary dividends on stock held under a testamentary trust, when payable from the accumulated earnings of the company, either in cash or stock, belong to the life beneficiary, unless they intrench on the capital of the trust fund, when they should be returned to the trust fund and apportioned between it and the life beneficiary in accordance with the amount thereof accumulated before and after creation of the trust or purchase of the stock.—*Id.*

That portion which the trustees under a will received of additional stock issued by a corporation in apportioning its surplus *held* an extraordinary stock dividend apportionable between the life tenant and the remaindermen, so as to give the latter that which accumulated prior to creation of the trust and the former that which accumulated subsequently.—*Id.*

§ 686 (N.Y.Sup.) The rule that, where a will directs trustees to distribute in the future, survivorship at the time of distribution is essential to an interest in the subject of the gift, is limited to cases where the only words of gift are to be found in the direction to distribute.—*Knapp v. Clark*, 146 N. Y. S. 926.

§ 687 (N.Y.Sup.) Where land is left by will in trust, the income to be turned over to the beneficiary for life and the principal only if the trustee should so see fit, with power to the beneficiary to dispose of the property by will, the heirs of the beneficiary took no title on the beneficiary dying intestate and had not been given the land during his lifetime, and the land reverted back to the estate of the testator.—*Johnson v. Ross*, 146 N. Y. S. 355.

(I) Actions to Construe Wills.

§ 697 (N.Y.Sup.) One of the next of kin of a testator not interested under the will may maintain an action in equity for construction of the will involving the annulment of a trust and to declare a resulting trust in favor of the next of kin.—*Davis v. McMahon*, 146 N. Y. S. 657.

§ 703 (N.Y.Sup.) In an action for the construction of a will as to the effect of a legacy and an annuity therein upon defendant's claim for services to testator as a nurse, evidence

held to show that, if there were no contract between testator and defendant that the legacy should be in lieu of her wages, defendant had been paid in full.—*Newcomb v. La Roe*, 146 N. Y. S. 133.

In an action for the construction of a will as to the effect of a legacy and an annuity there- upon defendant's claim for services to testa- tor as a nurse, evidence held to show that it was the understanding between testator and the defendant that the legacy was in lieu of any claim by defendant for wages.—*Id.*

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

§ 718 (N.Y.Sup.) Where a legacy and an annuity were in lieu of any claim of the legatee for wages for services rendered the testator, the acceptance by the legatee of part of the legacy was a waiver of all her claim for services.—*Newcomb v. La Roe*, 146 N. Y. S. 133.

§ 734 (N.Y.Sup.) A legacy to plaintiff, payable on death of testator's widow, did not carry interest until that time.—*Disbrow v. Disbrow*, 146 N. Y. S. 63.

(D) Election.

§ 784 (N.Y.Sup.) An inchoate dower right of one person in land devised to another is such an interest as requires her to elect to take her dower right or accept a devise of other land.—*Jurgensen v. Dana*, 146 N. Y. S. 1001.

§ 788 (N.Y.Sup.) Where testator, having an interest in described land, devised the entire fee to certain beneficiaries, and devised other land in joint tenancy to others, one of whom owned an undivided one-third of the described land, and the other an inchoate dower interest there- in, the right of election to take under the will or the interest in the described land might be exercised severally.—*Jurgensen v. Dana*, 146 N. Y. S. 1001.

(F) Legacies Charged on Property, Estate, or Interest.

§ 821 (N.Y.Sur.) Codicil construed, and held that testator, by charging against the interest of his daughter the amount of a mortgage note which by its terms bore interest, and the note by her husband not purporting interest, did not intend, by the use of the word "amount," to charge the interest, but only the principal against his daughter's share.—*In re Stoneman*, 146 N. Y. S. 172.

§ 822 (N.Y.Sup.) Where a testator directs the payment of an annuity in a fixed amount, it is a charge on the residuary estate without the intervention of a trust, and the lien may be discharged by payment of the present value of the annuity, irrespective of the validity of the trust; but where the annuity is not given absolutely, but is expressly limited to the income, there is no charge upon the residuary estate unless a valid trust is created to carry the gift into effect.—*Davis v. McMahon*, 146 N. Y. S. 657.

(H) Void, Lapsed, and Forfeited Devises and Bequests, and Property and Interests Undisposed of.

§ 852 (N.Y.Sup.) Where property was left in trust for a period of 25 years, the income to be paid to C. during her life and to others in the event of her death before the end of the trust period, the capital to be distributed to specified persons at the end of the trust period, if C. was then dead, the trust being invalid as unduly suspending the power of alienation, the remainders over are invalid under Real Property Law, § 42, the persons entitled to take in remainder not being capable of ascertainment until the expiration of the trust period.—*Davis v. McMahon*, 146 N. Y. S. 657.

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See Criminal Law, §§ 568, 649, 662, 742, 786, 811, 1159, 1170½, 1186; Evidence; Trial, § 140; Wills, § 308.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

§ 21 (N.Y.Sup.) That a contumacious and unlawful refusal of a witness to answer proper questions, punishable as a contempt under Judiciary Law, § 750, subd. 5, may also constitute a crime under Penal Law, § 600, is immaterial, since the remedies by indictment and by punishment for criminal contempt may coexist.—*Hanbury v. Benedict*, 146 N. Y. S. 44.

II. COMPETENCY.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

§ 143 (N.Y.Sup.) Under Code Civ. Proc. § 829, in an action by an executrix to recover stock certificates, the court improperly permitted defendant's assignor to testify that testator's signature was on the certificates before his death.—*Fuller v. New York Cent. & H. R. R. Co.*, 146 N. Y. S. 345.

§ 181 (N.Y.Sup.) Where, under Code Civ. Proc. § 829, the court improperly permitted a witness to testify against an executrix as to a transaction with deceased, the executrix could fairly cross-examine such witness without waiving the benefit of the statute.—*Fuller v. New York Cent. & H. R. R. Co.*, 146 N. Y. S. 345.

(D) Confidential Relations and Privileged Communications.

§ 202 (N.Y.Sup.) Under Code Civ. Proc. §§ 835, 836, an attorney, who signed as subscribing witness to a will which he had drawn, is rendered incompetent to testify to the facts surrounding the making of the will by the testatrix's revocation of the instrument.—*Mead v. Herdman*, 146 N. Y. S. 353.

III. EXAMINATION.

(B) Cross-Examination and Re-Examination.

§ 269 (N.Y.) In a prosecution for larceny, it was error to limit defendant's cross-examination

of the principal witness for the state to only such points as were touched upon in direct examination.—*People v. Pindar*, 104 N. E. 133, 210 N. Y. 191.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(A) In General.

§ 330 (N.Y.) Where three accomplices were granted immunity and were confined by the state pending trial, accused was entitled to show, on the cross-examination of any of them, that they were in constant communication, nor was the error in excluding such evidence cured by the fact that it subsequently appeared that there was opportunity for conference.—*People v. Becker*, 104 N. E. 396, 210 N. Y. 274.

(C) Interest and Bias of Witness.

§ 366 (N.Y.) A confessed accomplice having been granted immunity by a written agreement in order that the state might obtain his testimony, accused's counsel was entitled to the production of such agreement, to be used in the accomplice's cross-examination.—*People v. Becker*, 104 N. E. 396, 210 N. Y. 274.

(D) Inconsistent Statements by Witness.

§ 388 (N.Y.) If the testimony of any witness was inconsistent with that given on the separate trial of one jointly indicted, that fact should have been called to the attention of the witness when on the stand and an opportunity given him to explain the inconsistency.—*People v. Seidenschner*, 104 N. E. 420, 210 N. Y. 341.

§ 392 (N.Y.) Where a conspirator testifying for the state had made a statement to the district attorney, it was error to refuse to require its production for the purpose of cross-examination and impeachment by accused, except on condition that accused would put it in evidence, and, accused having been compelled to agree, the effect of the paper should be limited to contradiction and impeachment.—*People v. Becker*, 104 N. E. 396, 210 N. Y. 274.

Where accused had taken the depositions of witnesses in another state to which an accomplice had fled, which showed statements and admissions seriously impeaching the accomplice's testimony given for the people, it was error for the court to refuse to open the commissions that they might be used in the cross-examination of the accomplice, nor was the error cured by the subsequent reversal of the ruling.—Id.

Where the court had refused to permit accused's counsel to use a published copy of a statement made by an accomplice to the district attorney for cross-examination of the accomplice, it was error to refuse to require the district attorney to produce the original, and the error was not cured by its subsequent production on condition that accused would put it in evidence.—Id.

(E) Contradiction and Corroboration of Witness.

§ 400 (N.Y.Sup.) Where a defendant was forced to call the one who claimed to be the real party in interest to establish his defense, he is

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